reescribiendo restaurativamente las respuestas a los daños contra los ecosistemas y los animales

CRIMINOLOGÍA VERDE: ALTERNATIVAS A LA IMPUNIDAD Y AL PUNITIVISMO ANTE LOS DAÑOS BIO-SOCIO-ECOLÓGICOS/GREEN CRIMINOLOGY: ALTERNATIVES TO IMPUNITY AND PUNITIVISM FACING BIO-SOCIO-ECOLOGICAL HARMS

Gema Varona (Ed.)

Con prólogo de Rob White,
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MINISTERIO DE CIENCIA E INNOVACIÓN

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PRÓLOGO/FOREWORD

ENVIRONMENTAL AND ANIMAL RESTORATIVE JUSTICE

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Ecocentrism refers to valuing nature for itself and not solely for instrumental purposes. Translated into criminal justice contexts, this means accounting for the rights of nature and duty of care toward non-human environmental entities (such as rivers, mountains, birds, animals, and plants) in prosecution, sentencing and restorative justice processes.

In an ecocentric framework, justice can be described as consisting of three major dimensions: environmental justice that deals with humans; ecological justice where the focus is on specific environments; and species justice that deals with non-human animals and plants. In each of these cases, there are voices that are marginalised in ordinary courtroom procedures and thereby potentially in environmental restorative justice (ERJ) processes as well. Even where non-human interests are acknowledged in ERJ contexts, there are major obstacles and dilemmas regarding who can or should speak 'for' and/or 'about' the non-human experience.

The terms 'natural object' and abiotic are sometimes used to describe non-living entities such as rivers, mountains, soils and oceans. Fauna or animal life is ordinarily dealt with through use of the term 'animal' while flora or plant life is ordinarily referred to under the broad category of 'vegetation'. Ecosystems can be defined as a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit. Together these entities comprise what can be described as *non-human environmental entities*.

Assessment of victimisation of non-human environmental entities requires addressing a series of interrelated questions. These include:

- How are 'harm' and 'risk' defined.
- By whom.
- At what level – individual, community, ecosystem (including biotic and abiotic elements).
- At what time – first instance, accumulated harms.
- At what point does 'risk' or 'harm occur to an extent warranting action or intervention.
- How do we stop the harm from occurring again.
- How do we compensate or repair the harm.
- Who are the legitimate proxies and spokespeople for entities that cannot otherwise articulate their claims in ordinary human speech/ ways of communicating.

In answering these questions, consideration must also be given to who, ideally, should speak for the non-human as advocates, and who, ideally, should speak on behalf of the non-human as experts.

This is not only a matter of face-value knowledge, interest and/or expertise. For example, in some jurisdictions, there is legal recognition that Indigenous people have the right to speak on behalf of a river or a specific mountain or specific geographical space ("country") – they speak as traditional owners and/or as formally acknowledged stewards, and this is spelled out in relevant legislation.

Similarly, specialist expertise is not just a matter of experience and practice (for example, fishers, hunters, biologists and ecologists). In a criminal justice context, it is also usually established via formal legal processes that verify specific expertise and that designate specific individuals as experts (for example, through examination of academic credentials, demonstration of peer acknowledged expertise, and through linking testimony directly to the field of expertise).

This book addresses the conundrums of bringing the voices of the non-human into criminal justice deliberations and specifically, ERJ processes. The non-human has much to say, but who is listening? They have much to tell, but who interprets what is being said? In regards environmental restorative justice, a key theme is how to translate other-than-human experiences into legal proceedings.

Addressing harms to humans, ecosystems and animal and plant species, rivers, mountains and nature generally, involves several key questions:

What?

- **Repairing the harm**, enhancing capabilities ('to do' and 'to be') and encouraging social reconciliation and community harmony.

How?

- Active process involving **participation in justice decision-making**, with engagement by harmed parties as well as offenders and communities.

Why?

- Effective interventions provide justice insofar as they lead to **good environmental outcomes** and change offender behaviour.

Fundamentally, an ecocentric approach to ERJ is based upon several principles that relate to the intrinsic value of nature, the precautionary principle, the primacy of environmental wellbeing, and remediation. Protection of the environment may be based on either one of or a combination of conceptions of the *rights of* nature (both as subject with rights, or object worthy of protection) and *duties to* nature (its intrinsic worth which therefore imposes a moral obligation and duty of care).

For ERJ, recent legal innovations provide interesting potential pathways to systematise expert opinion in regard to the non-human. For instance, 'species victim impact statements' (SVIS) now feature in some countries. The elements of a SVIS may include:

Impact of trade on specimen

- Welfare concerns.
- Fate of the specimen.
- Population depletion.
- Impact on wider species population.

Impact of trade on ecosystems and environment

- Ecosystem impact.
- Invasive species concerns.

Impact of trade on human population

- Local community impacts.
- Effects on ecotourism.
- Food chain effects.

- Risk of zoonosis.
- Human casualties associated with the trade.

Institutionalising 'voice' through such measures appears to offer the prospect of greater acknowledgement of the non-human in criminal justice proceedings.

Part of the disputes over who speaks for whom or what, hinges upon official recognition and legal status. Yet this, too, may be construed as constraining and limiting insofar as it can be used to exclude human voices that are intrinsically important to the listening of the non-human message – such as the elderly, the Indigenous, the activist and so on. Moreover, different knowledges give rise to very different understandings of the non-human. A 'river' is described and experienced quite differently by Indigenous people, a geomorphologist, an ecologist and the weekend fisher.

When all is said and done, however, the point of including the voiceless (or rather *hearing* what the non-humans say) in ERJ or other legal proceedings is to better approximate the 'truth' about the environmental harms suffered. To do this, it is essential to appreciate the uncertainties and chaotic unpredictability, to consider a wide range of alternatives in interpreting what is going on and how best to respond, and to have a plurality of voices amongst experts and advocates. These processes also demand continuous monitoring and evaluation, since things change in space and over time, and there are evolving ways in which humans are trying to understand non-human environmental entities.

It is also important to understand phenomenon such as biodiversity historically, since understandings of biodiversity (and indeed planetary features generally) have developed differently in different social contexts and continents. Knowledge of life in one part of the globe need not inform assumptions about life in another part. There are close and ongoing interrelationships between culture, knowledge and nature.

This provocative and exciting book explores environmental restorative justice as applied to and involving non-human animals and environments, and of course humans. The interface between these three sets of actors is complex and variable. It also intrinsically incorporates ethical consideration and moral sentiment. Determining what is 'bad' and 'good' is thus intertwined with 'what is' and 'what ought to be', and this in turn is grounded in our understandings of the non-human.

ECOCIDIO/ ECOCIDE

ECOCIDIO Y JUSTICIA RESTAURATIVA

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1. PRELIMINAR

El debate en torno al sentido del término "ecocidio" -que el Diccionario de la Real Academia de la Lengua define como la "destrucción del medio ambiente, en especial de forma intencionada"- se remonta a 1970. Fue entonces cuando Arthur Galston, fisiólogo vegetal de la Universidad de Yale, lo formuló por vez primera, con ocasión de la Conferencia sobre guerra y responsabilidad nacional (Washington), en la que propuso un acuerdo internacional contra el ecocidio (Adigun, 2023, p. 44), haciendo referencia a la catástrofe ecológica derivada del empleo de productos químicos defoliantes en la Guerra de Vietnam.[2] El término fue utilizado, al parecer, con similar propósito, por Olof Palme, primer ministro de Suecia, en la Conferencia sobre Medio Ambiente de las Naciones Unidas (Estocolmo, 1972) (Soler, 2017, pp. 861-862).

2. LA INCRIMINACIÓN DEL ECOCIDIO EN EL PLANO INTERNACIONAL Y COMPARADO

Los esfuerzos dirigidos a la incriminación internacional del ecocidio siguieron inmediatamente a lo anterior (Gauger *et al*, 2013),[3] centrados en primer término en los hechos conectados con acciones bélicas y objetivos militares.

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[1] El presente trabajo se enmarca dentro del Grupo GICCAS (IT-1486-22).

[2] Entre ellos el "*agente naranja*", derivado de un componente químico descubierto por Galston en 1943, cuando investigaba un fertilizante.

[3] Para un rápido repaso, por décadas, vid. también https://ecocidelaw.com/history/

2.1. Un crimen de guerra

La creación en el foro Folkets —«la Cumbre de los Pueblos»— de un grupo de trabajo sobre una Ley de Genocidio y Ecocidio, apoyada por múltiples ONG, dio paso al Proyecto de Convención internacional sobre el crimen de ecocidio (y Protocolo sobre la guerra medioambiental) preparados en 1973 por Richard A. Falk (1973, pp. 93-95). El artículo I del Proyecto de Convención declaraba al ecocidio como "un crimen de derecho internacional" que los Estados deben comprometerse a prevenir y castigar,[4] "ya sea cometido en tiempo de paz o en tiempo de guerra"; un crimen, en todo caso, caracterizado por "la intención de perturbar o destruir, total o parcialmente, un ecosistema humano" y particularmente ligado a acciones y objetivos militares: solo en un supuesto de los contemplados por el artículo II como modalidad de ecocidio –el "traslado forzoso de seres humanos o animales de sus lugares habituales de habitación"- se mencionaba la aceleración de "la consecución de objetivos (…) industriales", junto a los de carácter militar (f).

Por su parte, desde la Convención sobre la guerra ecocida, en Estocolmo, promovida por la asociación Dai Dong, rama internacional de *Fellowship of Reconciliation*, surgieron dos propuestas: un proyecto de protocolo sobre guerra ambiental, dirigido a la prohibición internacional e incriminación de no pocas de las modalidades de acción militar desplegadas en Vietnam por los EE. UU., que supuso "un giro dramático en la historia del ecocidio" (Adigun, 2023, p. 43), y un proyecto de convenio sobre el ecocidio.

En 1976 se aprobó el Convenio sobre la Prohibición de utilizar técnicas de modificación ambiental con fines militares u otros fines hostiles, entendiendo por "técnicas de modificación ambiental" las dirigidas a "alterar -mediante la manipulación deliberada de los procesos naturales- la dinámica, la composición o estructura de la Tierra, incluida su biótica, su litosfera, su hidrosfera y su atmósfera, o del espacio ultra terrestre" (Werle y Jessberger, 2017, marg. 1326). Y en 1977 el Protocolo Adicional I de los Convenios de Ginebra, reflejando la prohibición internacional consuetudinaria de daño ambiental desproporcionado por medio de acciones de guerra, incluyó en su art. 35.3 la prohibición de aquellos "métodos o medios" de beligerancia "concebidos para causar, o de los que quepa prever que causen, daños extensos, duraderos y graves al medio ambiente natural".[5] Por su parte, en el art. 55.1 (Protección del medio ambiente natural) se dispuso que "en la realización de la guerra se velará

[4] Al igual que la "conspiración para cometer ecocidio", la "incitación directa y pública al ecocidio", la "tentativa de ecocidio" y la "complicidad en ecocidio" (Artículo III).

[5] Contra la ambigüedad de esta fórmula que, "interpretada a la luz de la historia de la negociación", coloca el listón en una posición inalcanzable por los medios de guerra convencionales. Bothe *et al* (2010, pp. 575-576).

por la protección del medio ambiente natural contra daños extensos, duraderos y graves", prohibiendo los métodos aludidos que comprometan "así la salud o la supervivencia de la población", a lo que se añadió en su núm. 2 la interdicción de "los ataques contra el medio ambiente natural como represalias".[6]

En la segunda mitad de la década de los 70 comienza también la andadura del ecocidio en las Naciones Unidas, en torno a la iniciativa de Convención sobre la guerra ecocida, dirigida a la definición y condena del ecocidio como crimen internacional de guerra. Richard A. Falk, crítico con las deficiencias de la Convención de genocidio, fue encargado de preparar una propuesta, centrándose el debate en si la intención de destruir ecosistemas había de resultar un elemento esencial del crimen de ecocidio, o si también debían integrarse en el concepto otros casos derivados de la propia producción y desarrollo económico, sin concurrencia "de un ataque directo y predeterminado contra el medio ambiente".

La primera línea de trabajo fue la abierta, en todo caso, en relación con la Convención sobre el crimen de genocidio, que la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías propuso ampliar en 1978, añadiendo el genocidio cultural y el ecocidio; este se identificó con aquellas "alteraciones adversas, a menudo irreparables, del medio ambiente -por ejemplo mediante explosiones nucleares, armas químicas, contaminación grave y lluvia ácida, o destrucción de la selva tropical- que amenazan la existencia de poblaciones enteras, ya sea deliberadamente o por negligencia criminal".[7]

En la década de los 80 el debate se trasladó a la Comisión de Derecho Internacional (CDI), donde se debatió la inclusión en el Proyecto de código de crímenes contra la paz y la seguridad de la humanidad de la causación (u orden de causación) intencionada de "daños extensos, duraderos y graves al medio ambiente natural". Si bien el borrador que lo recogía fue inicialmente aprobado, el artículo 26 quedó luego eliminado "por completo, y de forma un tanto misteriosa" (Gauger *et al*, 2013, p. 11) contra lo que, en aquellos momentos, era la opinión mayoritaria de los miembros de las Naciones Unidas, los cuales no hicieron, con todo, verdaderos esfuerzos por recuperarlo posteriormente (Adigun, 2023, p. 46).

La cuestión se retoma en 1995 por la CDI en relación con el Estatuto de la Corte Penal Internacional. El *Documento sobre los crímenes contra el medio ambiente*,[8] elaborado por un nuevo grupo de trabajo, propuso tres alternativas:

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[6] En cuanto al Protocolo II (conflictos armados de carácter no internacional), solo indirectamente cabe hallar una protección del ambiente a través de los arts.14 y 15, dirigidos a proteger, de un lado, "bienes indispensables para la supervivencia de la población civil" y, en segundo término, "las obras e instalaciones que contienen fuerzas peligrosas".

[7] Doc. NN.UU. E/CN.4/Sub.2/1985/6 (2 julio 1985), 17 (pár.33).

[8] Véase en https://legal.un.org/ilc/documentation/spanish/ilc_xlviii_dc_crd3.pdf.

a) incluir los delitos contra el ambiente en disposiciones independientes de otros crímenes; b) colocarlos en el seno de los crímenes contra la humanidad; c) insertarlos entre los crímenes de guerra. Descartada la primera propuesta por la Presidencia[9] en 1996, el encargo al Comité de redacción fue, finalmente, la inserción de los daños ambientales entre los crímenes de guerra. Así, el texto del Estatuto de Roma de la Corte Penal Internacional, adoptado en 1998 y que entró en vigor el 1 de julio de 2002, recoge entre las "otras violaciones graves de las leyes y usos aplicables en los conflictos armados internacionales[10] dentro del marco establecido de derecho internacional" constitutivas de crímenes de guerra (art. 8.2. b) iv): "Lanzar un ataque intencionalmente, a sabiendas de que causará pérdidas incidentales de vidas, lesiones a civiles o daños a bienes de carácter civil o daños extensos, duraderos y graves al medio ambiente natural que serían manifiestamente excesivos en relación con la ventaja militar concreta y directa de conjunto que se prevea".[11] Aunque no se precise que los daños se produzcan de modo efectivo, los autores entienden que de la referencia a la naturaleza extensa, duradera y grave de los daños al ambiente natural -términos que no resultan formalmente definidos- se deriva el "alto umbral"[12] requerido. Los daños han de ser igualmente desproporcionados -esto es, no hallar de manera manifiesta ninguna justificación desde el prisma de la previsible "ventaja militar concreta y directa"-, lo que supone asumir "el carácter ponderable" del ambiente, hasta en supuestos de daños "graves, extensos y duraderos", algo particularmente criticable (Nieto, 2011, p. 489).

2.2. Un crimen internacional también en tiempo de paz: propuestas doctrinales

El artículo 26 del Proyecto de Código de la CDI identificó la infracción de "daños intencionales y graves al medio ambiente" -que no denominaba ecocidio- con el hecho de, "intencionadamente", causar u ordenar la causación de "daños extensos, duraderos y graves al medio ambiente natural". Tras su desaparición del Proyecto de Código en la segunda lectura, la CDI replanteó la cuestión en el marco del Proyecto de Artículos sobre Responsabilidad del Estado por Hechos Internacionalmente Ilícitos. Mediante la inserción de un apartado d) en el párrafo 3 del art. 19 se incluyó, así, entre los que el Proyecto calificaba de "crímenes internacionales" (generadores de responsabilidad internacional; no de naturaleza penal), "la violación grave y en gran escala de una obligación internacional de

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9 Sin someterla a votación. Adigun (2023, p. 47).

10 Críticamente, por la no inclusión de los conflictos armados no internacionales, Werle y Jessberger (2017, marg.1332).

11 Destaca De Vicente (2018, p. 259), la similitud de la cláusula con los arts. 35.3, 55 y 51.5 b) del Protocolo Adicional I.

12 Werle y Jessberger (2017, marg.1327).

importancia esencial para la salvaguardia y la protección del medio humano, como las que prohíben la contaminación masiva de la atmósfera o de los mares". A pesar del interés suscitado, la reformulación del artículo 19, derivada del informe de James Crawford, acabó desdibujando su contenido, desapareciendo del mismo -y del texto finalmente aprobado-[13] la mención específica de contenido medioambiental. Múltiples fueron las razones aducidas como justificación (Pérez Vaquero, 2009): entre las de orden más técnico, las referidas a la falta de precisión de los conceptos empleados, la insuficiente taxatividad en la incriminación de las conductas, así como lo cuestionable de algunas de las decisiones que llevaban, por ejemplo, a tipificar la contaminación de la atmósfera y los mares y no la de la biosfera en general. Todo lo cual vendría a mostrar la falta de un suficiente acuerdo sobre los "contornos jurídicos" de la figura.

Obviamente, ante la falta de reconocimiento normativo e institucional en el plano internacional de este aspecto "crucial" de la política criminal en este ámbito (de la Cuesta, 2021, p. 215), se reiteran en la actualidad las voces que reclaman la definición del ecocidio por parte de los instrumentos internacionales como "el quinto crimen contra la paz" (Gauger *et al*, 2013), superando lo que algunos llaman "la barrera de Núremberg" (Soler, 2017, p. 870): esto es, independiente de los crímenes de guerra, sujeto a la competencia de un fiscal internacional especializado, y, como recomendara la Conferencia Mundial de la AIDP (Bucarest, 2016, rec. 33), susceptible de enjuiciamiento bien por la Corte Penal Internacional[14] (de la Cuesta, 2016, p. 348) o, en su caso, por aquella otra jurisdicción penal internacional creada específicamente para ello.

Son igualmente múltiples las propuestas definitorias elaboradas desde la doctrina y/o impulsadas por los movimientos medioambientalistas.[15]

Así, sin olvidar a Falk -que identificaba el ecocidio con las conductas dirigidas a perturbar o destruir, total o parcialmente, un ecosistema humano-, ya en la segunda edición de su *Proyecto de Código Penal Internacional*, la "protección del ambiente" (esto es, de "la tierra, aire, mar, fauna y flora de los mares, ríos, y

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[13] Que quedó del modo siguiente: "*el Estado responsable del hecho internacionalmente ilícito está obligado a ponerle fin, si ese hecho continúa; a ofrecer seguridades y garantías adecuadas de no repetición, si las circunstancias lo exigen; (...) y a reparar íntegramente el perjuicio causado por el hecho internacionalmente ilícito*" (Arts. 30 y 31 A/RES/56/89).

[14] Que, en la década pasada, dio ya "algunos pequeños pasos hacia la persecución del daño ambiental" (Minkova, 2023, p. 62) y en 2024 ha lanzado una consulta pública, a través de la Fiscalía, sobre una nueva iniciativa política para promover la rendición de cuentas por los crímenes contra el medio ambiente en virtud del Estatuto de Roma. https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0 Acerca de los necesarios cambios sustantivos que requeriría la respuesta a las necesidades del ambiente como víctima por parte de una Corte tan antropocentrista, Killean & Newton (2024).

[15] Para una reproducción de las más conocidas, Killean & Short (2024, pp. 46-53). Véase también https://ecocidelaw.com/definition/.

aquellas especies animales consideradas en peligro de extinción") fue incluida por Bassiouni (1987, p. 170) en el artículo XVII de la Parte especial. Este definía el crimen de "depredación ambiental" como la "contaminación significativa por parte de un estado, con infracción de una obligación internacional, del aire, mar y ríos de forma que impacte en otros estados o cause daño o perjudique a otro estado, o que afecte de manera significativa a la viabilidad y pureza de esos elementos, o que destruya en todo o en parte, o dañe de forma significativa la fauna y la flora del mar y ríos internacionales navegables; y la destrucción intencional de especies en peligro o tolerar su destrucción dolosa".

Antes de finalizar el siglo, vio la luz la obra de Mark Allan Gray, *The International Crime of Ecocide*, reconocida por muchos como fundamental en la materia. Para Gray el crimen de ecocidio debía castigar la producción de (1) "daños ecológicos graves y extensos o duraderos", (2) con "consecuencias internacionales", y (3) de forma insostenible y equivocada, por actos u omisiones, imprudentes o negligentes y con "violación deliberada o negligente de derechos estatales y humanos fundamentales" (Gray, 1995, pp. 217-228).

En 2010 P. Higgins presentó a la CDI una enmienda de inclusión del ecocidio en el Estatuto de la Corte Penal Internacional, buscando la incriminación por esta vía de "la destrucción, daño o pérdida extensiva de ecosistemas de un territorio determinado" generadora de una grave disminución del "disfrute pacífico de ese territorio por parte de los habitantes" (Higgins, 2010). Para Higgins, el ecocidio podía ser resultado de una "acción humana" o producirse "por otras causas" y debía generar daños "generalizados, a largo plazo o severos"; de otra parte, el término "habitantes" llevaba a incluir como víctimas a los seres tanto humanos como no humanos (animales, peces, aves, insectos, especies vegetales y otros organismos vivos) residentes en el territorio afectado (Wijdekop, 2019, p. 36).

En la actualidad, y prosiguiendo con la labor de Higgins,[16] *Stop Ecocide International* trabaja por la inclusión del ecocidio entre los crímenes de la competencia de la Corte Penal Internacional, habiendo encargado en 2020 a un "panel de expertos independientes" la elaboración de una definición jurídica de ecocidio para su incorporación al Estatuto de Roma (como artículo 8 ter). La propuesta elaborada por el panel de expertos establece que "se entenderá por 'ecocidio' cualquier acto ilícito o arbitrario perpetrado a sabiendas de que existe una probabilidad sustancial de que cause daños graves que sean extensos o duraderos al medioambiente". El Preámbulo de la propuesta se adentra en el significado de algunos de los términos empleados con el fin

[16] En 2011, con un grupo de abogados, Higgins redactó igualmente un Proyecto de ley sobre ecocidio que encontró reflejo en la iniciativa de directiva europea sobre el Ecocidio impulsada por el movimiento *End Ecocide on Earth*. Vid. en https://www.endecocide.org/wp-content/uploads/2016/10/ICC-Amendements-Ecocide-ENG-Sept-2016.pdf.

de esclarecer mejor el sentido y alcance de la definición. Así, por "medio ambiente" se entiende "la Tierra, su biosfera, criosfera, litosfera, hidrosfera y atmósfera, así como el espacio ultraterrestre". Daños "graves" son aquellos "que cause(n) cambios muy adversos, perturbaciones o daños notorios para cualquier elemento del medioambiente, incluidos los efectos serios para la vida humana o los recursos naturales, culturales o económicos". Por daño "extenso" debe entenderse el que supere "una zona geográfica limitada, rebase las fronteras estatales o afecte a la totalidad de un ecosistema o una especie o a un gran número de seres humanos", considerándose "duradero" aquel "daño irreversible o que no se pueda reparar mediante la regeneración natural en un plazo razonable".[17] A juicio de Soler (2017, p. 871),[18] la exigencia de que los hechos se realicen "a sabiendas" peca de falta de realismo, pues "la gran mayoría de daños graves al medio ambiente se producen de modo imprudente", sin que, a pesar de lo señalado en el Preámbulo, la referencia al posible carácter arbitrario del acto parezca suficientemente apropiada para cubrir estos supuestos.

También el Grupo Neyret (2015) propugna el reconocimiento del ecocidio como crimen internacional. En el marco de una "articulada propuesta sobre el Derecho penal como mecanismo de protección del medio ambiente" (Berdugo, 2024, p. 32) -y entendiendo, con razón (de la Cuesta, 2017, pp. 351), que son cuestiones que no conviene mezclar-, promueve la aprobación de dos convenciones internacionales: una, sobre los "ecocrímenes" (Neyret, 2015, 267), llamada a facilitar e intensificar la cooperación interestatal en la persecución de los delitos contra el ambiente objeto de incriminación a nivel doméstico; y la otra sobre el ecocidio (Neyret, 2015, p. 285). Para el Grupo, el ecocidio debe identificarse con el "impacto adverso en la seguridad del planeta" derivado de alguno(s) de los actos específicamente incriminados (art. 2.1),[19] realizado(s) "en el contexto de una acción sistemática y generalizada"

17 Véaseenhttps://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60e439ad-a9c617141da5d282/1625569715267/ES+SE+Foundation+Commentary+and+core+text+ES+rev3.pdf.

18 Véase también, Minkova (2023, pp. 71-82).

19 Vertido, emisión o introducción de una cantidad de sustancias o de radiaciones ionizantes en el aire o la atmósfera, el suelo, el agua o los medios acuáticos; recogida, transporte, valorización o eliminación de residuos, incluida la supervisión de dichas operaciones y el cuidado posterior de los lugares de eliminación, e incluida la actuación como negociante o agente en el marco de cualquier actividad relacionada con la gestión de residuos; explotación de una instalación en la que se lleve a cabo una actividad peligrosa o en la que se almacenen o utilicen sustancias o preparados peligrosos; producción, transformación, manipulación, utilización, tenencia, almacenamiento, transporte, importación, exportación o eliminación de materiales nucleares u otras sustancias radiactivas peligrosas; matanza, destrucción, posesión o recogida de especímenes de especies de fauna o flora silvestres protegidas o no; otros actos de carácter similar cometidos intencionadamente que afecten negativamente a la seguridad del planeta.

y causante(s) (art. 2.2) bien de "una extensa, constante y grave degradación del aire o de la atmósfera, la calidad del suelo o la calidad de las aguas u otros elementos acuáticos, la fauna y la flora o sus funciones ecológicas", o bien de "muerte, discapacidades permanentes o graves enfermedades incurables en una población"; así como desposeer "permanentemente a esta de sus tierras, territorios o recursos".

El crimen de ecocidio se configura como un delito imprescriptible (art. 4) y principalmente doloso: se requiere un conocimiento del carácter sistemático y extenso de las acciones; pero también se contempla su punición cuando el sujeto activo supiera o pudiera haber sabido que había una alta probabilidad de afectación negativa de la seguridad del planeta (art.2.3). La regulación avanza en muchos aspectos anteriormente no contemplados por otros textos: participación punible (art.3), responsabilidad penal de las personas jurídicas (art. 5), las penas y su determinación (arts. 6-8), el embargo y decomiso (art. 9). Apunta igualmente a la conveniencia de creación de un Grupo de Investigación y Encuesta en materia ambiental (GREEN) (art. 20) y la designación de un Fiscal internacional para el ambiente (art. 17) por parte de la Asamblea de Estados Partes, propugnando intensificar la cooperación "con el objetivo de creación de una Corte Penal Internacional para el Ambiente, (…) complementaria de las jurisdicciones nacionales" y con "competencia sobre el crimen de ecocidio" (art. 19). Se fija asimismo en cuestiones procesales (competencia jurisdiccional, investigación, persecución, participación de la sociedad civil, extradición, mutuo auxilio jurídico, cooperación internacional), completándose con medidas preventivas y de aplicación de la Convención.

2.3. Tendencias en Derecho comparado

La presencia del neologismo "ecocidio" para identificar los atentados más graves y destructivos del ambiente no es todavía frecuente en el Derecho Comparado.

Como la nueva Directiva Europea 2024/1203, relativa a la protección del medio ambiente por el Derecho penal, reconoce explícitamente (Preámbulo apdo. 21) -y sucede en su propio texto-, es a través de las figuras cualificadas de los delitos ambientales centradas en los "resultados catastróficos" que las legislaciones internas suelen dar cobertura incriminatoria a aquellos supuestos dolosos o imprudentes que derivan en "daños generalizados y sustanciales (…) irreversibles o duraderos" de elementos ambientales relevantes como los "ecosistema(s) de considerable tamaño o valor medioambiental", otros espacios protegidos o, incluso, "a la calidad del aire, del suelo o de las aguas": "conductas comparables al 'ecocidio'" que, por su importancia y gravedad, merecen ser contempladas de manera específica.

Con todo, la realidad va cambiando progresivamente, pudiendo observarse distintas líneas de tendencia a la hora de la creciente incriminación de los comportamientos más graves contra los bienes jurídicos ambientales.[20]

Así, durante la última década del pasado siglo, probablemente por influencia de los trabajos de la Comision de Derecho Internacional en relación con el Código de Delitos contra la Paz y Seguridad de la Humanidad, y comenzando por Vietnam (1990) (Gauger *et al*, 2013, p. 12), las conductas generadoras de (o capaces de producir) una catástrofe o desastre ecológicos[21] fueron progresivamente objeto de incriminación específica en diversos Códigos penales: Federación Rusa (1996), Kazakstán y la República Kirguisa (1997), Tayikistán (1998), Georgia y Bielorrusia (1999), a los que se unieron, ya en el siglo XXI, Ucrania (2001), Moldavia (2002), y Armenia (2003) (Adigun, 2023, p. 48; Killean & Short, 2024, pp. 8-9).[22] En cuanto al Estado de Chiapas (México), el art. 457 de su Código Penal castiga "la conducta dolosa consistente en causar un daño grave al ambiente por la emisión de contaminantes, realización de actividades riesgosas o la afectación de recursos naturales de la competencia del Estado de Chiapas".[23]

En la actualidad son varios los proyectos de introducción del delito de ecocidio en tramitación en distintos países[24], algunos inspirados en la definición propuesta por *Stop Ecocide International* (Killean & Short, 2024, pp. 9-13). Destaca entre ellos el caso de Bélgica, con la reforma del Código penal aprobada el 22 de febrero de 2024 por la Cámara Representantes. El art. 94 §1 identifica el ecocidio con la comisión deliberada, "por acción u omisión" -tanto en tiempo de paz como de guerra- de "daño grave, generalizado y duradero al medio ambiente,[25] a sabiendas de que el acto realizado causa dicho daño" y con "infracción de la legislación federal o de un instrumento internacional vinculante

[20] ELI (2023, pp. 19-20), y el Informe preparado para el *Environmental Rights Centre for Scotla*nd (ERCS) por Killean & Short (2024, pp. 8-16). Ver también https://ecocidelaw.com/existing-ecocide-laws/.

[21] Como la "destrucción masiva de los reinos animal o vegetal" o "del entorno natural", "de la flora o la fauna", la "contaminación" o el "envenenamiento (...) del medio ambiente", "la atmósfera", "los suelos" o de "los recursos hídricos", al igual que otras conductas causantes de o capaces de provocar una "catástrofe" o "desastre" ecológicos.

[22] Para los textos de los artículos correspondientes en los Códigos penales vigentes en estos países, Killean & Short (2024, pp. 34-37). Véase también https://ecocidelaw.com/existing-ecocide-laws/.

[23] Vid. en https://leyes-mx.com/codigo_penal_chiapas/457.htm#:~:text=Art%C3%ADculo%20457.-,Ecocidio%20es%20la%20conducta%20dolosa%2C%20consistente%20en%20causar%20un%20da%C3%B1o,competencia%20del%20Estado%20de%20Chiapas

[24] Brasil, Nuevo León (México), Holanda, Italia, Reino Unido. Killean & Short (2024, pp. 11-13 y 39-40). Véase también https://ecocidelaw.com/existing-ecocide-laws/.

[25] Esto es: "la tierra, sus ecosistemas, la biosfera, la criosfera, la litosfera, la hidrosfera, la atmósfera y el espacio exterior".

para la autoridad federal", incluyendo los actos que no puedan localizarse en Bélgica. Las penas previstas son de quince a veinte años de prisión y, para las personas jurídicas, multas de 1,2 a 1,6 millones de euros.

"Marcos alternativos" (Killean & Short, 2024, pp. 14-6 y 41-45) para la incriminación de los hechos de grave destrucción ambiental ofrecen, por su parte, los Códigos penales de Ecuador (arts. 245-253), Chile (arts. 308-310 ter), Uzbekistán (arts. 196 y 198) y, muy en particular, el Código del ambiente francés. Su artículo L231-3, reformado por la Ley 2021-1104 (en vigor desde el 25 de agosto de 2021),[26] califica como ecocidio los hechos dolosos -de contaminación del aire y del agua productores de "efectos nocivos graves y duraderos para la salud, la flora o la fauna (...), o alteraciones graves del sistema normal de abastecimiento de agua" (art. L.231-1), así como de abandono, depósito o gestión irregulares de residuos (art. L.232-2)- generadores de daños sustanciales "graves y duraderos" (esto es, por más de 7 años) a la salud, la flora, la fauna o la calidad del aire, el suelo o el agua. Las penas se agravan llegando a diez años de prisión y multa de 4,5 millones de euros, susceptible de "incrementarse hasta diez veces el beneficio derivado de la comisión del delito", remitiendo el inicio del plazo de prescripción "al momento en que se descubra el daño".[27]

2.4. Recapitulación: un singular plural

El fenómeno del ecocidio suscita una amplia reprobación y reclama respuestas contundentes, no sólo en el plano penal interno, sino igualmente internacional, donde crecen las demandas de su incorporación como crimen objeto de la competencia de la Corte Penal Internacional (o de aquella estructura jurisdiccional supranacional que resulte más oportuna). Son varios, en todo caso, los "rostros diferentes" (Nieto, 2022a, p. 694) que adopta el ecocidio en la actualidad.

A nivel doméstico, como se ha visto, algunas legislaciones estatales comienzan a denominar ecocidio a los supuestos más graves de delitos ambientales, abarcando en ocasiones hasta su comisión por imprudencia grave. Caracterizados por su extraordinaria gravedad, se trata de hechos que, de alcanzar dimensión transnacional, por su propia naturaleza, extensión y alcance, merecerían ser objeto privilegiado de cooperación interestatal en

[26] Vid. en https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043961215/2022-10-28.

[27] Asimismo, conforme al artículo 296 de la nueva Ley, el Gobierno debe informar al Parlamento (en el plazo de dos años desde la promulgación de la Ley) sobre las medidas adoptadas para promover el reconocimiento del ecocidio como delito de la competencia de tribunales penales internacionales.

su persecución y sanción, a través de la adopción de los correspondientes instrumentos internacionales. Basados en una definición común del delito de ecocidio, en sentido amplio -centrada en el hecho intencional[28] de causar (o contribución igualmente intencional y sustancial a causar) "daños graves y duraderos o daños graves e irreparables o irreversibles a un ecosistema o ecosistemas en el medio natural" (ELI, 2023, p. 34)[29]-, estos deberían buscar el aseguramiento de las posibilidades efectivas de persecución extraterritorial, lo que -cuanto menos en el caso de la protección del mar y/o de la atmósfera- requeriría el reconocimiento efectivo del principio de jurisdicción universal (o, en su defecto, de justicia supletoria).

A nivel internacional, la causación de "daños extensos, duraderos y graves al medio ambiente natural (...) manifiestamente excesivos en relación con la ventaja militar concreta y directa de conjunto que se prevea" constituye una modalidad de crimen de guerra (art. 8.2. b) iv Estatuto de Roma); quedan, desgraciadamente, sin cobertura los ecocidios producidos fuera de conflictos armados internacionales.

Tampoco hay, por el momento, un tratamiento jurídico-internacional penal efectivo para aquellos supuestos de ecocidio que merecerían ser reconocidos como crimen internacional en tiempos de paz,[30] respecto de los que la falta de homogeneidad y ausencia de definiciones consensuadas es la regla.

En este punto, la propuesta del Grupo de Expertos Independientes para la Definición Jurídica del Ecocidio (2021), que se coloca más bien en el plano de "ecocidio política pública", no acaba de responder a las exigencias de un modelo de "tipo penal propiamente dicho" (Neto & Mont'Alverne (2018, p. 220). Frente a ella, y habida cuenta de que la competencia de la CPI ha de centrarse en "los crímenes más graves de trascendencia para la comunidad internacional en su conjunto" (art. 5.1 Estatuto CPI), la propuesta del Grupo Neyret se presenta como una base "mejor" (Nieto, 2022a, p. 707) y más completa (Fernández-Hernández, 2024, p. 8), al restringir los supuestos de ecocidio objeto de la competencia de una jurisdicción penal internacional a los supuestos "vinculado(s) a los delitos de lesa humanidad" (Berdugo, 2024, p. 34). Se fija así "la cláusula umbral" (Nieto, 2022a, p. 687) en aquellos actos (primordialmente dolosos) de afectación negativa de la seguridad del planeta y/o de degradación ecológica

[28] Incluyendo, como en la Propuesta de Directiva del *European Law Institute* (ELI, 2023, p. 34), no solo los supuestos de intención directa, sino también aquellos casos en que la persona "es consciente, o no puede ignorar, la probabilidad sustancial de que pueda producirse" (apdo. 3 b).

[29] Pero sin exigir el carácter ilegal de estos actos conforme al Derecho interno. Sobre la necesidad de desvincular a estos delitos de la infracción de la normativa administrativa de cada Estado, Nieto (2011), 483.

[30] Recuerda Black (2009, p. 127) que ya en 1991 propuso Glen Plant la elaboración de un quinto convenio de Ginebra para proteger el medio ambiente en tiempos de paz.

grave, extensa y duradera[31] producidos en el marco de una política[32] sistemática o generalizada y con significación internacional.

3. INSUFICIENCIA DE LOS MECANISMOS TRADICIONALES PARA LA REPARACIÓN DE LOS DAÑOS A LOS ECOSISTEMAS Y LA SATISFACCIÓN DE LAS VÍCTIMAS

Las dificultades a las que se enfrentan los mecanismos tradicionales para asegurar una reparación de los daños ambientales y la satisfacción de las víctimas son ampliamente conocidas.[33] Caracteriza, además, a la legislación y a la política ambiental (Aertsen, 2022, p. 206) un particularmente alto déficit de ejecución, debido a factores múltiples[34] y agudizado en los supuestos más graves por las dimensiones mismas de los problemas y las características del control punitivo, "especialmente selectivo" (Varona, 2023, p. 1), de una criminalidad protagonizada por "empresas internacionales" (Nieto, 2011, p. 483). Indiferentes "a las consecuencias altamente peligrosas" de su actividad (Saad-Diniz, 2019, p. 10), estas no pocas veces cuentan con la tolerancia de las instancias competentes para la autorización[35] de unas actividades con fuerte interferencia de intereses económicos, políticos y hasta de conflictos estructurales y sociales (Varona, 2020, 668): entre otros, los ligados a esa "dependencia comunitaria" (Saad-Diniz, 2019, 19) derivada de que sea principalmente (o hasta de modo exclusivo) a través de la actividad desplegada por la entidad agresora que la población de la zona afectada (p.e. en la minería) pueda lograr los recursos necesarios para su subsistencia…

La situación se agrava en el plano transnacional e internacional donde, a "la impotencia de los derechos nacionales" (Nieto, 2011, p. 478), se añade, junto a la ausencia de regulación y de unanimidad conceptual, la falta de estructuras internacionales específicas dirigidas a esclarecer de modo efectivo las responsabilidades relativas a los supuestos más graves de ataques al ambiente

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[31] A lo que el Grupo Neyret añade igualmente la producción de "muerte, discapacidades permanentes o graves enfermedades incurables en una población", así como el desposeer "permanentemente a esta de sus tierras, territorios o recursos".

[32] A interpretar en línea con el art. 7.2 a) ER; esto es, abarcando "dos tipos de política": la directamente encaminada a la comisión de los hechos incriminados, "y la que podríamos denominar política de consecuencias necesarias" (Nieto, 2022a, p. 703).

[33] Para una propuesta de utilización de la multa, el decomiso y la responsabilidad civil *ex delicto*, "a partir de una nueva mirada de justicia restaurativa". Cardona (2020).

[34] Fuentes (2023); ver también, sobre la "eficacia y eficiencia penal" del Derecho ambiental frente a los delitos ecológicos, Colás y Morelle (2021).

[35] Lo que permite salvar el elemento de infracción administrativa que, como recuerda Nieto Martín (2011, p. 482), resulta comúnmente exigido por las legislaciones internas para concurrencia de un delito contra el ambiente.

de repercusión internacional, dificultando, aún más, la satisfacción por otras vías de las poblaciones afectadas y la reparación de los daños causados.

Siendo asimismo crecientes los conflictos interestatales en la materia, junto a la intervención de la Sala medio ambiental de la Corte Internacional de Justicia de La Haya, del Tribunal internacional de Derecho del Mar[36] o de otras instancias de orden regional para el abordaje de controversias interestatales, desde hace tiempo se demanda la creación y desarrollo de instituciones internacionales especializadas en temas ambientales[37] que, superando "los límites impuestos por la soberanía de los Estados" permitan abrir espacios de actuación a "una justicia global" en este marco (Abed, 2012, p. 143). Al lado de la Corte Permanente de Arbitraje -con sede en La Haya y reconocida por algunos tratados internacionales bilaterales o de orden multilateral (así como en contratos y otros instrumentos) como foro para la resolución de conflictos en materia de recursos naturales y de medio ambiente, surgidos entre estados, entidades no estatales y otras partes interesadas-, entre las iniciativas procedentes de la sociedad civil, destaca la del Tribunal Internacional de Monsanto,[38] surgida en 2016 para la exigencia de responsabilidades a la multinacional Monsanto, por los efectos ambientales y para la diversidad biológica, animales y plantas derivados del uso del herbicida Roundup, calificados de crímenes contra la naturaleza y la humanidad (Hennequin & Laissue, 2018). También cabe aludir a la Corte Internacional de Arbitraje y Conciliación Ambiental para la resolución alternativa de conflictos, que se inscribe en el modelo de "arbitraje institucionalizado" (Abed, 2012, p. 146). Nacida en noviembre de 1994, sin carácter permanente ni jurisprudencia vinculante, presta a aquellas partes de un conflicto internacional que deseen someterse voluntariamente al dictamen de la Corte, servicios de Conciliación, Arbitraje u Opiniones consultivas de carácter preventivo, confirmatorio o denunciatorias (Eceizabarrena, 2019). Se inscriben igualmente en este mismo marco los proyectos de creación de un tribunal internacional medioambiental o de justicia climática (Soler, 2017, p. 871) o hasta de una Corte Penal Internacional del Medio Ambiente (Abed, 2012, pp. 144-145), contemplada en el art. 29 de la Propuesta de Convención del Grupo Neyret y, para muchos, "la clave de la eficacia de su represión" (De Vicente, 2018, p. 275), pues "los atentados más graves contra el medio ambiente han dejado de ser un asunto nacional para convertirse en una materia de gobernanza global" (Nieto, 2011, p. 477).

Estamos, con todo, ante iniciativas de las que, por su propia naturaleza, perspectiva y alcance limitados o dificultades de acceso y funcionamiento, y sin

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[36] Fruto de la Convención de Naciones Unidas sobre Derecho del Mar firmada en Montego Bay, Jamaica, en 1982; entrada en vigor el 16 noviembre de 1994.

[37] Así como "códigos de conducta obligatorios erga omnes (…) a nivel internacional para la protección del ambiente" (Abed, 2012, p. 143).

[38] Vid. en https://es.monsantotribunal.org/.

perjuicio de su interés, no cabe esperar, por el momento, relevantes resultados de cara a la efectiva respuesta a las necesidades de reparación integral generadas por las agresiones más graves a la naturaleza y el ambiente, que los mecanismos propios de la perspectiva de responsabilidad civil tradicional -centrados en la reparación e indemnización pecuniarias (incluso si completados a través de fondos específicos)- solo de manera muy limitada llegan a contemplar.

4. POSIBILIDADES Y LÍMITES DE LA JUSTICIA RESTAURATIVA

En realidad, y como en otros fenómenos criminales, los delitos contra el ambiente "demandan respuestas flexibles y multidimensionales" (White, 2017, p. 130) que los esquemas reparatorios tradicionales de la justicia penal no son por sí solos capaces de suministrar. La compensación económica de daños y perjuicios causados a personas y entidades queda muy lejos de la verdadera reparación integral victimológica. Por ello, si de lo que se trata es de reconocer y dar respuesta reparadora a la victimización generada por las distintas manifestaciones del ecocidio -caracterizada por su "opacidad" (García Ruiz, 2018, p. 1), por la complejidad, amplitud y extensión de los daños materiales (e inmateriales) sobre elementos naturales, ecosistemas y convivencia, así como por la "invisibilidad" (García Ruiz, 2018, 32-34) de unas víctimas muy "diversas" ("humanas y no humanas", pertenecientes no solo a la presente generación, frecuentemente "desoídas" y "sin voz") (Varona, 2020, p. 668)- es la vía de la justicia restaurativa la que, a la luz de las aportaciones de la Victimología y en el momento actual, debería merecer el mayor esfuerzo de desarrollo y atención. El objetivo del enfoque restaurativo no se limita a la reparación del daño -que la justicia tradicional, "incapaz de atender al conflicto social, a los daños inmateriales, a la petición de disculpas y a la asunción de responsabilidades que exigen las víctimas", trata de asegurar "en un contexto generalmente más punitivo" (Nieto, 2020)-, sino que pone también el acento en la promoción de "relaciones armoniosas" entre victimarios, víctimas y la comunidad (White, 2017, p. 129) a partir del análisis compartido del conflicto -y de las condiciones o elementos que han favorecido la comisión de los hechos-, del reconocimiento del daño por el victimario, su petición de disculpas y compromiso efectivo en la reparación, de la prevención de nuevos daños y garantías de no repetición, y hasta de la memoria.

4.1. Diferencias con la justicia penal tradicional

El triángulo víctimas, victimarios y comunidad constituye el campo de juego de los modelos de la justicia restaurativa, caracterizada por la búsqueda de respuestas audaces e innovadoras (Achilles & Zehr, 2001, p. 87) a las conductas delictivas en una dinámica voluntaria de comunicación participativa

(Igartua, 2017, p. 29) con el fin de favorecer tanto la reparación del daño como la responsabilización del victimario y su reinserción (GEMME, 2023, p. 3). En cuanto a las prácticas restaurativas, destacan, junto a la mediación entre víctima y victimario en un proceso de comunicación confidencial apoyado por un facilitador imparcial, las conferencias de grupos familiares y los círculos (de construcción de paz, de sanación y de sentencia), así como otras prácticas -paneles, círculos de apoyo, programas con víctimas subrogadas, con elementos propios de la justicia restaurativa- también identificadas como cuasi-restaurativas (UNODC, 2020, p. 37).

Claras son las diferencias entre el modelo de justicia tradicional (retributivo) y este nuevo modelo de justicia, que no persigue necesariamente evitar la respuesta penal al hecho del victimario (Pain *et al*, 2016, p. 2), sino responder al delito de una manera diferente (De la Cuesta y Germán, 2022, p. 112). Mientras que el enfoque retributivo se fija en la culpabilidad manifestada por el hecho ilícito e injusto y para aplicar al victimario un castigo proporcional a su gravedad, la mirada de la justicia restaurativa prioriza a las víctimas y su reparación integral (en su caso, simbólica). La posición central de las víctimas transforma el sistema de justicia (Gracia, 2018, p. 80). La víctima, olvidada por el derecho penal tradicional (Giménez-Salinas y Rodríguez, 2017, p. 27) salvo, en su caso, por su condición de testigo, recupera de este modo el control de su vida en el plano procesal y de su desvictimización, con lo que supone de refuerzo de su autonomía y dignidad; pero no por esto se aparta al victimario, a quien se contempla no como alguien exclusivamente a castigar, sino como un sujeto susceptible de cambiar y de reintegración positiva en la comunidad; una persona a la que, en el marco de un espacio comunicativo y de diálogo, sin merma de sus derechos y garantías, y con presencia de la comunidad, se anima a la asunción de su propia responsabilidad, algo que puede acabar teniendo lugar en diferentes fases del proceso de justicia penal (Al-Alosi & Hamilton, 2021, p. 488). Frente a la obsesión por el castigo y la prevención a través de la respuesta punitiva (prisión, multa, privaciones de derechos), propios de la justicia penal tradicional, se busca así en la justicia restaurativa la mejora o "sanación de las relaciones dañadas" (Wijdekop & van Hoek, 2019, p. 21), a través de respuestas reparadoras, de la mediación, de la compensación y de los acuerdos de conciliación, así como el restablecimiento del equilibrio social afectado, en el convencimiento de que todo ello redundará en la prevención de futuros delitos.

4.2. Primeras propuestas

El planteamiento de la apertura de espacios a la justicia restaurativa en relación con el ecocidio -por sus potencialidades de cara al tratamiento de las responsabilidades de autores y partícipes y para la compensación de los daños ecológicos y culturales (Mehta, 2019, p. 28)- fue defendido por Higgins *et al* (2013) a partir de la positiva experiencia del círculo restaurativo en torno al

caso *Atabasca Tar Sands*, en el juicio simulado desarrollado en el Tribunal Supremo de Inglaterra y Gales (Londres, 2011[39] para demostrar la viabilidad de una Ley sobre el Ecocidio (Wijdekop, 2019, pp. 37-38).

El texto de la Propuesta de Directiva UE del *European Law Institute* (ELI, 2023, 28) recuerda, por su parte, cómo "inicialmente se contempló incluir la idea de justicia restaurativa en el preámbulo"; sin embargo, la iniciativa no fue finalmente asumida por los ponentes, "por no ver en el momento presente cómo la justicia restaurativa puede funcionar para un crimen tan grave como el ecocidio".

4.3. Una victimización muy grave, irreparable y difusa

Ciertamente, como fenómeno, el ecocidio conecta en sus distintas manifestaciones con aquellos daños especialmente graves, extensos y duraderos -contaminación del aire, el agua y el suelo, degradación de la tierra, desertización y salinización, pérdida de biodiversidad, agotamiento de recursos, aceleración del cambio climático, efectos negativos sobre la salud (no solo humana)- causados al ambiente y a las comunidades por emisiones industriales a la atmósfera, vertidos marinos o en aguas continentales, depósitos, deforestación extensiva (y no solo en Amazonia), incidentes con centrales nucleares, explotación minera a gran escala… Y entre las resistencias a las que se enfrenta todavía en muchos lugares la aplicación de la justicia restaurativa se encuentra obviamente la cuestión de los delitos más graves, muy especialmente si generadores, además, de victimización extensa, difusa y de imposible o muy difícil reparación a través de los medios disponibles.

Las evaluaciones de programas implementados con delincuentes y víctimas de delitos violentos revelan, con todo, desde hace tiempo (Shapland *et al*, 2011), cómo, en términos generales, no hay pruebas de que ciertos tipos de delitos o de delincuentes deban considerarse más o menos apropiados. Por el contrario, la justicia restaurativa -que, bien aplicada, no tiene por qué incrementar el riesgo de revictimización- suele favorecer el proceso de recuperación de las víctimas, fomentar la responsabilidad activa de los infractores y mejorar la cohesión social; además, permite abordar las necesidades fundamentales y las expectativas legítimas de justicia tanto de las víctimas como de los infractores y de la sociedad en su conjunto (Varona, 2012, p. 229).

Tampoco las dificultades de reparación deberían impedir por sí mismas el desarrollo de procesos restaurativos. En realidad, lo importante es acordar el significado de "reparación", que, para la justicia restaurativa, no se identifica exclusivamente con el regreso a la situación previa al hecho victimizador. Sin abandonar el esfuerzo de restauración (p.e. del equilibrio ecológico), la

[39] Véase en http://www.thehamiltongroup.org.uk/common/ecocide-sentence.asp.

reparación debe también comprender el reconocimiento de la victimización sufrida, satisfaciendo en todo lo posible a las víctimas, acompañándolas y asistiéndolas en el proceso de retomar el control de su vida, al igual que el despliegue de sistemas y garantías creíbles de no repetición…. Aún más, no pocas veces, ante la imposibilidad de una reparación material completa (o al lado de ella), junto al acceso a la verdad de lo sucedido, pueden resultar del mayor interés otras formas de reconocimiento y reparación (hasta de corte simbólico), en particular si se puede contar con la plena y sincera participación tanto del (o de los) victimario(s) como de la comunidad.

En fin, la posibilidad de utilizar prácticas restaurativas no debería quedar necesariamente excluida en casos de victimización difusa (Germán, 1995, p. 246), donde no solo son comunidades enteras y ecosistemas (con sus múltiples integrantes) los afectados, sino hasta las generaciones futuras, debiendo superarse las dificultades de su identificación o individualización a través de diversos mecanismos (de representación, subrogación…) que, cubriendo las ausencias (Cario, 2005, p. 67), permitan dar voz a las futuras generaciones y al ambiente.

4.4. Otros obstáculos y retos

Las anteriores no son, evidentemente, las únicas dificultades a las que se enfrenta la justicia restaurativa en orden a su aplicación al ecocidio tanto en el plano internacional como interno. Junto a las propias limitaciones de los sistemas tradicionales de justicia -para los que los mecanismos de justicia restaurativa también pueden funcionar como complemento integrado o adicional en las distintas fases procesales-, conviene en este momento subrayar la falta de regulaciones específicas (tanto de las propias prácticas restaurativas como respecto del abordaje de la reparación de los daños conectados con el ecocidio). Esta carencia alimenta demasiadas veces las resistencias administrativas e institucionales y dificulta el despliegue e implementación de no pocas iniciativas que, junto a la participación activa de las comunidades afectadas, y por su inevitable complejidad, precisan de una financiación de largo alcance, adecuada y sostenible, así como la colaboración de múltiples expertos procedentes de diversas disciplinas.

También el desconocimiento e incomprensión ciudadanos acerca de la filosofía y posibilidades de la justicia restaurativa, en general y en relación con los daños ecológicos y su restauración, constituye un importante obstáculo a la aplicación de estos programas y su extensión, de aquí la necesidad de fomento de las apropiadas líneas formativas, de educación y sensibilización.

Si el desafío constituido por lo anterior es ya grande, no lo son menos los retos a los que ha de enfrentarse la justicia restaurativa para su aplicación al ecocidio y, en general, en el derecho penal ambiental. Así -y avanzando de entrada que,

por la gravedad de los hechos y la complejidad e importancia de los daños y sentimientos involucrados, la búsqueda del necesario equilibrio entre la justicia para las víctimas y la justicia para los perpetradores llevará probablemente a que se plantee más como complemento del proceso penal tradicional que como alternativa excluyente del mismo-, son múltiples las cuestiones que se suscitan, en primer término, respecto del proceso restaurativo en cuanto tal:[40] entre ellas -junto a la modalidad más apropiada, difícil de resolver con carácter general-, primordialmente, y sobre todo, la determinación y selección de los participantes.

La determinación de las personas participantes en el proceso restaurativo requiere, en primer lugar, identificar a las víctimas de los daños producidos por el ecocidio, cuya participación voluntaria e informada constituye un presupuesto esencial de validez del propio proceso. Víctimas de los daños producidos por el ecocidio son, sin duda, los titulares (privados, comunitarios y públicos) de los objetos y bienes jurídicos dañados, así como las comunidades afectadas. Sin embargo, desde el prisma victimológico el ecocidio genera daños y sufrimiento para otros seres y entidades no humanos (animales, plantas, ecosistemas), contemporáneos y hasta de las generaciones futuras, cuya representación ha de canalizarse de cara a asegurar el restablecimiento de su bienestar: una cuestión no abordada por la mayor parte de legislaciones ambientales, centradas exclusiva (o, al menos, principalmente) en la protección (Forsyth *et al*, 2021, p. 34). Las iniciativas de reconocimiento de la personalidad jurídica[41] de la naturaleza o de elementos destacados de la misma,[42] merecedores y necesitados de una especial protección (Wijdekop, 2019, pp. 39-43), se inscriben en este plano, al igual que las demandas de ciertas ONG implicadas en la defensa del ambiente.

En todo proceso restaurativo se precisa igualmente la participación voluntaria del victimario y de las comunidades afectadas.

Obviamente, la Justicia restaurativa defiende que el victimario sea tratado de forma justa, promoviendo su reintegración en la sociedad, algo que puede resultar un auténtico desafío cuando el daño causado es grave y muy extendido, y las emociones siguen a flor de piel. En todo caso, al lado de las personas físicas autoras o partícipes en los hechos, destaca en los ecocidios el peso de las estructuras empresariales y entidades societarias. Preocupa en este orden de cosas a Aertsen (2023) cómo lograr "sentar a la empresa infractora a la mesa" de la justicia restaurativa medioambiental. La pregunta es muy relevante,

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[40] Para un estudio de caso de implantación de la justicia restaurativa en supuestos de daño ambiental, Kershen (2019, pp. 41-53). Vid. también Varona (2024, pp. 71-88), en particular, respecto de casos de vertidos ilegales.

[41] Que, para algunos, puede generar un riesgo de "favorecer el legalismo". Forsyth *et al* (2021, p. 34).

[42] Como en el caso del Mar Menor en España, cuya personalidad jurídica ha sido reconocida por Ley 19/2022. Vid. García de Enterría (2023).

habida cuenta de las necesidad frecuentemente manifestada por las víctimas de ser oídas de forma personal y directa por un representante de alto nivel de la empresa, con capacidad para tomar decisiones en nombre de la compañía, y ello individualmente o a través de los correspondientes delegados o representantes de cada grupo o categoría de víctimas, según los casos. Ahora bien, a pesar del interés de las empresas de mantener la confianza y buenas relaciones con los consumidores y con los entornos sociales en los que se mueven y trabajan, así como de los potenciales efectos beneficiosos del diálogo, es frecuente que empresas y sociedades, por múltiples razones, duden y se resistan a involucrarse en reuniones personales con víctimas directas, de aquí la necesidad de fomentar el compromiso de las empresas con mecanismos de responsabilidad social corporativa, de asunción voluntaria de estándares elevados de exigencia y de rendición de cuentas a través de medidas de concienciación y motivación, tanto intrínsecas como extrínsecas, entre ellas, el apropiado marco normativo regulador (Aertsen, 2023, p. 220).

En cuanto a la participación de las comunidades afectadas, sus aportaciones pueden ser decisivas por su conocimiento del entorno y de cara a reforzar la legitimidad y efectos de las acciones de restauración. Debido no pocas veces a situaciones de opresión, exclusión o marginación ilegítimas o por razones discriminatorias, lograr su participación no resulta fácil y obliga a pensar en estrategias efectivas de inclusión, así como de apoyo a la asunción de las funciones representativas y de liderazgo que demanda la defensa de los derechos.

También es reto central en el marco que nos ocupa la cuestión de cómo abordar la reparación. Para la justicia restaurativa, en esta tarea resulta fundamental, junto a la involucración efectiva de los causantes del ecocidio, el reconocimiento integral del daño (esto es, a las personas y comunidades, pero también a los ecosistemas, la biodiversidad…), pues, interesándose igualmente por las desigualdades e injusticias sistémicas que tantas veces se encuentran en el origen, lo propio de la perspectiva restaurativa es esforzarse en lograr la reparación integral de los impactos físicos, emocionales, sociales y económicos, individuales y colectivos y llegar a soluciones más completas y eficaces. La progresiva recuperación del equilibrio ecológico y de los elementos o recursos naturales afectados demanda por lo común -y no solo en los supuestos evaluados como irreversibles o irreparables-[43] esfuerzos extendidos en el tiempo, en un abordaje necesariamente interdisciplinar, lo

[43] Por su naturaleza, efectos (v.gr. extinción de especies, pérdida de bosques antiguos, la destrucción permanente de ecosistemas…) o magnitud, de aquí la importancia de la prevención guiada por el principio de precaución. Apoyándose en los apropiados marcos normativos, esta debería traducirse en acciones múltiples: v.gr. prohibición de las actividades generadoras de daños irreversibles, conservación y protección de hábitats y espacios protegidos, y fomento de prácticas sostenibles, que contribuyan al equilibrio ecológico, minimizando en todo lo posible el impacto ambiental y los efectos del cambio climático.

que suscita la cuestión de los importantes recursos materiales y humanos a involucrar y el nada fácil aseguramiento de su financiación. En todo caso, cuando la completa restauración no sea viable, y sin perjuicio de la aplicación de cuantas estrategias de restauración y compensación resulten posibles, habría que explorar otras vías de mitigación del sufrimiento y acompañamiento de las personas y comunidades afectadas, como la memorialización. La propuesta de Gema Varona (2020, pp. 673-678) de "Caminar por los paisajes de los ecocidios del pasado", a partir de la evaluación de la visita a los memoriales del desastre del petrolero *Prestige* en las costas gallegas (Morelle-Hungría, 2023, pp. 233-252) constituye en esta línea una estupenda e innovadora iniciativa merecedora de difusión y extensión.

5. CONCLUSIÓN

Afirma Nieto Martín (2020) que, sin olvidar los demás crímenes internacionales ni "desatender la responsabilidad individual", el Derecho penal internacional de tiempos de paz, post-Núremberg, debería prestar especial atención a "las violaciones graves de los derechos humanos" o daños graves al ambiente por parte de las grandes empresas multinacionales, "autores arquetípicos de las más graves violaciones ambientales" (Fronza, 2021, p. 1405). Y permitir "la utilización directa" de procedimientos de justicia restaurativa", en los que -por medio del "diálogo directo" entre los directivos empresariales y las víctimas- pueda llegarse a la "correcta cartografía o descripción del conflicto" y "petición de disculpas", que permitan dar paso a la transformación de "los factores que han hecho posible la comisión del delito"[44] y a la "reparación por la propia empresa de "los daños ecológicos o socioeconómicos causados por su comportamiento" (Nieto, 2020), elementos decisivos en la imprescindible tarea de "recuperación de la cohesión social perturbada por un comportamiento corporativo socialmente dañoso y fortalecimiento de las redes comunitarias" (Saad-Dinitz, 2020, p. 191).

Ciertamente, no sólo en el plano internacional, sino igualmente en el ámbito estatal interno, el establecimiento de mecanismos que permitan superar el grave déficit de aplicación de la protección penal ambiental resultaría del mayor interés. En este plano, las experiencias restaurativas[45], al igual que los ensayos de juicios simulados (Babakhani, 2023, pp. 12-13; Rivers, 2012), contribuyen

[44] Sobre el importante papel de los programas de cumplimiento para la resolución de los conflictos sociales ligados a la delincuencia corporativa, Nieto (2022b).

[45] Como en la Selva Tropical del Gran Oso (Canadá), la limpieza del delta del río Níger (Nigeria), entre los maoríes y el Gobierno de Nueva Zelanda o en Australia, para hacer frente a los delitos medio ambientales como los vertidos ilegales o la contaminación". Hamilton (2021); Wijdekop (2019, pp. 49-80).

a poner de manifiesto las capacidades de la justicia restaurativa para tratar los daños ambientales y fomentar la reparación y la reconciliación.

Son numerosos, con todo, los retos, obstáculos y resistencias que, no solo en este campo, frenan la aplicación de la justicia restaurativa, y para cuyo abordaje y superación se requiere, junto a la permanente "reimaginación de las prácticas restaurativas" (Saad-Diniz, 2019, p. 25), el refuerzo de la responsabilización ética y compromiso hacia el ambiente (individual, de la ciudadanía y por parte de empresas y gobiernos), el ajuste de las estrategias legales, de educación y sensibilización, y el fortalecimiento de la participación comunitaria que permitan dar satisfacción a las necesidades y preocupaciones de todas las partes interesadas. Todo ello en un marco de adecuada y sostenible financiación y de cooperación interdisciplinar e internacional al más alto nivel.

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LOS OTROS NO HUMANOS/OTHER-THAN-HUMANS

AMPLIFYING EDGE-AWARENESS: SOCIO-ECOLOGICAL RESTORATIVE APPROACHES TO HUMAN-WILDLIFE COEXISTENCE

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1. INTRODUCTION

Human-wildlife coexistence has always been a complex issue, involving survival, thriving, loss, fear, courage and more, for all beings. Its complexity reflects a relational simultaneity of human existence and other-than-human existence, shaped by millennia of interactions, adaptation, and conflict, a relationship increasingly strained in our era of rampant industrialisation, ecocidal pathways and shattered planetary boundaries (Bogert et al., 2022; Lindgren, 2017; Richardson et al., 2023). The clarion call to change our ways and pay closer attention to the human-nature relationship rings fiercely and loudly.

Responding to this call involves raising awareness of edge spaces—the sidelines or margins beyond the locus of mainstream activities where human and non-human lives intersect—and their relationship with the centre, understood here as the dominant narratives, systems of governance and management paradigms. Central to addressing complex and uncertain socio-ecological and multispecies issues, this simple yet powerful heuristic resonates deeply across many fields including anti-racism, feminism/ecofeminism, postcolonialism, urbanisation studies, and environmental justice (e.g., see, Alexandrescu et al., 2021; Crenshaw, 1991; Haraway, 2016; hooks, 1984; Jax et al., 2018; Plumwood, 1993). By framing coexistence challenges as an interplay of edge and centre

spaces that weave back and forth, it becomes possible to cultivate a more wholistic and integrative understanding of our shared existence.

Awareness of edge spaces invites recognition that while these zones are often contested and marginalised, they also harbour generative and innovative possibilities. Far from being mere peripheries, invisibilised, or dismissed as not worthy of attention, edge spaces can serve as fertile grounds for resilience, dynamism, diversity, hybridity and productivity (Ortiz-Colin & Hulshof, 2024; Wall Kimmerer, 2024). For those attuned to their potential, much can be gained from drawing on the transformative strengths inherent in these spaces (Valgora, 2018). Realising this potential requires the application of a socio-ecological lens—an approach that engages with the interconnectedness of human and ecological systems. This lens acknowledges that harm in one system reverberates through the other, creating a socio-ecological interplay that impacts both humans and non-humans. Furthermore, in responding to human-wildlife coexistence challenges, this chapter calls on restorative practitioners and scholars to engage more deeply with this socio-ecological intertwinement, particularly in light of calls to 'live restoratively', which entails cultivating enduring peaceful coexistence (Salm et al., 2021).

Human-wildlife contestations—situations of conflict, misunderstandings, confusion, curiosity, and more—occur at the very intersections of human and wildlife needs and offer fertile ground for the application of restorative values and practices, which together I term 'restorative approaches'. Addressing the layers of interpersonal and interspecies conflict arising from human-wildlife interactions is urgent and should be one of our highest priorities. I contend that restorative approaches can provide one valuable pathway to help us iteratively and collaboratively shape more harmonious, interconnected and informed ways of coexisting with wildlife and reconnecting with the natural world.

From a felt sense born of my habit of stitching into the wee hours, I have imagined this chapter as a tapestry. This imagining evokes a weaving from the edges to the middle and back again, interlacing diverse threads of thought and inquiry to present a richly textured canvas of what might be possible. In keeping with this metaphor, the chapter is divided into two major skeins—*Skein One* focuses on human-wildlife coexistence, while *Skein Two* explores restorative approaches. Throughout the chapter, the strands or plies continue the numbering sequence, evoking the sense that each thread is part of a cohesive, woven whole.

Skein One weaves the **first thread** by discussing human-nature relationality, detailing the problematic positioning of the natural world at the margins or edges of human society, scholarship, practice, and ways of thinking about the world.[1] To help us better understand the interplay of edges and centres, I categorise edge spaces in three ways—metaphorical, actual and observational (observed/observing). The *metaphorical* category concerns the disconnection of many human societies from the natural world; the *actual* category explores ecological edges; and the *observational* category invites consideration of non-human perspectives. Each category interconnects through a socio-ecological lens, emphasising the interdependence of human and ecological systems and encouraging a wholistic perspective on the interplay between edge and centre. The **second thread** focuses on human-wildlife coexistence as a site of both conflict and regenerative opportunities. I briefly illustrate the complex interplay between edge and centre spaces through two interrelated areas of coexistence: rewilding and synanthropic species.

In *Skein Two*, the **third thread** offers a snapshot of possibilities, with the hope of inspiring further thought. It explores four strands where restorative approaches can facilitate positive human-wildlife coexistence outcomes. This includes the recommendation to embrace *multispecies hospitality* as a restorative value—taking us beyond mere tolerance towards actively welcoming the shared and reciprocal relationships of coexistence. The **fourth thread** looks at how environmental restorative justice embodies edge space characteristics and what this suggests for its future. The chapter concludes with a call for the amplification of edge-awareness and advocates for restorative approaches as a respectful, shared pathway towards harmonious coexistence for both current and future generations.

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[1] This discussion primarily targets industrialised, urbanised and high-tech societies that have inherited and often celebrated dualist traditions of human-nature separation, particularly influenced by Cartesian thought (Alberro, 2019; Bogert et al., 2022; Plumwood,1993). While not all individuals or organisations adopt this perspective or practice, some degree of generalisation is inevitable, given the state of our planet. These societies span the globe, shaped by high-tech advancements and aspirations that equate success with ceaseless modernisation and consumerism. This often goes hand in hand with unexamined, dissonant practices, including the exploitation of animal kin and environmental resources. In societies that lionise individual success and attribute failure to personal flaws, we often fail to recognise the structural barriers and inequities that perpetuate environmental degradation and social harm (Bowers-Brown et al., 2019). The emphasis on human progress, disconnected from the ecological and social systems that sustain us, reinforces dualism and deepens the separation between human aspirations and the natural world (Plumwood, 1993). In contrast, I acknowledge and respect the enduring, unbroken human-nature relations maintained over millennia by many Indigenous and traditional societies, whose interconnected ways of life have been disrupted by such 'modernising' forces in recent history.

2. SKEIN ONE: COEXISTENCE

2.1. Thread 1: Human-nature relationality—reconnecting lost ties

Thread One explores the historical and ongoing relational disconnect between much of humanity and the natural world. It emphasises the need to reconnect edge spaces, introduces the socio-ecological lens, and explains three categories of edge spaces that guide my thinking.

2.1.1. Strand 1 - Confronting the disconnect: A relational intervention

> *Living as we did–on the edge–we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the center as well as on the margin. We understood both. This mode of seeing reminded us of the existence of a whole universe, a main body made up of both margin and center. Our survival depended on an ongoing public awareness of the separation between margin and center and an ongoing private acknowledgment that we were a necessary, vital part of that whole. - bell hooks (1984, p. i)*

Human history is woven through with stories of edges and centres—stories of exclusion, resilience, and the enduring effort to create wholeness out of separation. For me, bell hooks' profound insights into the margins, originally addressing race, offer an illuminating perspective for exploring another dimension of coexistence: human-nature relations, especially the connection between humans and animal kin and wildlife.[2]

To begin, a brief overview of the human-nature relational concept, often referred to as 'the human-nature relationship' (Lengieza et al., 2023),[3] is essential because it shapes the chapter's flow and underpins my thinking about edges. This concept involves reconceptualising—and, in some ways, reviving—our connection to the natural world, aiming to rebalance modern life's disconnected human-nature interactions (Lengienza et al., 2023; Ruggeri, 2023). It is intrinsically linked to the idea of edges and centres, reflecting recent historical human-centric perspectives elevating humanity's place on Earth as central, and placing all other species beneath. Specifically, it acknowledges the growing detachment from the natural world, influenced by Cartesian thought, which has reinforced human-centric

[2] My use of 'animal kin' is intended as a caring, recognition-based way to refer to non-human animals, all while acknowledging humans too are animals. While I like this term, I use alternatives as well, like 'animals', 'non-human beings', etc., if the meaning is clear. I do not address terminology contestations here.

[3] Other terms used include *human-nature interaction* (Ruggeri, 2023) and *human-nature connection* (Hursh, Perry and Drake, 2024).

ideas of dominance and unchecked growth, often at nature's expense (Artmann, 2023; Kesebir & Kesebir, 2017; Plumwood, 1993). Over the past few centuries, this shift has profoundly shaped the worldviews, vocabularies and actions of many, particularly in urbanised, high-tech societies (Bogert et al., 2022; Hartig et al., 2022; Kesebir & Kesebir, 2017).

Human-nature relations span a range of dimensions across how human beings interact with, perceive, and are influenced by the natural environment, including psychological (e.g., well-being, creativity, quality of life), philosophical (e.g., ethical approaches, values), ecological, technological (human effects on the environment), and cultural perspectives. Acknowledging the interconnectedness of humans and the natural world clarifies that our well-being—individual, collective and societal—is tied intrinsically to the health of ecosystems, lands, waters, atmosphere, soils and wildlife (Hartig et al,, 2014; Lloret et al., 2024; Ylä-Mononen, 2023).

Care must be taken on two fronts here. First, it must be recognised that the human-nature relationship has been an enduring, unbroken relational ethos and directly lived experience for many Indigenous and traditional societies and cultures, for whom the natural world is not a separate sphere or entity but rather embeds them and cares for them, generating a reciprocal responsibility to care in return (Arnold et al., 2021; Jax et al., 2018; Niigaaniin & MacNeill, 2022; Russell & Ens, 2020). In such societies, the natural world is a biocultural phenomenon, nurturant of knowledges around health, safety and well-being, as well as generating spiritual and cultural identity, sustained within a continuous deep-time perspective that honours the past, present and future as a continuum (Debold, 2021, citing Tyson Yunkaporta; Jax et al., 2018; Lukawiecki et al., 2022). Thus, while reconceptualising or reviving the human-nature relationship is needed in disconnected societies, calls for reconnection with nature are not directed at societies and cultures where this tradition was never ruptured. Instead, it challenges those of us who have become disconnected from the web of relationships in the natural world or tightly bound to narratives favouring human superiority to recognise and reestablish the relationships that have always been in place, learning from these deep traditions and their enduring stories and knowledges as we move forward together: '[T]ogether we'll find that it's not the content that matters—it's the process and the relation. For that, we have to bring our stories together.' (Yunkaporta, 2024: 7).

Second, the natural world is not a singular, abstract entity (Astegiano et al., 2023; Morrison, 2022). 'Nature' cannot be reduced to a binary counterpart to human culture, nor should it be framed as a mere backdrop for commodification, recreation, extractivisim, ideological glorification or political narratives. Modified forms of nature-othering—whether by framing wilderness as a pure, untouchable ideal or by dismissing human-modified environments as

devoid of ecological or relational value—are equally problematic (Dalrymple, 2022). These perspectives perpetuate disconnection by failing to recognise the intertwined web of human and non-human lifeworlds, particularly in edge spaces that are rich with potential for coexistence and innovation. Nature is neither a separate realm nor an exploitable machine—a worldview biologist E. O. Wilson identified as 'exemptionalism', 'the overriding mindset for people in the long-industrialised world' (Dalrymple, 2022). Instead, nature is a vast, multifaceted web of life, imbued with sentience, consciousness, intrinsic worth and its own rightfulness and responsibilities. It is not 'out there', separate from humanity, but a living, dynamic co-presence within, around and spun through human societies. Nature is multitudes, perceived by Earth's myriad beings in ways far more diverse and complex than the human perspective often acknowledges or comprehends. Whether referred to as nature, the environment, or another term, the natural world must be understood as a whole composed of many interdependent parts, each interacting through its unique lifeworld and agency. This recognition calls for respect, reciprocity and care.

These two points highlight the urgency of foregrounding the relational ethos in human-nature relations. First, this challenges the trap of instrumentalising nature and animal kin as mere resources or benefits for human purposes (Piccolo et al., 2022). Instead, it calls for recognising care for nature as an intrinsic good—one that mirrors our interconnected well-being, supports inner flourishing, and reflects a morally enriched way of living in which humans have obligations to nature (Jax et al., 2018; Piccolo et al., 2022). By embracing our relational entanglement and reciprocity as foundational, we can shift the focus from nature's utility to its inherent worth, affirming care as both a personal and collective responsibility (Jax et al., 2018; Piccolo et al., 2022). Without this perspective, we risk confining nature to human-centric paradigms, as seen in terms like 'nature-based solutions', 'ecosystem services', or the narrow framing of 'how being in nature benefits human well-being'—all of which imply that human needs come first (Astegiano et al., 2023: 53). Such approaches, while often well-intentioned, can inadvertently 'box nature' into anthropocentric systems, overlooking agency and the profound, reciprocal connections sustaining all life. By contrast, embracing a relational ethos allows us to honour these connections and actively pursue a shared, flourishing existence.

This reflection on anthropocentric packaging of nature is not intended to dissuade social and ecological experts and decision-makers from diligently and respectfully incorporating the natural world and animal kin into human choices and actions. Rather, it is a reminder to approach these efforts with care, so as to avoid instrumentalising, abstracting or commercialising the natural world as our playground, resource pantry or ideological tool (Piccolo et al., 2022). Human systems must attune themselves to ways other beings

relate to us, recognising the dynamic interactions that shape and are shaped by our presence (Crist et al., 2021). This encourages policymakers, politicians, businesses and other key decision-makers to make choices that reflect their duty of care to the natural world.[4]

In the context of edges and centres, foregrounding the relational ethos in human-nature relations calls for intentional decentring of human-centric perspectives that seek to dominate, subjugate or otherwise harm animalkind and the natural world (Imbrogiano, 2024; Meijer & Bovenkerk, 2021; Smith 2024). This requires us to amplify the voices, perceptions and lifeworlds of other beings and the natural world that have long been pushed to the margins. Lifeworlds, also referred to as *Umwelt*, encapsulate the ways in which every being subjectively perceives the world through their particular sensory and cognitive capacities (Schroer, 2021; Tepper, 2022; Yong, 2022). To amplify non-human voices, we must embark on a 'fantastical voyage'—a deliberate and imaginative effort to inhabit their lifeworlds by deeply listening, observing, and learning 'to possess other eyes' and 'see the hundreds of universes that each of them sees' (Yong, 2022). What matters most is this commitment to immersion: to stretch beyond our taken-for-grantedness human-centric perspectives, noticing and caring for what we might otherwise dismiss as peripheral to our own experiences (Imbrogiano, 2024). By creating space for these lifeworlds to come to the fore, we not only support their vitality but also deepen humanity's understanding of its embeddedness in the natural world. In doing so, we cultivate more meaningful and reciprocal ways to perceive and engage with the other lives and worlds around us.

Whether as co-stewards, carers, knowledge keepers, or co-habitants of Earth, all of humanity has obligations to and within the natural world and towards non-human beings, an ethical duty of care requiring us to actively recognise that we share this world with countless other beings, and that their flourishing underpins our own (Piccolo et al., 2022). Furthermore, this relational responsibility extends to being good ancestors to future generations, ensuring that they too have the opportunity to experience a healthy, resilient and nature-embedded life (Brown Weiss, 1990).

2.1.2. Strand 2 - Edge-ifying the centre, centring the edges

As bell hooks' quote in Strand 1 powerfully illustrates, those living on the edges tend to look outward from the margins, attuning themselves to the centre.

[4] Here, I treat the concept of 'duty of care' as broader than a legal one, although expanding that sense across conservation legislation is important too (Earl et al., 2010). I use it in a moral, ethical sense to reflect an attitudinal, reciprocal, stewardship sense of an obligation to nature, one infused through daily thinking and actions.

Edges–whether sidelines, margins, transition zones, peripheries or other conceptualisations—are places of dual awareness. In contrast, those situated at the centre are often either unaware of the edges or exploit them for their own purposes, typically ambivalent or dismissive of the consequences for those living on the edges.

Edges and centres can be viewed in multiple ways, but I have chosen to view them as three categories: metaphorical edge, actual edge and observational (observing/observed) edge. This breakdown highlights the varied perspectives that, when woven into the coexistence tapestry, allow an interconnected pattern of edges and centres to emerge. I will unpack each of these aspects in turn shortly, but first I address the importance of the socio-ecological lens, which weaves through each category and informs environmental restorative justice's approach to human-wildlife coexistence.

2.1.2.a.Filament 2.a – Viewing the world through the socio-ecological lens

Whether as government officials, community members, business leaders, researchers, practitioners, civic ecologists, citizens, or family members, adopting a socio-ecological lens allows us to explore complex challenges in a wholistic way. This lens brings the edges into awareness, preventing us from defaulting to human-centric perspectives. It emphasises the interconnectedness of social and ecological systems, which together form dynamic networks of people and nature, spanning micro (local), meso (bioregional) and macro (global) scales (Fischer et al., 2015). The socio-ecological lens embraces both the social—including economics and culture—and the ecological—comprising animalkind, flora, lands and waters, atmosphere and soils, forests and mountains, amongst others. By cultivating a socio-ecological consciousness, we can better recognise the mutually co-determining nature of both systems: caring for one sustains the other, promoting balance and resilience, while harm to either inevitably harms both (Cadenasso et al., 2022).

As an approach guiding humanity in managing its choices and actions, the socio-ecological lens is necessarily interdisciplinary, requiring communication across diverse fields of knowledge and experiences to reflect the breadth and complexity of addressing our multiscale planetary challenges (Kelly et al., 2019). Furthermore, science, in both Western and Indigenous forms, is valued not only as a pragmatic and realistic way of understanding the world but also as a vital tool for addressing complex socio-ecological challenges effectively (Pullanikkatil & Hughes, 2022). Furthermore, this lens takes the long view of socio-ecological interdependence. By shifting the emphasis to long-term thinking (Casajeros, 2020), it explores how complex drivers interact and

intertwine over time, shaping mutually dependent trajectories of both human and ecological systems. This lens also necessitates a critical examination of justice, especially concerning power dynamics, equity and meaningful, localised participation in decision-making (Fischer et al., 2015).

The socio-ecological lens is inherently relational, illuminating the interwoven connections not only between the social and ecological systems but also the web of relationships amongst people, animal kin, and the natural world (Lejano, 2019). Importantly, as with nature, the relational aspect of the socio-ecological lens is not monolithic; it honours the 'collective richness of relational approaches', a perspective that encourages us to go beyond seeking connection points to also recognising and embracing differences and intersections as essential to a deeper understanding of socio-ecological dynamics (West et al., 2024, p.15). By doing so, we actively commit to 'walking together' and consciously embracing the multifaceted nature of relationality between each other and between humanity and nature (West et al., 2024, p. 17). Additionally, the socio-ecological lens recognises that relationships within systems often defy traditional managerial and top-down assumptions, instead prioritising cooperation and mutual benefit over competition, respecting self-organisation over mandated, imposed pathways, and eschewing binary assumptions that favour only one way or perspective (Ulanowicz, 2021).

In these important respects, the socio-ecological lens expands our understanding of how interconnected networks—both human and natural—function and thrive, providing a dynamic and inclusive framework for navigating today's complex challenges. And with this understanding in mind, I now address the three categories of edge and centre spaces.

2.1.2.b. Filament 2.b – Three categories of edge spaces

Metaphorically, edges represent that which is alienated from what is perceived as 'the real action', with the centre being the legitimised, mainstream and normalised space where the status quo holds sway and anthropocentricity is omnipresent. One example is the human preference for cities or urban life as the centre of business, consumption, social life, and the arts, which diminishes the value placed on peripheral spaces, such as peri-urban areas, villages and other settlements (Burnill-Maier & Gilmore, 2023; Maddah et al., 2021). More recently, in re-conceptualising cities as a neoliberal project, the 'commodification, financialization, and revalorization of housing, real estate, and other urban assets' serves to centre cities as mechanisms of capital accumulation (Golubchikov, 2016, p. 215). To feed this insatiable machine, the natural world underpinning and flowing through cities has become a commodified edge space, termed 'green infrastructure' and either concreted

over or corralled into serving the recreational, green gentrification and observational needs of wealthier inhabitants—thus abstracting nature into a 'luxury' at the edge of most citizens' experience (Eyster et al. 2024; Gabriel, 2016). This is a socio-ecological challenge—poorer inhabitants experience the inequities and injustices of lacking the green and blue spaces cities as a whole need to thrive, while the natural world and wildlife are variously hoed, poisoned, trampled on or chased out. Later, I explore this urban tension from the perspective of synanthropic species.

From the perspective of human-nature relations, the metaphorical centre is unwaveringly human-centric. Here, the centre represents the dominant paradigm of industrialised societies where managerial, ecocidal and competitive drives—such as excessive resource extraction, mass production, and quantifying-oriented systems—seek to control nature and people. Human-centred priorities and domination over all other beings shape the commercialised world we bathe in daily. The centre worships growth, a centralised goal of *more* consumption, *more* success, just *more, more, more*. This pushes intentional living practices like enoughness (Edlinger et al., 2021), animal welfare or veganism (Hannan, 2024) to the edges. These caring, sensemaking attempts to fulfil values-to-action for living more coherently and attuned are often performatively vilified or subject to 'symbolic violence'—precisely because coherency in values and actions threatens the centre's status quo of consumption, domination and wealth hoarding (Burnill-Maier & Gilmore, 2023; Hannan, 2024).

As for the well-being of our animal kin, 'animal welfare is an issue which clearly stands at the extreme periphery of the concerns of social welfare' (Jamieson, 1987, p. 36), often accompanied by sophistry that to care about beings other than humans is wrongheaded, marginalising the mattering of non-humans (Korsgaard, 2018). Peripheralising attentiveness to their lifeworlds, sentience and needs leads to instrumentalisation and commodification, which justifies harms such as coercive labour (Narayanan, 2024), intensive animal farming, disposability of bycatch (Killoren & Streiffer, 2020), disruption of non-human relationships (Benz-Schwarzburg et al., 2023; Kossakovsky, 2020), mass slaughter (Farm Transparency Movement, 2018) and trophy hunting (Bekoff, 2015). Animal abuse and abandonment are additional ways in which human-centric beliefs in non-human inferiority harms and marginalises non-humans. More broadly, human conceit and greed lead to habitat destruction and ongoing, widespread environmental harm, which detrimentally impacts the health, flourishing and autonomy of all beings, including humans. From a socio-ecological perspective, marginalisation of other kin is a primary cause of environmental and animal harm.

Next, turning from edges as metaphor to *actual* edges, the focus shifts to embracing the generative, diverse and harmonising aspects of ecological edge

spaces. Here, ecological concepts such as ecotones, the edge effect and migratory crossing points, understand edges as rich and often unique transitional spaces (Mora, 2022). Ecotones—places of transition between ecological communities—are areas where boundaries either blend gradually or meet abruptly, yet still actively interact and sustain the life of each adjacent community (Kark, 2015). Ecological edge spaces include urban-nature interfaces, such as peri-urban suburbs or city parks; riparian zones where land meets water; intertidal zones where oceans meet shorelines; woodlands meeting the plains; soil horizons where distinct layers support microbial life and nutrient cycling; desert-oasis boundaries where arid landscapes meet watered life; and cliff edges where steep altitudinal transitions create unique ecological niches (Kark, 2015; Mora, 2022). Ecological edges or peripheral zones are often places of flourishing, adaptation, and integration: as Potawatomi botanist, Robin Wall Kimmerer, explains: 'The gap edges, or ecotones, where two ecosystems, the new and the old, meet, are among the most diverse and productive of ecosystems, full of berries and birds' (Wall Kimmerer 2024: 102).

Self-regulating and self-organising, the dynamic, liminal spaces of ecological edges are where diverse species interact, generating mutually beneficial outcomes. These interconnected zones contribute to the health and balance of the wider ecosystems of which they form a part. However, human-created edges can potentially unravel the tapestry with disruptive patterns. Disturbances such as habitat fragmentation, ecotonal degradation, and introducing non-native species can snap the threads that once held everything together (Anjanalakshmi, 2024). Human-imposed edges are on the increase—for example, by 2100, it is predicted that the majority of the world's forests will be near edges, a transformation imposed upon ecosystems by human activities (Willmer et al., 2022). We are far from understanding how this might play out in the longer term and must recognise that for many animals and plants, navigating these human-forced edges is not an autonomous choice but a necessary response to human-dominated centres influencing their pathways of survival. In an era where resilience is celebrated as a guiding principle, erosion of interconnected habitats into fragmented, human-imposed edge spaces signals troubling consequences for animalkind and ecosystems.

Understanding the centre as both an object and subject of observation encapsulates my third category: *observational* (observing/observed). This category calls for an exercise in both empathy and science—demanding that we engage with the growing body of research affirming that non-human beings possess sentience and consciousness (MacCormack, 2023). Their perspectives and ways of sensing the world (lifeworlds) differ from ours but are equally valid and finely attuned to the spaces they inhabit. Ultimately, this recognition challenges us to acknowledge that while we often fail to perceive the edges, the edges are, nonetheless, perceiving us.

One pertinent example is that of synanthropic species—the animals that choose to live alongside us, particularly in urban contexts (Black, 2020). In a twist of roles, these species adapt to and thrive in human-made environments, effectively making their homes in ours rather than the other way around. The foxes, pigeons, possums, sparrows, kangaroos and raccoons, to name but a few non-human urban residents, likely watched us from afar at first, as they assessed the opportunities our built environments, rubbish heaps and artifices created (Froiland, 2017). Many, like Australia's iconic 'bin chickens'—more aptly known as white ibis—arrived en masse in our cities due to environmental degradation such as drought and habitat loss (Connor & Allatson, 2018). This drive to switch habitats is rather ironic, reflecting how the very habitats we degraded to extract materials for building our cities have transformed urban spaces into oases where species like white ibis flocked to and now thrive (Griffin, 2024).

Observationally, for animals living at the peripheries of human-dominated environments, dual awareness becomes vital for survival. They observe, adapt, and respond to human activities—whether foraging in urban spaces, navigating traffic, or avoiding industrialised zones—acting as attuned, silent witnesses to the dynamics of the 'centre' even if that centre remains largely oblivious to their presence. This quiet, often unseen interaction gives urgency to the need for us to rethink how we shape, perceive and interact with the world's edges and centres.

Being observed by non-human beings is immensely portentous. When we recognise that all beings—human and non-human alike—have sentience, agency and distinct lifeworlds, we must accept our ongoing responsibility to acknowledge these alternative perspectives. Our duty is not to dominate or objectify through the 'sovereign gaze' (Daly, 2022) but rather to return the gaze with humility, curiosity and respect for the rightfulness of other species to exist, flourish, and be heard. This responsibility extends to recognising the complexities of our entangled interspecies and other relationships. Non-human beings, in all their diversity, animate and non-animate, may challenge us in many ways: they can eat us (tigers, crocodiles), threaten us (elephants, funnel-web spiders), make us ill (mosquitoes, ticks), or undermine human-made habitats (wood-chewing cockatoos, termites). They disrupt our best-laid plans for re-engineering (beavers, ants) or find shelter in our homes (possums, rats, pigeons, spiders). Non-animal natural entities can drown us (rivers, seas, tsunamis), drop us (cliffs, air, sinkholes), lure us (mushrooms, red berries, low tides) and lull the unprepared into becoming lost (forests, deserts, ocean depths). Yet, human beings are nature too, and a restorative response obliges us to own the harms we inflict first; while second, our cognitive capacity to plan, problem-solve, be creative, and anticipate the consequences of our choices (Thomas, 2022), places the onus on us to reorient our interactions with the natural world—not to disrupt it, but to make informed, relationally-attuned

and grounded choices, sometimes through restorative processes, that lay the groundwork for safe and mutually beneficial coexistence.

The *observational* category of edge and centre spaces can further be framed as attitudinal. As a restorative way of thinking, the observational category calls upon us to notice, become aware of, acknowledge, see and heed the non-humans and their active lifeworlds. This restorative attitude can be fostered through restorative approaches like attentiveness, care, respect, deep listening and dialogue, further explored below. Restorative approaches shift human observer—or non-observers—from a controlling, human-loaded interpretive stance to one of humility, curiosity and a willingness to engage beyond-the-human sphere, resonant with the broader goal of reinvigorating human-nature relations.

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2.2. Thread 2: Human-wildlife coexistence

This Thread explores human-wildlife coexistence as a complex socio-ecological phenomenon. It first aligns coexistence with the three categories of edge spaces, setting the stage for exploring both conflict and opportunities for positive interactions. To illustrate these dynamics, I utilise two tangible examples—rewilding and synanthropic species—which illuminate the intricate interplay between edge and centre spaces within coexistence contexts.

2.2.1. Strand 3 – Coexistence as a critical edge space

By 2070, it is likely that human-wildlife overlap will occur in over half of the world's lands (Ma & Carter, 2024). Human-wildlife coexistence is a response to this 'ever-encroachingness'—it concerns humanity and wildlife existing together 'in ways that are mutually respectful and peaceful' (Boronyak, 2023) in a 'dynamic but sustainable state in which humans and wildlife coadapt to living in shared landscapes, where human interactions with wildlife are governed by effective institutions that ensure long-term wildlife population persistence, social legitimacy, and tolerable levels of risk' (König et al., 2020, p. 787). Coexistence offers a socio-ecologically cognisant pathway to restoring the disconnect between humans and the natural world, provided its risks and opportunities are addressed through collaborative, restorative approaches grounded in local experiences of living with wildlife (Glikman et al., 2021; Pooley et al., 2020).

Human-wildlife coexistence embodies the metaphorical, actual and observational edge categories discussed above. The *metaphorical* edge emerges in the oppositional framing of conflict between humans and nature, which

perpetuates the sense of division, imposition and competition, overlooking the potential for co-benefits, reciprocal interactions, and the dual-way influence inherent in coexistence (Hsiao, 2022; Pooley et al., 2020). Both mental and structural, the metaphorical edge tends to relegate the needs of wildlife to the periphery of policymaking, urban planning and commerce, amongst other human activities. It also manifests in figurative limits, such as protected places and reserves, where we fence in/out or set aside 'nature spaces' from 'human spaces', an approach that often reinforces rather than reconciles this divide.

The *actual*, or physical, edge of human-wildlife coexistence manifests in tangible barriers like walls, fences, roads and dams. These human-made boundaries often obscure the intricate interdependence between human systems and ecosystems, limiting our awareness of how we inhabit and alter shared places. Highways bisect migration routes, Big Ag displaces feeding grounds, and urban sprawl spreads mindlessly across natural habitats. These physical boundaries delineate and constrain the spaces where human activity overlaps with the natural world—urban settlements, agricultural zones, military ranges, recreational infrastructure, and more. At these intersections, the edge becomes a site of contestation, adaptation and innovation.

The *observational* edge of coexistence represents areas of mutual scrutiny. Wildlife watches us from the fringes, observing our behaviours and sizing up our infrastructures. Over time, animals learn to exploit the resources we unintentionally provide and avoid the dangers we pose, turning the observational edge into a zone of adjustment, where they adapt to our patterns, often in ingenious and unexpected ways.

Just as the edge of a forest and a field can be a rich and diverse ecosystem, the edge spaces of human-wildlife coexistence are critical zones where different species, including humans, interact and influence each other. These interactions may spark conflict at times, but they also present opportunities for innovative co-determination of effective space sharing. By reframing these edge spaces as sites of mutual adaptation, we can begin to disentangle the oppositional narrative and replace it with a more nuanced cooperative, constructive one. These three edge categories—metaphorical, actual and observational—highlight the interplay between edge and centre spaces, urging us to engage with the complexity and plurality of coexistence in thoughtful and adaptive ways. I now turn to the challenges and opportunities in this space that underlie the reason for applying restorative approaches.

2.2.2. Strand 4 - Conflict and contestation

Human-wildlife coexistence can be envisioned as a patchwork of connection and disconnection, innovation and tradition, which gives rise to tensions as

wildlife encroaches on human spaces and activities, and humans encroach upon spaces once dominated by wildlife. These tensions can manifest as conflict between humans and wildlife, as well as contestations amongst humans themselves. The latter often follows the former, as differing views emerge on how best to navigate this complex relationship (Glikman et al., 2021).

Conflict in coexistence refers to direct interactions between humans and wildlife (Nyhus 2016). These conflicts predominantly occur in edge spaces, where human and wildlife domains intersect, such as around protected areas (Sobrevila & Bhammar 2017) or in urban contexts (Zellmer & Goto, 2022). Tension hotspots emerge when human activities encroach on wildlife habitats or wildlife interacts with human settlements (Lecuyer et al., 2022; Ma & Carter, 2024). This can result in harm on both sides: wildlife may damage crops or prey on farm animals, while humans may react with defensive or retaliatory measures (IUCN, 2022; 2023; Wangchuk et al., 2023). These conflicts raise concerns around livelihoods, safety, cultural taboos or exclusion from conservation management (see Table 1), highlighting the urgency of responding in ways that account for the needs of all species effectively and compassionately.

Table 1: Summary of conflict and contestation

Human-wildlife – reasons for conflict	
Loss of livelihood	Occurs where crops are eaten or damaged, or when farm animals are harmed/killed, e.g., leopards preying on farm animals, elephants eating crops (Datta et al., 2024). Changed patterns of work, time lost guarding crops, borrowing money, health issues, etc., can follow attacks or raids by wildlife (Gross et al., 2021; Nyhus, 2016).
Safety concerns	Local experiences and news/social media stories about attacks on people from wildlife can lead to increased anxiety and fear (Nanni et al., 2020).
Cultural stigmatisation	Fear, disgust, etc., towards wildlife stemming from cultural beliefs, taboos and superstitions; negative attitudes concentrated in certain areas (Lecuyer et al., 2022); loss of cultural knowledge about coexisting methods (Hsiao, 2022).
Exclusion from conservation efforts	Failure to involve local communities in rewilding, relocation, and other conservation planning can lead to anti-coexistence sentiments (IUCN, 2021; 2023).

Human-human – reasons for contestation	
Differing perspectives	Varied stakeholder insights & priorities; differing/conflicting perspectives between experts, business, government, communities, Indigenous groups (Hill, 2021).
Varying values & ontologies	Different ways of perceiving wildlife as benefit, threat, detrimental, etc. Tolerant ontologies view wildlife as other-than-human persons in a community of beings, but this is not reflected in most worldviews (Thekaekara et al., 2021, p. 15).
Land use disagreements	Conflicting ideas about how land should be used, set aside, or allocated can create tensions between different groups.
Legal support lacking	Laws protecting wildlife can: lack cohesion/wholistic perspectives, have low/no enforcement or effectiveness, or err in intent, causing confusion and disagreements, leading to disagreements/confusion (Griffin, 2024; Woolaston et al., 2021).
Varying tolerances for interventions	Contextually-driven varied tolerances for wildlife management interventions: scientific, Indigenous, recreational, local, welfare advocacy, etc. variances.

In contrast, **contestation** refers to tensions between humans that arise from differing views on navigating conflict challenges. From Indigenous communities and local restoration groups to scientists, governments, and environmental NGOs, a multitude of stakeholders bring diverse perspectives, experiences, critiques and solutions to the table. Within the highly contextual, emotionally charged and knowledge-intensive nature of coexistence, this plurality of perspectives unsurprisingly results in contestations around values, land use, legal effectiveness, or varying tolerances regarding interventions (see Table 1). While challenging, perspective diversity can become a strength if approaches to managing coexistence are participatory, inclusive, and rooted in mutual respect. For instance, local communities may contest conservation directives restricting land use, advocating instead for policies integrating wildlife protection with sustainable livelihoods suited to their context. When centre spaces—occupied by conservation agencies, scientists, policymakers, and other authoritative decision-makers—actively include communities situated in these shared edge spaces in deliberations, contestation can transform into a constructive process that generates innovative, shared solutions (Green et al., 2024; Nyhus, 2016).

The interplay between edge and centre spaces reveals a critical dynamic: while conflict necessitates immediate resolution and harm reduction, contestation, when addressed through deliberative processes such as socio-ecological restorative practices, can provide a platform for creating systemic solutions. Supporting this interplay embodies core values of restorative justice, including healing, inclusivity, deep listening, collective problem-solving and relationality (Forsyth et al., 2021). By addressing both the structural and interpersonal dimensions of coexistence, we can move towards a balance—a middle way—that respects the needs and lifeworlds of all beings. This complex socio-ecological process requires ongoing attentiveness, effort and commitment, and as will be explored in Thread Three, restorative approaches offer promising pathways for precisely this.

2.2.3. Strand 5 – Edges as generative and regenerative interaction opportunities

Edge spaces are more than sites of tension and contestation; they also hold rich potential for generative and regenerative possibilities. This is particularly true regarding positive interactions which spark opportunities to amplify connectedness and improve psychological well-being (Boronyak, 2023; Nyhus, 2016; Zellner & Goto, 2022). Restorative approaches to human-wildlife coexistence must therefore focus as much on these opportunities as on resolving conflict, for this is where the prevention of future harm begins. Sustainable, collective solutions that support harmonious coexistence between humans and wildlife can be iteratively woven together in this space. Coupled with restorative justice's emphasis on viewing conflict as a constructive process (Zehr, 2008), highlighting the benefits of coexistence can encourage participants in restorative processes to seek collectively agreed solutions that benefit both humans and wildlife. These solutions can integrate beneficial opportunities into long-term strategies for repair, renewal of relationships, and prevention of future harm.

While edge spaces can be challenging to govern and manage, due to their unclear and shifting boundaries, this very fluidity holds promise for adaptation and transformation. Unlike rigid, path-dependent systems, edge spaces offer room for innovative, flexible and experimental approaches to emerge. Through collaborative, participatory efforts, shared solutions to coexistence challenges can be explored. Balancing optimism with pragmatism is essential here, as is the willingness to engage with complexities, navigate trade-offs, and co-develop solutions that meet the needs of both humans and animals (Hill, 2021).

Recognising the opportunities inherent in edge spaces, a variety of long-term interventions can support coexistence between people and wildlife. Wildlife crossings, tunnels, bridges, and corridors can facilitate safe passage for animals across human-dominated landscapes (Greenfield, 2021). Community-

based ecotourism, where contextually appropriate, might provide economic and cultural incentives for conservation while generating funds for wildlife protection (Alam & Nayak, 2024). Sustainable agriculture practices that integrate wildlife-friendly farming can maintain connectivity across agricultural lands (Goulburn Broken CMA, n.d.), while habitat restoration, rewilding, and wildlife-friendly urban design enhance local ecosystems. Sharing Indigenous knowledge about traditional wildlife conflict minimisation and partnering on conservation efforts can strengthen cultural connections with nature (Jolly et al., 2022). Additionally, community-based monitoring and educational programs that promote empathy, awareness, and sustainable wildlife-based livelihoods are vital for cultivating long-term coexistence (Green et al., 2024). These diverse, mutually beneficial opportunities, along with sharing stories about positive interactions, can empower communities living at the edges of human-wildlife interactions to collaboratively develop innovative and restorative responses that are locally relevant and resilient.

2.2.4. Strand 6 – Two examples of coexistence edge-centre interplay

The edge-centre interplay of coexistence in practice can be understood through two examples, first rewilding, and second, synanthropic species.

Rewilding involves considered, deliberate reintroduction of wildlife into areas they once inhabited or where similar species are needed to restore lost ecological roles. To fulfil the harmonious human-nature relations this chapter advocates, I conceptualise rewilding as human-nature mutualism: 'a way of restoring mutually beneficial relationships between humans and nature' in which 'the autonomy of both become enmeshed', each shaping and strengthening the other (Glentworth et al., 2024: 3).[5] This framing challenges conventional ideologies around 'wild' and the human-nature separation, emphasising humans' capacity to be active participants within ecosystems (Glentworth et al., 2024). Education on mutualistic rewilding can promote a cultural shift, encouraging nature-disconnected people to reimagine their connection to the natural world and their responsibility as custodians. In this way, rewilding is a socio-ecological endeavour that restores human-nature relations.

The *metaphorical* edge-centre dynamic surfaces in the governance of rewilding projects, for example, where apex carnivore reintroductions (e.g., grey wolves, Iberian lynx), spark contestations due to community fears, management strategies and the quantifiability of benefits. These contestations challenge human hubris and invite radical ecological humility, raising vital, iterative and reflective questions about

[5] Defining rewilding is multifaceted and contentious but this is not the place for that discussion (IUCN, 2021).

whether humans interfere too much, too little, or strike the 'Goldilocks' balance of stewardship (Butler, 2024; Glentworth et al., 2024; IUCN, 2023). Rewilding also manifests as an *actual* edge—zones of reintroduction often occupy areas on the brink of ecological collapse, while reintroduced wildlife frequently interacts with human activities like farming, housing and industrial zones, sparking conflicts with human interests (IUCN, 2021; 2023). The *observational* edge is subtler but equally important: humans refine rewilding practices by observing how species adapt, while reintroduced wildlife must continuously adjust to landscapes reshaped by human activities, shifting demographics and trends that ebb and flow—from monoculture to permaculture, and attitudinal shifts towards the perceived value or challenges of animal kin.

Where scientifically grounded, adaptive and inclusive of the intrinsic worth and autonomy of all species, rewilding offers multiple benefits, including reduced human-wildlife conflicts, enhanced ecological functioning, improved water retention and soil health, and deepened understanding of human-nature understanding (Glentworth et al., 2024; IUCN, 2021; 2023). By restoring ecosystems to a sustainable state, encroachment into human spaces can decrease, alleviating reliance on human-grown/manufactured resources—though opportunistic foraging requires convivial forbearance. Examples of rewilding successes appear around the world, including Iberian lynx in Spain, ecosystem engineers like bettongs and bandicoots in Australia, beavers in the UK, and muskoxen in the Arctic (IUCN, 2024; Schueman, 2024; WWF-Australia, n.d.).

Ultimately, rewilding's success depends on its integration into broader socio-ecological contexts. It must prioritise community engagement, encouraging stewardship and pride in local conservation efforts (Ecosulis, n.d.; Glentworth et al., 2024). Empowering local and Indigenous communities to manage reintroductions according to their local, traditional conservation methods respects historically effective and contextualised practices and strengthens both ecological resilience and social cohesion. When communities work together to rewild, the chances of success are much higher.

Synanthropic species are animals (and plants) that thrive in human-altered environments, particularly urban spaces with their novel ecosystems (Griffin, 2024; Rouse, 2022). In contrast to rewilding, these species choose coexistence by adapting to human presence and structures. Edge spaces emerge where humans and synanthropic species interact—often uneasily—as wildlife exploits human-modified environments. Most particularly, synanthropic interactions highlight the *observational* edge, whereby human activity is observed by wildlife, to determine the suitability of accessing and utilising human-dominated spaces and to maintain safety. This observational edge is a key dynamic, as wildlife must continuously assess the risks and opportunities presented by the human-altered landscape they have chosen to inhabit.

Additionally, *metaphorical* edges come into play because of our perceptions of such species. They may be viewed in various ways—positively, as welcomed garden visitors, nature-in-the-city, or even helpful; or, negatively as vermin or pests, roadkill, competitors for the vegetable patch, threats or nuisances. Negative attitudes and categorisations create barriers to harmonious coexistence, which returns us to the *observational* edge, whereby human observation must become more attuned to the lifeworlds, sentience and motivations of our animal kin. For without this awareness, we risk staying mired in old wildlife management paradigms that do not fit urban contexts, thereby perpetuating negative stereotyping of urban wildlife (Griffin, 2024). From pooping pigeons to kangaroos bounding across busy highways, the *actual* physical edges come into play through direct interactions, both positive and negative, that arise as synanthropic species encroach on human spaces and activities.

Overall, the presence of synanthropic species in urban landscapes will only continue to grow. As urban wildlife specialist John Griffin (2024) aptly notes: '[T]o ignore their presence or to assume they don't belong in these spaces and places is not only unhelpful but serves to exacerbate those conflicts that do surface'. Instead, we must embrace the reciprocal interplay of these edge spaces and learn to see and respect them. Recognising the lifeworlds of synanthropic animals is key to centring the edges. By leaning in to the fluidity and flexibility of these spaces, and the diverse opportunities they offer, communities can collaboratively navigate the complexities of human-wildlife relationships, unlocking new pathways towards harmonious and mutually beneficial coexistence.

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3. SKEIN TWO: RESTORATIVE APPROACHES

3.1. Thread 3: Restorative approaches to coexistence

This Thread explores three key areas of socio-ecological restorative approaches to coexistence conflict. These areas are selective and not exhaustive; what follows serves as a living checklist, constantly evolving. First, I examine multispecies attentiveness as a restorative approach. Next, I address restorative approaches that meaningfully interweave non-human perspectives and lifeworlds into human-wildlife coexistence efforts. Finally, I explore how restorative approaches can navigate multi-layered contestations between humans striving to find common ground to coexist harmoniously.

3.1.1. Strand 7 – Multispecies attentiveness

Before exploring the restorative approach of attentiveness, it is necessary to explain what the multispecies aspect adds. In addressing human-wildlife coexistence, I advocate that environmental restorative justice can draw inspiration from and be guided by the theory of multispecies justice. Multispecies justice challenges commodifying, disconnecting narratives of human-nature relations, exposing power imbalances in our relationships with other species (Celermajer et al., 2020). It de-centres human exceptionalism and expands the understanding of justice to include non-human species and earthly entities such as rivers, forests, and mountains, without imposing human characteristics onto other species, and foregrounds the intrinsic value, diverse lifeworlds and unique sensory perspectives of non-human kin (Celermajer et al., 2020; Smith & McManus, 2024 Willis, 2024). There is an expectation in multispecies justice that humans act responsibly towards all beings, human and non-human (Celermajer et al., 2020). Multispecies justice recognises and values Indigenous and traditional knowledges and philosophies, which have never separated humans from nature or imposed harmful binaries of humans versus nature but rather emphasise the interconnectedness of all beings in the cosmos (Celermajer et al., 2020). As such, the principles and values of multispecies justice provide an important bedrock from which to expand the restorative value of attentiveness.

Attentiveness, as part of the ethic of care, is a core value of environmental restorative justice (Tepper, 2022). Moreover, as a practice of care embodying multispecies justice, attentiveness must extend to all species, understanding that '[i]mmersive ways of knowing and being with others involve careful attention to what matters to them—attention to how they craft shared lives and worlds' (Van Dooren et al., 2016, p. 6). I refer to this as 'multispecies attentiveness' and it is situated in all three of the *metaphorical*, *actual* and *observational* edges, requiring us to set aside the 'sovereign gaze of the human subject' (Daly, 2024) to instead notice the presence, acknowledge the intrinsic worth and recognise the needs of coexisting species.

Multispecies attentiveness compels us to consider the consequences of our actions on other species, attuning us to the harms or potential harms we cause them. It also requires redefining the scope of participation in restorative practices, obliging us to *make space for Earthly kin within the restorative circle.* Effective inclusion involves setting aside human-centric judgements of the intelligences, abilities and worth of other species and instead recognising that non-human senses are ideally attuned to the lifeworlds they inhabit (Mishler, 2023). In acknowledging our co-embeddedness, we can focus on relational interconnectedness and mutual interdependence as 'the right way' to approach shared existence on Earth. Within the non-judgmental, supportive space of a

restorative process, multispecies attentiveness invites us to be 'coconstituted inside dense webs of lively exchange' (Van Dooren et al., 2016, p. 14), allowing the voices and perspectives of other kin to ripple through the tapestry of our shared existence, gently reshaping our understanding and enriching our relational awareness. Next, I explore a few practical approaches for hearing these voices and perspectives.

3.1.2. Strand 8 – Addressing conflict restoratively: Dialogue across species

Making room for a plurality of voices and perspectives is central to environmental restorative justice (Forsyth et al., 2021). Extending this respectful stance to non-human beings is crucial to enable us to hear their voices and consider their perspectives (Varona, 2022).

Bringing the voices and perspectives of animal kin and the environment into the restorative circle or space can be achieved through several approaches. **In situ** practices, such as restorative walking, holding the restorative process directly in the affected environment, having participants meet with impacted animals through appropriate mediators, or other embodied experiences can allow for the lifeworlds of animal kin to become more perceptible to participants, encouraging restorative reflection and a sense of connectedness while within the animals' own space (Varona, 2019; 2022). Deep listening, in this context, requires participants to stop and reflect on not only the sounds but also the other sensory input around them such as movements, colours, odours, and textures. **Intermediary tools**, such as animal-centric artificial intelligence and similar technologies, can help interpret the actions, communications and beyond-human-sense perceptions of non-human beings, offering non-judgmental ways to understand their needs and responses (Savage, 2024). **Storytelling**, rooted in empathy and imagination, allows the experiences, lifeworlds and responses of animals and natural entities to be understood through narratives that reflect their perspectives, sparking empathy, recognition and awe (Forsyth et al., 2021; Tepper, 2024).

Representatives—whether human or animal—can serve as vital bridges between human and non-human worlds, ensuring that the interests and concerns of animals and natural entities are included in the restorative process (Varona 2022; Wijngaarden, 2023). Human intermediaries, such as experts or creative practitioners, can facilitate deep listening to non-human perspectives, using storytelling, art, or science to help participants understand the lifeworlds of other species (Pointer & Pali, 2022; Varona 2022). Including children's expressions of animal kinship may also provide valuable insights, particularly in restorative processes where younger participants are present. Younger children, with their innately restorative sense of justice and natural curiosity

about animals, often grant animals a greater moral status than older children and adults (Neldner & Wilks, 2022; Riedl et al., 2015), bringing a uniquely empathetic perspective to the circle. These intermediaries bring essential knowledge of and experiences with animal kin and Earthly entities, making their voices heard in ways that enrich the restorative process.

In some cases, animals themselves may act as intermediaries, representing not only their own species but the broader ecological relationships they inhabit. Astegiano et al. (2023) discuss the 'cabrero' guardian dog in Argentina, bred to protect goats from puma predation, as an example of how animals can actively mediate between humans, farm animals, and predators, in a form of species interconnectedness. This role challenges the notion of animals as passive subjects, positioning them as active agents in conflict resolution. In restorative practices, recognising the agency of animals like the 'cabrero' to inform storytelling acknowledges their relational importance and allows them to act as representatives not only for their species, but for the broader ecological network, contributing to a more inclusive, multispecies approach to coexistence.

Selecting suitable human representatives requires careful consideration of their knowledge, cultural relevance, experience and credibility with the human participants involved. For example, when harm occurs to animal kin in contexts deeply tied to Indigenous lands, traditions or relationships, it is crucial to consult with and include Indigenous peoples as representatives for those animal kin. Many Indigenous and traditional cultures regard specific animals and natural entities as totems, spiritual guides, or integral to their communities' well-being (Glynn-Mcdonald, 2020; Hsiao, 2022; Turner & McKenzie, 2022), and their active participation ensures that the restorative process respects these vital connections.

In this way, environmental restorative justice, informed by multispecies justice, 'invites otherwise silenced animals (and people) into the realm of justice, giving voice and recognition to those (non)humans left out of Anthropocene stories' (Willis, 2024). By ensuring that both human and non-human representatives are heard, the restorative process becomes multispecies in nature—offering a more inclusive, just and ecologically-attuned effort to heal and restore our interdependent relationships with all forms of life.

3.1.3. Strand 9 – Constructive contestation: human-human collaborative problem-solving

A diversity of perspectives and levels of acceptance towards living with non-human beings reflects the multitude of firsthand experiences, values, priorities and cultural worldviews regarding coexistence. Navigating this plurality of perspectives is not easy, but respectful dialogue, a cornerstone of restorative

justice, can serve as a constructive starting point to examine the range of contestations constructively, and in doing so, rebuild trust, co-create solutions, and move towards just relations for both humans and non-human kin.

A key issue to address up front is the commonplace imposition of top-down solutions upon human-wildlife coexistence challenges (Green et al., 2024). While often well-intended, technocratic and expert-led solutions typically focus on quelling fears, reducing political exposure to controversy, or satisfying pressure for quick fixes. In such cases, any failure to accommodate all viewpoints risks overlooking the lived realities of those most affected. As former CEO of the Australian Institute of Marine Science, Dr Paul E Hardisty, aptly notes, 'if you want to protect the natural world, you have to look after the people' (Hardisty, 2024, p. 2). This means that the most effective conservation outcomes involve the communities directly impacted by the harms and benefits of living in close proximity with wildlife, harnessing their wealth of knowledge, innovations, and experiences—and goodwill—to implement sustainable solutions (Dore et al., 2022; Green et al., 2024).

Environmental restorative justice offers a pathway for addressing expert-centric dominance by centring conflict resolution in the hands of those directly affected. Researcher Flavia Corso (2024) explains: 'Forget about top-down legal authority; conflicts belong to the people, and people are perfectly equipped with everything they need to manage them'. Through the restorative approaches of respectful dialogue, deep listening and collaborative problem-solving, an ethos can be cultivated in which every voice—human and multispecies—is valued, not solely the expert's authority. Further, restorative dialogue carries the expectation that experts and researchers will engage in mutual listening and respectful dialogue to resolve contestations within and between their own fields, ensuring that top-down interdisciplinary disagreements are worked through constructively and do not cause confusion for laypersons (Pooley et al., 2020).

Restorative dialogue reframes conflict as constructive, creating opportunities for understanding and relationship-building, allowing parties to share their stories, identify commonalities and shared goals, and contribute to shaping collective solutions (Glikman et al., 2021; Johnstone & Van Ness, 2013; Paul & Dunlop, 2014; Zehr, 2008). Creating open, safe and non-judgmental spaces for honest discussion can alleviate tensions and cultivate trust, enabling all participants to work through differing perspectives that may initially seem at odds. As restorative practitioner Ted Wachtel (2024) explains, '[r]estorative processes provide people with an opportunity to express themselves honestly even when in disagreement with others. Civility is possible because when people express their negative emotions in a safe setting—that immediately reduces the intensity of those feelings'. Restorative spaces enable participants to

deliberate without fear, ensuring all stories are heard, and that every suggestion for solutions is heard, even if not all are implemented.

Restorative approaches also offer significant educational value, including insights into the historical and systemic injustices that have marginalised people directly impacted by coexistence conflicts (Hübschle et al., 2021). Participants can also gain practical knowledge about coexistence strategies—such as deterrents to prevent wildlife incursions or livelihood opportunities. By empowering individuals and communities with a sense of agency, restorative approaches can help people co-determine solutions that address both immediate challenges and root causes while prioritising the well-being and safety of individuals and their communities, and protecting wildlife and habitats. Restorative coexistence strategies should therefore seek to bridge divides, promote equity, and support the long-term flourishing of multispecies relations.

At its core, environmental restorative justice nurtures just relations grounded in interconnectedness and reciprocity (Varona, 2022). Attending to the perspectives of edge spaces—whether marginalised human communities or the lifeworlds of animal kin—ensures that solutions are inclusive and care-driven. Collaborative problem-solving should result in collective agreements that all parties support, with commitments upheld for the long term. Governments, businesses, and other stakeholders taking responsibility must honour these agreements by supporting grassroots and community-led coexistence projects (Forsyth & Tepper, 2024). Such agreements must address existing *and* future harm, and promote participatory approaches that integrate the edges with the perceived centre.

Coexistence conflict is not a binary problem of nature-versus-humans but a dynamic space for co-designing enduring, collectively acceptable solutions. By honouring both human and non-human interests, environmental restorative justice strengthens relationality and encourages interconnectedness, as just ways of living together.

3.1.4. Strand 10 – Multispecies hospitality as restorative welcoming

While those taking responsibility for mending harm and facilitating coexistence must provide resources, effective project management and evaluation to fulfil commitments made under restorative agreements, long-term harmonious coexistence requires more than logistical follow-through. It demands an attitudinal shift that embraces human-nature entanglement as an everyday reflex. Achieving this shift is where environmental restorative justice could excel by adopting *multispecies hospitality* as a guiding principle (Höckert & Rantala, 2024).

The principle of multispecies hospitality offers a restorative ethos of 'welcoming', encouraging us to shift from mere tolerance of animal kin, to extend the ideas of welcome and care to non-humans (Höckert & Rantala, 2024, p. 2). Tolerance, while frequently invoked in discussions of human-wildlife coexistence, implies a hierarchical power imbalance in which humanity assumes the moral authority to grant permission for other beings' existence, permission we can just as easily withdraw (Serenari, 2024).

For environmental restorative justice to be effective long-term, it needs the ability to influence habit and attitudinal change (Forsyth & Tepper, 2024). Fleeting solutions to environmental harm do not build ecosystem resilience, nor aid sustained coexistence (Standish & Parkhurst, 2024). Herein lies a critical strength of the multispecies hospitality principle—it 'is not just a one-time act; it requires continual growth and adaptation' (Drayton, 2024). It asks us to rethink our interactions with wildlife—choosing peaceful deterrents over conflict and cultivating a mindset that values edges not as peripheral but as enduring sites of coexistence. Edges, after all, are where tensions, vulnerabilities, and possibilities meet and 'where we find the most dramatic developments and upheavals' (Plumwood, 1993, p. 1), that offer fertile ground for realising innovative, meaningful relationships across species and spaces. By treating the principle of multispecies hospitality as a restorative approach, practitioners and scholars can encourage people to think more about how they can give expression to multispecies attentiveness in their everyday lives.

This restorative welcoming embraces the reciprocity inherent in coexistence. Multispecies hospitality recognises humans acting as hosts in spaces they perceive as their own while simultaneously recognising their role as guests in the habitats of other species (Höckert & Rantala, 2024; Serenari, 2024). This dual awareness emphasises the interconnectedness of all beings and the respect necessary to sustain interspecies relationships. It invites us to view wildlife not as invaders or competitors but as rightful co-habitants with their own needs and perspectives.

Importantly, as Serenari (2024: 10) argues, multispecies hospitality cannot be reduced to economic or human-centric exchange. Rather, it is a 'restorative project' that demands persistent dialogue, experimentation, and truth-seeking to navigate the complexities of shared existence. By recognising and amplifying the voices of those often silenced—both marginal human communities and non-human kin—multispecies hospitality keeps us engaged with the intricacies and uncertainties of coexistence. Instead of viewing tensions as barriers, we can reframe them as invitations to iteratively grapple with challenges, practising multispecies attentiveness to embrace the edges as integral to shaping just coexistence.

Foregrounding hospitality as a restorative approach within environmental restorative justice offers a transformative opportunity to cultivate cultural and attitudinal shifts essential for sustainable coexistence. Restorative agreements grounded in this ethos become living commitments that evolve alongside the needs of humans, animal kin, and their shared environments. In doing so, coexistence is not just an outcome but a dynamic, organic practice that celebrates the interconnectedness of all life.

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3.2. Thread 4: Emerging from the edges: environmental restorative justice

This final Thread reflects my *personal* observations drawn from many conversations, discussions and presentations during our four-year collective project, of which this co-authored book is one heartfelt result. My main impression from these years is that environmental restorative justice is still gaining traction within the broader restorative justice movement. Environmental restorative justice is an edge space—emergent, curious and contested.

Environmental restorative justice is evolving through interdisciplinary insights rooted in socio-ecological concerns, blending diverse knowledge, practices, and values from both within and beyond the established centre of restorative justice. Like ecotones, it occupies a transitional space, iteratively shaping its epistemology, values and approaches to address socio-ecological harms. Perhaps an apt descriptor for environmental restorative justice is 'edgy'—'innovative, daring, unconventional'[6] and 'bold, provocative'.[7] On occasion, being 'edgy' has, I discovered, prompted some restorative practitioners and scholars to question the justification for extending restorative justice into the complex realm of ecological concerns.

Reflecting on this, I wonder if this hesitation stems from what Imbrogiano (2024) describes as 'taken-for-grantedness'—an anthropocentric worldview embedded within the social sciences that prioritises human-centric concerns. Given restorative justice's deep rootedness in social science perspectives, perhaps this foundational bias has initially influenced a reluctance to extend to ecological and multispecies contexts? Or is it because environmental and animal harms are not yet fully understood as deeply intertwined with social

[6] See at https://www.collinsdictionary.com/dictionary/english/edgy
[7] See at https://www.merriam-webster.com/dictionary/edgy

issues? Or does the idea of applying restorative justice to non-humans feel, for some, just a little too edgy?

I do not claim to have definitive answers; there are likely as many reasons for this personally observed hesitation as there are individuals who hold restorative justice dear. Instead, I am motivated to encourage restorative practitioners and scholars to approach this edge space with an abundance of curiosity. I urge them to view the integration of ecological and multispecies peacebuilding into restorative justice as an evolution of their work and values. Socio-ecological and multispecies perspectives widen restorative justice's impact and value, helping us all to better understand and engage with the co-determining interplay between environmental and social harm (Cadenasso et al., 2022).

Where does this leave those of us already involved in or planning to do environmental restorative justice work? First, do not be dismayed. Growth stages for any new shoots branching from a mother stem are natural. Just as new disciplines take time to evolve scope, approaches and specialisations (Areekkuzhiyil, 2017), environmental restorative justice is in a phase of gradual development. And even though it can feel challenging at times, especially in an age of eco-anxiety, there is no cause for alarm. The immense potential and creativity within environmental restorative justice is a source of inspiration and hope, making the slow journey towards broader recognition less daunting.

Second, environmental restorative justice must continue to embrace even wider interdisciplinarity than traditional restorative justice. As restorative justice philosopher Theo Gavrielides (2023, p. 437) explains: 'After all, much of the success of restorative justice is to be found in its plurality, diversity and living nature as a continuously evolving system of justice.' Beyond the usual influences like criminology, sociology and psychology, it must also draw from ecology, eco-psychology, conservation sciences, environmental philosophy and political ecology, amongst others. Here, environmental restorative justice's cousin, green criminology, offers reassurance: once occupying a similar edge space in the 1990s (Bitna, 2023; South, 2014), it gradually rose by challenging traditional ideas in criminology, demonstrating the 'interconnectedness of environmental harm and social inequality', and addressing structural harms as well as individual harms (Bitna, 2023, p. 1). It is now a well-recognised field.

Patience is therefore essential. Just as restorative justice expanded beyond the criminal justice system into areas like healthcare and education, environmental restorative justice can gain ground by proactively demonstrating its value. Progress so far—articles (e.g., Forsyth et al., 2021) books (e.g., Hamilton, 2021; Pali et al., 2022), conference presentations, reports, environmental case re-

storying (e.g., Varona, 2024), working groups,[8] and growing interest—indicates a young movement taking root. Ultimately, environmental restorative justice's position as an edge space is not a limitation but a strength. It is a source of innovation, inspiration and hope, with the potential to enrich restorative justice with new ideas for supporting the flourishing and resilience of both human and non-human communities alike.

4. CONCLUDING THOUGHTS

At the heart of this chapter lies a compelling call to heed the edges—those often-overlooked spaces where diverse perspectives and untapped potential reside. Amplifying edge-awareness is a restorative way of thinking that challenges us to include voices and perspectives at the margins. Regarding human-nature relations, when we genuinely listen to non-human voices, we create fertile ground for mutual learning and the co-creation of solutions that respect and nurture the interdependence between human and non-human communities.

Edge-awareness is not a one-off action; it demands dynamic, everyday engagement. Hospitality encourages us to welcome those at the margins, while multispecies attentiveness compels us to care deeply about the consequences of our actions on other species. Together, these restorative practices promote a reciprocal relationship with edges—metaphorically, in practice, and observationally—where we cultivate non-judgmental spaces to hear and heed the perspectives of other kin. This synthesis of edge-awareness, hospitality, and multispecies attentiveness embodies a long-term commitment to coexistence that values presence and attentiveness as integral to action and transformation.

Edges should not be perceived solely as sites of limitation or conflict; rather, they burst with imagination, creativity and regenerative potential. They invite us to reimagine the human-nature relationship as one that is more equitable, inclusive and informed. Rather than viewing human-wildlife interactions as fixed points of contention, this chapter reframes these dynamics as opportunities for constructive, generative engagement. Where edges blur and boundaries fade, restorative approaches offer a framework for navigating the complexities of coexistence.

Attention to edges aligns with bell hooks' vision of a 'sense of wholeness', urging us to see what is 'unknown to most' (hooks, 1984, p. i), allowing us to immerse in lifeworlds beyond our own and unveil new pathways towards more

[8] For example, the European Forum for Restorative Justice's Working Group on Environmental Restorative Justice, https://www.euforumrj.org/working-group-environmental-restorative-justice

harmonious relationships between humans and the natural world. Critical engagement with edges and their inhabitants allows us to redefine the centre, challenging its dominance and prompting more peaceful, meaningful interactions with nature. Recognising that harm to our Earthly kin is harm to humankind intertwines social and ecological healing—a wholistic responsiveness true to restorative philosophy and essential for peaceful human-wildlife coexistence.

I hope this chapter's many-threaded tapestry of ideas inspires and catalyses deeper thinking about how environmental restorative justice can address human-wildlife coexistence challenges. I invite restorative justice practitioners and scholars to engage in further research, reflection, and application of restorative approaches to the socio-ecological challenges that give rise to coexistence conflict and contestation. By embracing the edges, we centre the lifeworlds of all species for a more harmonious, equitable, and sustainable future.

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5. AFTERWORD: ACKNOWLEDGING OUR THREADS OF COLLABORATION

My final word is a small token of appreciation for being included in the multi-year project that this book encapsulates. Throughout the project's lifespan, I gained valuable insights from our group's collaborations—through discussions, meetups, presentations, and delightful conversations. These encounters have breathed life into the tapestry of hope presented in this chapter, reassuring me that many of us care deeply about the fate of animalkind and natural entitites, and are willing, as Donna Haraway (2016) says, to 'stay with the trouble' for the longue durée. Like sparkling threads woven as highlights in a tapestry, these glimpses of light dispel the shadows of despair and compel me to keep the faith that our work matters. I express my profound gratitude for our collective endeavour and for being so lucky to have learned from so many brilliant minds. Thank you.

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COMPRENDER EL DAÑO Y EL SUFRIMIENTO DE LOS ANIMALES. LA JUSTICIA RESTAURATIVA COMO PEDAGOGÍA

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1. INTRODUCCIÓN

Evitar el daño, o no incrementar el sufrimiento de quienes han pasado por la experiencia de un delito, son algunas de las ideas y objetivos básicos con los que concuerdan teóricos y prácticos de la justicia restaurativa. La normativa avala este lema y lo refrenda cuando reclama, entre las condiciones para promover herramientas restaurativas, el reconocimiento de los hechos por parte del agresor. Aunque con algunos matices, Directiva y Estatuto coinciden en esta idea. En concreto, la Directiva 2012/29/UE en su artículo 12.c establece como garantías para evitar la victimización secundaria de la víctima en los procesos de justicia restaurativa, que el agresor haya reconocido "los elementos fácticos básicos del caso"[1]. Por su parte, el artículo 15.1 del Estatuto de la Víctima indica que una de las condiciones para acceder a los servicios de justicia restaurativa es que: "a) el infractor haya reconocido los hechos esenciales de los que deriva su responsabilidad"[2]. Esa asunción de responsabilidad del agresor por los hechos cometidos puede verse bloqueada por estrategias procesales (relacionadas, por ejemplo, con la falta de prueba) o por un interés en evitar la reacción penal. Pero también puede verse dificultada cuando el agresor no reconoce que los hechos hayan generado un daño, negando la condición de víctima de quien ha sufrido por ello, cuando la justificación legitima el daño, o cuando los hechos

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[1] Directiva 2012/29/UE del Parlamento Europeo y del Consejo de 25 de octubre de 2012, *por la que se establecen normas mínimas sobre los derechos, el apoyo y la protección de las víctimas de delitos, y por la que se sustituye la Decisión marco 2001/220/JAI del Consejo*.

[2] Ley 4/2015, de 27 de abril, *del Estatuto de la Víctima del delito*.

son avalados, promovidos o protegidos por su comunidad de referencia. De alguna manera, esto ocurre en los delitos contra los animales.

Algo que podría parecer evidente es que nuestras relaciones con los otros están en constante cambio, en función de los valores sociales prevalentes en un momento dado. Y también son cambiantes y diversas las relaciones que mantenemos con los animales. Un conocimiento más científico sobre su sintiencia[3] permite una mirada diferente que podría (y debería) transformar la ética individual y social, y el propio concepto de justicia[4]. Si esto no ocurre, como indica Tepper (2023, 107), "la falta de reflexión, la negación y el silencio que sustentan el *habitus* crean una forma de 'daño profundo'". Ahora bien, no todos los animales son iguales. Nuestra cotidianeidad se vincula, conscientemente o no, con algunos animales y se construye sobre la vida y muerte de otros muchos. Con unos pocos podemos tener un vínculo afectivo y emocional que ha sido analizado científicamente[5]. No obstante, lo cierto es que una buena parte de la población construimos nuestra existencia sobre la vida de otros muchos animales en nuestros actos cotidianos y más básicos como comer, intentar sanar o vestirnos. Cada sociedad determina, jurídicamente o no, cómo se construye esa jerarquía especista en función del vínculo que establecemos con los animales o de su utilidad en la satisfacción de nuestras necesidades. Este hecho de que los animales hagan nuestra vida diaria posible o más fácil y placentera hace que parte de la población muestre una reticencia a hablar en serio de los derechos de los animales o al menos a considerar sus intereses. Matevia (2016, 189) llega a afirmar que cuando hablamos de animales víctimas de nuestros comportamientos somos reticentes a hablar en términos de justicia.

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[3] En ese sentido, Tepper (2023, 116) hace una revisión de los estudios que han profundizado en las capacidades de los animales. Así, indica que "tenemos un conocimiento cada vez mayor de que, al igual que los seres humanos, numerosos animales: tienen lenguaje (Brensing, 2019; Ferguson, 2019); juegan (Brensing, 2019); tienen emociones y sentimientos (de Waal & Andrews, 2022; Nussbaum, 2020; Wrage, 2022); entienden la causa y el efecto (Ferguson, 2019); tienen memoria a largo plazo (Brensing, 2019; Bridle, 2022); usan estrategias (Brensing, 2019); usan herramientas (Brensing, 2019); son sociables y tienen empatía (Ferguson, 2019; Wrage, 2022); tienen fuertes lazos familiares (Wrage, 2022; Radinger, 2017); reaccionan al estrés como los humanos (Ferguson, 2022); castigan la deslealtad, recuerdan a los infractores y pueden perdonar (Brensing, 2019; Ferguson, 2019); realizan transmisión cultural (Nussbaum, 2020), y mucho más. Ellos son nosotros. Nosotros somos ellos".

[4] Bertolesi (2017, 123) afirma que "la admisión de nuestra responsabilidad por la condición de los no humanos producido por el desequilibrio de poder es el primer paso para empezar a repensar la justicia".

[5] En esa línea, Tepper (2023, 101) entiende que: "Ahora vivimos en una era en la que las excusas para la reticencia a involucrarse con la Cuestión Animal y comprometerse a vivir en armonía con los animales ya no son justificables. Esto se debe al creciente llamamiento para construir relaciones justas y al mayor conocimiento científico de que los animales tienen intereses vitales, culturas, comunicaciones, realidades y capacidades tan complejas, intrincadas y especiales como las nuestras".

Asumimos que más derechos y protección de los animales conlleva necesariamente una restricción de los derechos de las personas. Y lo cierto es que, técnicamente, así es porque un reconocimiento de derechos a los animales relacionados con su bienestar supone una serie de obligaciones positivas y negativas para las personas de las que dependen (y de las demás). De momento, una prolija normativa administrativa establece las condiciones mínimas de vida y muerte de los animales que instrumentalizamos. Por su parte, el Código civil ha reconocido como una tercera categoría, junto a las personas y las cosas, a los animales que dependen de nosotros como seres sintientes. Al tiempo que la última modificación del Código penal, en su Exposición de Motivos, destaca que el bien jurídico protegido en los delitos de maltrato y abandono es la integridad física y psíquica del animal y ha incrementado la duración de las penas de prisión, pretendiendo mostrar que la violencia contra los animales (sobre todo los que dependen de las personas) importa y merece una respuesta social contundente[6].

Podemos avanzar como hipótesis que, si el tema animal resulta controvertido a nivel social, también lo será la categorización legal y la respuesta que establezca el sistema penal para responder proporcionalmente a los delitos contra los animales. De un lado, una parte de quienes entienden que el bienestar de los animales (y de cada animal individualmente considerado) debe ser asumido como bien jurídico digno de consideración, parece exigir una elevación de las penas que simbolice esa conciencia y empatía social. Ante ese posicionamiento, parece que no hacerlo, o reclamar otras respuestas más eficaces y alternativas a la cárcel, es calificado de pusilanimidad con la causa animal[7]. De otro lado, quienes siguen entendiendo el animal como objeto, por tradición o por interés, consideran que, en los supuestos de maltrato y abandono animal, la cárcel es una respuesta desmesurada e injusta.

En un trabajo previo abordé la cuestión de la respuesta penal al maltrato animal y revisaba la posición de quienes entienden y reivindican la cárcel como herramienta necesaria en la protección de los animales y, sobre todo, ineludible en la consolidación de la causa animal. Aquel trabajo evidenciaba la incoherencia de exigir la liberación animal mediante el encerramiento de las personas. Al tiempo que pretendía interpelar sobre la necesidad de idear castigos eficaces y responsabilizadores que prevengan la reincidencia, evitando pensar en la cárcel como única respuesta posible (Bernuz 2020). Socialmente, la cárcel

[6] El Código penal, en su modificación por LO 3/2023, no solo contempla a al animal doméstico, amansado, domesticado o que viva temporal o permanentemente bajo el control humano, sino también, con menor protección, a los vertebrados.

[7] Tepper (2023, 103) indica que "la Cuestión Animal se refiere a las complejas, a menudo implícitas y extendidas disparidades sobre cómo pensamos, nos relacionamos, usamos y convivimos con los animales de maneras que desprecian, abusan y niegan el bienestar, la agencia y las realidades de los animales". Y, en todo caso, subraya, es algo que debería interpelarnos para mantener una actitud humilde y atenta a sus necesidades (ibídem, 104).

es entendida como un castigo simbólico, que muestra la máxima repulsa hacia los comportamientos más reprobables. Sin embargo, puede generar efectos perversos para el individuo y para la comunidad, tanto cuando se ejecuta como cuando no se aplica, o es poco efectiva en el logro de fines preventivos del delito o de la reincidencia. Por ello, más allá del poder simbólico que le asignamos a la cárcel como el castigo por excelencia, apostar por la prisión incondicionalmente supone asumir que el agresor es irrecuperable y solo cabe el aislamiento durante un tiempo lo más largo posible para evitar su reincidencia. En esta respuesta, la víctima y la sociedad quedan fuera. Al tiempo que puede llevarnos a pensar que, cuando la cárcel fracasa, nada funciona.

Por contraposición, se discutía sobre la necesidad de poner en valor los castigos que pueden lograr funciones de prevención especial positiva porque, como se indica desde buena parte del movimiento victimal, lo que se desea es que lo sucedido no vuelva a ocurrir. Para ello, es preciso que el agresor se responsabilice del daño causado y lo repare significativamente para ambas partes y para la comunidad. Obviamente, con carácter previo, para que esa responsabilización se produzca, el agresor debe asumir que hay un daño (no solo material) que se genera cuando se maltrata a un animal y que importa para la víctima-animal, para su dueño (si no es el propio maltratador), para la comunidad próxima y para la sociedad. Este daño al animal es algo que no siempre es comprendido, ni asumido por el agresor, ni tampoco por su contexto familiar y social, que incluso lo encubre o lo apoya. A veces porque esa actitud se asienta en una posesión y utilización del animal justificada ancestralmente. Otras porque resulta más cómodo seguir haciéndolo sin cuestionarlo. O porque se entiende que el daño está justificado. Por ello, aunque indiscutible e injustificable, creo que la discusión sobre el daño y la víctima en los delitos contra los animales es esencial en la protección de los animales y puede promoverse mediante el diálogo que se abre con las herramientas restaurativas. Además, las herramientas más comunitarias permiten que esa transformación en la forma de entender el animal pueda tener un impacto en un contexto social más amplio.

Explica Hamilton (2015, 548) que la justicia restaurativa es especialmente útil para "dar voz a los que no la tienen y amplificar las voces que se han reducido a un susurro". Y Hill (2021, 231) precisa que la justicia restaurativa es apta para tratar delitos contra los animales porque "coloca al animal víctima en primer plano, está bien posicionada para abordar las causas profundas del delito e implica a la comunidad". Desde esa perspectiva, en este trabajo me gustaría iniciar un diálogo (ideal) con maltratadores, animalistas y mediadores que permita debatir teóricamente las posibilidades que ofrecen las herramientas de justicia restaurativa en la discusión de delitos que todavía resultan controvertidos socialmente y en los que agresores y entorno, siguen sin asimilar el bien jurídico protegido ni, en consecuencia, la respuesta penal. En un primer mo-

mento, abordaremos las dificultades teóricas y prácticas cuando la víctima es un animal. En segundo lugar, se ahondará en la potencialidad responsabilizadora de la justicia restaurativa. Aunque puede parecer que se centra en el agresor, utilizarla para discutir y despertar una mayor conciencia sobre las necesidades y el sufrimiento animal, puede tener efectos positivos para el animal maltratado en particular y para el resto de animales en general. A continuación, se explorará la dimensión pedagógica de la justicia restaurativa, que permite la discusión sobre el daño, individual y colectivamente. Es cierto que habrá que valorar cada caso, pero creemos que las diferentes herramientas de justicia restaurativa pueden ofrecer vías para el aprendizaje y, finalmente, para la consolidación de la causa animal, más efectiva que la pena de prisión, que resulta muy efectista pero poco efectiva. Explorar esta opción pedagógica y transformativa permite discutir sobre el espacio social de los animales y dar un nuevo valor a la justicia restaurativa. Finalmente, se concluirá con la revisión de algunas premisas sobre las que se construye la justicia restaurativa para verificar si efectivamente ésta puede ser o contribuir a una justicia interespecies.

2. LA JUSTICIA RESTAURATIVA CUANDO EL ANIMAL ES LA VÍCTIMA: EMPATÍA O IMAGINACIÓN

La justicia restaurativa surge de y se construye sobre lo humano. Su filosofía y una buena parte de su desarrollo implica características que asumimos como propias de las personas (físicas). Entre otros, podríamos hacer referencia al sufrimiento que se reclama como humano frente al dolor de cualquier ser sintiente, a la voluntariedad en la participación del proceso restaurativa, al diálogo y a la importancia de la palabra, al acuerdo sobre una reparación significativa, a la empatía con el otro y con su sufrimiento. Plantear el recurso a la justicia restaurativa en delitos contra los animales nos coloca esencialmente ante dos cuestiones que es preciso resolver: la que tiene que ver con la propia victimidad animal y la de los límites de la propia justicia restaurativa cuando la víctima es un animal. En ese diálogo ideal con los implicados en supuestos de violencia contra los animales, los interlocutores en esta discusión sobre la victimidad animal serían tanto los maltratadores como los facilitadores.

2.1. La victimidad animal

La sentencia de Varona (2021, 5) indicando que “considerar a los animales como víctimas supone una ruptura cultural en la sociedad española” resume a la perfección la posición social ante los animales. Para algunos es asumido como un reto a valorar y para otros un desafío a repeler sin más. Se trata de un planteamiento que afecta de manera profunda a nuestra ontología y a nuestra

forma de habitar el mundo. La discusión sobre la posible consideración de los animales como víctimas viene impulsada esencialmente por dos corrientes, la victimología y la criminología verde. De un lado, la victimología ha ido ampliando progresivamente el concepto de víctima sobre el que trabaja. Como indican Lewis y Umbreit (2021), de una victimización vinculada esencialmente a la comisión de un delito, se extiende la condición de víctima a todos aquellos que sufren un daño. Además, Varona (2021, 15) apunta que la victimología verde propone un concepto de "daño más allá de su conceptualización en Derecho civil, que se entiende en un sentido biológico, ético y sociológico, como individual y social, como una categoría más difusa, interespecies e intergeneracional". De otro lado, la criminología verde ha integrado paulatinamente a los animales entre sus objetos de estudio, de manera autónoma de las preocupaciones medioambientales (y a veces en conflicto con ellas)[8]. Considero que el objetivo de ambas corrientes no debe ser el de extender artificialmente el concepto de víctima o caminar hacia una sociedad de víctimas, sino tratar de identificar individuos y colectivos que sufren, y lo hacen de una manera específica, para poder pensar en una reparación del daño adaptada y significativa. Algo que, como indica Varona (2024, 12,), nos coloca ante el reto de desarrollar esa imaginación moral a que se refería Lederach cuando una buena parte de la población sigue entendiendo a la mayoría de los animales como objetos a su servicio a los que infligimos un sufrimiento justificado[9].

Ya comentábamos que la Exposición de Motivos de la última modificación del Código penal (2023) entiende que el bien jurídico protegido con los delitos de maltrato y abandono de animales es su vida o integridad física o psíquica. En consecuencia, deberíamos considerar a éste como sujeto pasivo del delito de maltrato por la capacidad que tienen los animales (todos ellos) para sentir placer y dolor[10]. Ahora bien, aunque Beristaín afirmaba que "todo sujeto pasivo de un delito es víctima" (Beristaín 1997, 60), no resulta obvio relacionar la cuestión del

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[8] Riechmann (2018, 29) sintetiza a la perfección las dos posiciones: "Nuestra mejor ética bien puede anclarse en el individuo; pero sin duda nuestra mejor ontología no puede hacerlo (será relacional, evolutiva y sistémica) (…) Para expresarlo de forma muy sencilla (pero creo que clarificadora): desde el mundo del deber-ser, tenemos vidas (individuales) que pueden florecer. Desde el mundo del ser, tenemos sistemas (sistemas complejos adaptativos): la trama de la vida en el tercer planeta del Sistema Solar. Por supuesto, no nos conformamos con el estado presente del "mundo del ser" y tratamos de realizar nuestros ideales morales ("¡autorrealización para todos los seres!", como diria Arne Naess)".

[9] En concreto, indica que "según Lederach (2005), la imaginación moral tiene cuatro implicaciones o cualidades: futuro común, complejidad, creatividad y riesgo. Primero, implica imaginar que nuestros 'opuestos o diferentes' tienen un futuro común en el sentido de que los futuros de nuestros nietos o las próximas generaciones están vinculados. Esto es muy difícil cuando muchos humanos y organizaciones aún consideran a otros humanos, animales, plantas o ecosistemas como objetos para ser utilizados" (Varona 2024, 12).

[10] Ahora bien, como apuntaba, existe una resistencia a ese reconocimiento porque parece que aceptarlo como sujeto pasivo del delito sería asumir que el animal es sujeto de derechos y que,

sujeto pasivo del delito con la víctima, cuando se trata de un animal. Herrera ha reflexionado mucho y bien sobre la complejidad de la construcción social, política y penal de la víctima y la victimidad (Herrera Moreno, 2014). Para Flynn y Hall (2017, 1 y 11), que han abordado específicamente la cuestión de la victimidad animal, si la victimología desarrolla el concepto de victimización apoyado en la idea de daño social y en la protección de colectivos invisibilizados, no estaría justificada la exclusión legal de los animales[11]. Si aceptamos que los animales tienen capacidad para "sufrir un daño", es legítimo preguntarse, desde una victimología crítica, por quién puede ser dañado realmente por un delito de maltrato o abandono. Sin tener en cuenta la especie, como hizo Bentham, y solo atendiendo a la capacidad para sufrir, parece evidente que el daño más directo se produce al animal que tiene un valor y unos intereses propios[12].

Aunque una de las reivindicaciones del movimiento victimal es la de evitar la categorización, porque se entiende que el sufrimiento es subjetivo e interseccional, una de las tendencias doctrinales ha sido la de reflexionar en torno al concepto de víctima ideal, que representa a la víctima aceptada y respetada socialmente y que mueve a consideración. Si pensamos en las víctimas animales, precisamente por su heterogeneidad y por el diferente espacio que ocupan en la sociedad, son percibidas como víctimas "reales, complejas, contradictorias y a menudo políticamente incorrectas" (Kearon y Godey, 2007, p. 31). Reales porque su sufrimiento lo es, complejas y contradictorias porque no es unánime la posición y el estatus social de los animales y políticamente incorrectas porque cuestionan la opinión (aún) dominante sobre el animal como objeto a disposición del dueño (o sin dueño en el caso de los animales salvajes). Desde otra perspectiva, y quizás pensando en los animales que más dependen de las personas, Flynn y Hall (2017, p. 8) entienden que los animales entrarían fácilmente en la categoría de 'víctima ideal'. Es cierto que la mayoría de los animales con los que convivimos más íntimamente son físicamente más frágiles que quienes los maltratan y vulnerables en cuanto dependientes de sus cuidadores para satisfacer todas sus necesidades, pueden ser victimizados por extraños (aunque también por sus propios dueños, en el caso de los animales domésticos o de producción), son inocentes en cuanto (creemos que) no tienen capacidad para

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de alguna manera, tiene ciertos derechos subjetivos y "determinados bienes jurídicos, que serían los tutelados penalmente: en concreto, vida e integridad, o incluso dignidad" (Hava, 2011, 280).

[11] En todo caso, la normativa zanja el tema considerando que solo las personas (físicas) pueden ser víctimas. Así, la Directiva europea 2012/29/UE define la víctima como "la persona física que haya sufrido un daño, en especial lesiones físicas o mentales, daños emocionales o un perjuicio económico, directamente causado por una infracción penal" (art. 2.1). En el mismo sentido se pronuncia el *Estatuto de la Víctima* cuando se refiere a las "personas físicas" como víctimas directas o indirectas de un delito.

[12] Desde esa perspectiva, el daño indirecto, cuando no coinciden maltratador y dueño, se producirá para el dueño, que también es víctima, aunque no sea sujeto pasivo del delito.

hacer daño conscientemente y, como es obvio, no se oponen (no pueden oponerse) a la acción de la justicia.

Así pues, a la dificultad que pueda suponer considerar a los animales como víctimas, hay que sumar la complejidad de integrar a los animales en una única categoría victimal. Aunque la *sintiencia* los une porque se predica de todos ellos[13], socialmente establecemos una clara jerarquía especísta en función de la relación y la utilidad que tiene el animal para las personas. Vemos cómo no generan las mismas simpatías unos animales que otros, no consideramos igual a los que percibimos como próximos a nosotros, valiosos desde un punto de vista cultural, que los que son vistos como peligrosos, dañinos o construidos como útiles en la producción, la experimentación o el entretenimiento. Verlo de esta manera nos exime de culpa. Una diversidad de actividades que causan conscientemente un sufrimiento al animal (o su muerte) no son consideradas como justas o injustas (Varona 2021, 16), sino como necesarias y justificadas para la satisfacción de necesidades, no siempre primarias, de las personas (De Lucas, 2009). Es claro que reconocer como víctimas a los animales supondrá un perjuicio a quienes viven de ellos, que van a tratar, por ello mismo, de objetivarlos e invisibilizarlos[14]. En estos casos, el animal pierde su posibilidad de ser considerado como víctima (White 2018, 246). Sus intereses siempre estarán sometidos a los propios de las personas (Donaldson y Kymlicka 2018)[15]. Una sociedad que se construye sobre la vida y muerte de los animales convive más fácilmente con un concepto del animal como objeto que no sufre o lo hace de una manera diferente de la nuestra, insignificante. La justicia restaurativa debe mirar hacia su aspiración inicial de reparar el daño y visibilizar el sufrimiento; en este caso, también animal.

2.2. La justicia restaurativa ante la victimidad animal

Pensar en los animales como víctimas y en la posibilidad de integrarlos en procesos restaurativos supone un reto, que no siempre están dispuestos a acep-

[13] Giménez- Candela (2018, 9) entiende que "el término sentiencia para las Ciencias del Bienestar animal -que es de donde procede-, equivale el término "sentience", así como la expresión "sentient beings", con las que se hace referencia a la capacidad de los animales de experimentar no sólo dolor, sino también sufrimiento y emociones positivas".

[14] Se ha considerado que "los sistemas de poder humanos se han especializado históricamente en el despliegue de mecanismos de represión, silenciamiento e invisibilización de todo aquél de cuya explotación dependía el "bienestar" del resto" (Verdú y García 2010/2011, 14).

[15] Véase la completa y compleja teoría de la ciudadanía aplicada a los animales planteada por Donaldson y Kymlicka (2018) en la que distingue derechos de los animales en función de su relación con las personas: animales domésticos y domesticados, animales salvajes y animales liminales que viven en y de los entornos humanos. Se diría que hemos asumido que tenemos una serie de obligaciones positivas y negativas hacia los animales con los que nos relacionamos, pero no hacia los que viven en estado salvaje y mucho menos hacia los animales que viven en los entornos urbanos, a los que ni siquiera consideramos.

tar, ni los defensores de la justicia restaurativa ni los animalistas. Para empezar, creo, con Maglione (2017, 31), que es preciso verificar las bases sobre las que hoy en día se construye la justicia restaurativa para ver si estamos siendo fieles o no a su espíritu originario. Destaca que, entre las señas de identidad de la justicia restaurativa, siempre han estado la inclusividad o el desafío a las definiciones legales. Y la inclusión del sufrimiento animal en el marco restaurativo nos permite desafiar las definiciones legales sobre el daño o la victimidad. Como asegura Tepper (2023, 116), "el enfoque expansivo del daño en la justicia restaurativa medioambiental permite que los parientes animales sean vistos como víctimas de daño incluso cuando la ley penal no refleja o responde suficientemente a esta realidad, y puede proporcionar una variedad de enfoques para abordar la cuestión de los daños".

Precisamente por esa misma invisibilización social y normativa de los animales como víctimas, la justicia restaurativa puede ser una buena opción para dar voz a quienes no la tienen, con el reto que supone representarlos adecuada y significativamente. Varona ha planteado algunas opciones restaurativas, principalmente mediante círculos, para integrar a los animales y sus intereses en la discusión (Varona 2021). Tepper (2023, 132, 133) propone "tener sustitutos o apoderados que estén en el proceso restaurativo, personas que puedan dar voz a los animales y que puedan explicar cómo es ser ese animal en particular cuando ha sido afectado por el daño (…) lo más importante es que la persona 'tenga el corazón y el compromiso' para hablar en nombre de la víctima animal". Fernández Aguilera (2019, 31) hace referencia a la importancia de "esforzarnos para generar una ética de representación no especista, incluso partiendo del punto de que, como humanos, nuestra narrativa va a ser producida desde cuerpos humanos y, por tanto, estará sesgada (…) reconocer y hacer visibles las voces particulares de los animales no humanos, sus lenguajes propios, sus experiencias y resistencias es un buen lugar de inicio". En todo caso, recuerda Motupalli (2018, 345) que no hay que ser ingenuo y siempre va a ser controvertido saber quién habla en nombre de quién. Cuando son animales, podemos caer en la ficción de ser sus ventrílocuos, sin representarlos realmente, o humanizando sus necesidades.

Se ha discutido mucho sobre la profesionalidad que exige la preparación y el desarrollo de los procesos restaurativos. Y esa complejidad se incrementa cuando la víctima es controvertida, como es el caso de las víctimas animales. Es visible la dificultad cuando Naciones Unidas hace referencia (en el tema de drogas y delincuencia) a los cuatro elementos que pueden comprometer el éxito de un proceso restaurativo: "a) una víctima identificable; b) la participación voluntaria de la víctima; c) un delincuente que acepte la responsabilidad por su conducta delictiva; y d) participación no forzada del delincuente" (en Motupalli 2018, 344). Cuando la víctima es un animal, parece obvio que el consentimiento para participar no es

(fácilmente) verificable[16] y la propia participación directa no es posible, al tiempo que en muchas ocasiones el agresor se justifica y no acepta su responsabilidad ni el daño causado (Varona 2023)[17]. Aun con todo, podemos imaginar maneras para que el animal y su sufrimiento injustificado estén en el centro de la discusión. Las mayores dificultades proceden de la resistencia del agresor y su comunidad a entender el animal como víctima, que sufre el daño. Y es que, asumir que el animal es víctima, convierte a quien le hace sufrir en victimario. Por ello, nos parece interesante indagar en las posibilidades de responsabilización del agresor que, en su caso, prevengan la reincidencia y la delincuencia del entorno que lo ampara[18]. Son pretensiones que podrían (o deberían) motivar, tanto a los animalistas, como a los mediadores a promover respuestas restaurativas.

3. LA DIFÍCIL TAREA DE RESPONSABILIZAR EN LOS SUPUESTOS DE MALTRATO ANIMAL

La justicia restaurativa surge con el objetivo de responder a una de las partes perjudicadas en el delito y que menor atención recibe por parte de la justicia penal tradicional, la víctima. La promoción de un diálogo entre las partes para acordar una reparación significativa para la víctima, pero también para el agresor, está en la esencia restaurativa. Asimismo, ese diálogo restaurativo (con la diversidad de herramientas que lo promueven) puede fomentar la empatía, lograr la responsabilización del agresor por el daño causado y, en su caso, reducir la reincidencia[19]. Se trata de una finalidad que, como indicaba, puede legitimar

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[16] Me parece muy interesante el estudio realizado por Healey (2021) ahondando en las posibilidades y los límites de buscar el consentimiento o asentimiento de los animales partiendo de que tienen intereses de *agency* y planteando los retos que supone.

[17] Varona (2021, 15) considera que a esas dificultades que suponen asumir al animal como víctima hay que añadir que "la invisibilidad del daño se ve agravada, además, porque constituye un daño que afecta a seres que no pueden expresarse ni defenderse por sí mismos, lo cual se complica, en muchas ocasiones, por las complejidades jurídicas de la regulación, la prueba del daño y la causalidad, y el desequilibrio de poder respecto de los autores del daño, en su caso grandes empresas con estrecha conexión con el mundo político y económico, así como por su carácter transnacional y porque su impacto suele ser intergeneracional o futuro". La autora, en una investigación con agresores de animales en prisión, llega a la conclusión de que "algunas personas muestran emociones como la vergüenza, pero, en general, se advierten discursos de justificación del daño y de minimización del mismo, en su caso, apelando a valores mayores o a la necesidad de hacerlo para evitar la condena por otro delito. Junto a ello, también queda plasmado cierto victimismo porque creen que los responsables realmente fueron otras personas" (Varona 2023b, 8).

[18] Hill (2021, 237) está de acuerdo en que los beneficios no son solo para el animal, víctima del delito, sino para todos los animales no victimizados por un agresor que se ha responsabilizado del daño que ha causado.

[19] Para Gracia (2018, 94), esa empatía se transformará en compasión cuando "se refiere a los que sufren, como es el caso de las víctimas". Zapata (2017, 218) entiende la compasión como "la capacidad de conmoverse ante el dolor, ante el sufrimiento del otro".

el proceso para los facilitadores, pero también para los animalistas que aspiran a evitar y minimizar el sufrimiento animal.

En el caso de los delitos contra los animales, esta compleja labor de empatía y responsabilización debería ser prevalente por dos razones: los animales sufren de manera específica y dependen de nosotros. Robertazzi (2022, 137) asegura que "eres responsable del daño porque, ante todo, eres responsable del otro". Es cierto que en los delitos contra los animales el fomento de esa empatía resulta más complicado por la distancia comunicativa, biológica y ontológica que nos separa de ellos, pero nos parece esencial para que el agresor comprenda el daño que ha causado a un ser vulnerable que sufre, asuma el sentido de la reparación y comprenda, en su caso, la respuesta penal a sus acciones. Como concluye Albersmeier (2023, 13), se trata de promover una solidaridad que "no se basa en la conciencia de alguna similitud dada, sino en consideraciones de justicia". Quizás en estos casos, lo óptimo sería una reflexión e intervención conjunta de facilitadores y animalistas que puedan idear formas de responsabilización mediante la justicia restaurativa. Previamente será preciso indagar en las razones de esa desafección del agresor en relación al animal, que puede tener que ver con el desconocimiento y la negligencia, o con una desvinculación moral basada en el interés (económico o no), o en la asunción de patrones de comportamiento respaldados por la comunidad.

No quiero insistir en las virtudes de la justicia restaurativa que en este volumen (y otros muchos) ya se han discutido sobradamente y de forma muy atinada. Sí que me gustaría subrayar los beneficios que tiene la justicia restaurativa para el agresor en los delitos contra los animales a que alude Varona (2021, 22): "puede permitir cuestionar la distancia cultural hacia su sufrimiento, considerando el valor inherente de los animales, su autonomía preferente y el derecho/obligación a un trato humano respetuoso"; "permite visibilizar y entender el daño que, económica y socialmente, se encuentra invisibilizado y descartado (…) puede favorecer un contexto y unos elementos que contrarresten las particularidades del daño que permiten esa invisibilización"; "favorecer la interconexión e interdependencia con el otro, 'radical', no humano (…) trabajar la autonomía relacional en una ampliación del círculo de la empatía y de la comunidad moral". Podemos asumir que comprender la sensibilidad animal y el daño causado a animales y personas, a la postre ayuda a consolidar progresivamente la causa animal. Cuestión distinta es qué competencias y habilidades necesita el facilitador para lograrlo, o si un animalista sería imparcial para escuchar al agresor como persona y trabajar para lograr su responsabilización (Bernuz 2024).

En esa línea, de identificar lo que puede aportar la justicia restaurativa a la responsabilización del agresor, creo que, junto con Pranis (2007), es preciso distinguir entre los valores del proceso de diálogo y su relación con los valores que se proyectan en los individuos participantes. De un lado, Pranis (2007, 61-63)

revisa la bibliografía sobre el tema y recopila algunos de los valores del proceso restaurativo. Entiendo que, en el caso de los delitos contra los animales, solo será posible cuando el agresor (y también el mediador) admita la victimidad del otro y la víctima (o quienes la representen) asuma la condición de persona del agresor. Entre esos valores del proceso se hace referencia al respeto, inclusión, verdad, escucha y comprensión (mutua), claridad y comprensión, voluntariedad, aprendizaje, responsabilidad, reintegración, confianza, empatía, dignidad, compasión, justicia, honestidad, seguridad, entre otros. De otro lado, entre los valores individuales que son precisos para participar, pero que también se consolidan con el proceso restaurativo, están el respeto, la apertura de mente o el ser atento, servicial, generoso, valiente, honesto o íntegro. Obviamente, cuando la víctima es animal será preciso revisar algunas cuestiones. Esos valores requieren, cuanto menos, una predisposición a la escucha por todas las partes y no solo la reivindicación para ser escuchado.

Nos interesan especialmente en este trabajo aquellos valores y dinámicas del proceso que permiten reforzar la responsabilización individual (y comunitaria) por el delito cometido y, a la postre, la evolución moral individual y colectiva. De entrada, es preciso acordar con Dzur (2015, 68) que "esta circulación de personas e ideas sirve al objetivo sencillo, pero también muy difícil, de la responsabilización: colocar a alguien en la posición de asumir la responsabilidad de lo que ha hecho. Implicándose, los ciudadanos pueden informarse indirectamente sobre las causas y consecuencias de los delitos". En el caso concreto de los delitos contra los animales, Tepper (2023, 126) establece que "la justicia restaurativa medioambiental surge con la expectativa de que aquellos responsables de causar daño real o potencial a los animales escuchen y reflexionen sobre las narrativas, participen en el diálogo para responder de manera constructiva y sean proactivos en cuanto a las sugerencias para reparar y prevenir el daño a los animales afectados". Como indicaba, esa responsabilización sincera por el daño puede promover el desarrollo moral cuando enfrenta a las personas a la solución de conflictos y la propuesta de soluciones. Así, Wheeldon (2009, 98) asegura que "al exponer a las personas a experiencias moralmente formativas en las que se pide cuentas sobre el comportamiento pasado mediante solución mutua de conflictos, las partes tienen la oportunidad de comprender y aclarar esas normas y valores".

Ahora bien, la responsabilización tendrá un impacto preventivo a más largo plazo si no solo se discute sobre el daño causado al animal individual, sino que también se aborda la cuestión de las relaciones con los animales. Como asegura Sharpe (2013), la relación no solo nos une, sino que nos define[20]. Al igual que

[20] Pranis (2007) insiste en que esa consideración de que el ser humano es profundamente relacional, la interconexión e interdependencia entre las partes que componemos la comunidad social, el vínculo que genera la necesidad, reclama una responsabilidad individual y social hacia

también nos define la relación que establecemos con los animales. Con Rossner y Taylor (2024, 358) se puede asumir que la justicia restaurativa puede "transformar las relaciones y prevenir futuras injusticias". En la violencia contra los animales, me parece interesante explorar de qué manera la justicia restaurativa nos permite considerar y comprender también a través del diálogo que estas relaciones no solo son con las personas, sino también con los animales (y con el medio ambiente). De hecho, se pueden explorar, aunque instrumentalmente, los beneficios de la perspectiva *One Welfare*. Y es que la relación con los animales es bidireccional. En un sentido, hemos hecho que nuestra vida biológica dependa de una diversidad de animales y nuestra ética social de cómo los tratemos. En otro sentido, una buena parte de los animales dependen inevitablemente de las personas y, aunque la normativa establece obligaciones jurídicas para los dueños, no evita que vivan en situaciones de extrema vulnerabilidad[21]. De manera que hacer justicia supone promover la conciencia de una relación respetuosa entre animales y personas. Como asegura Llewellyn (2021, 382), "la justicia reparadora se ocupa fundamentalmente de las relaciones justas". Y, en esa línea, será preciso definir cuándo entendemos justas nuestras relaciones con los animales o cómo de justas queremos que sean[22].

4. LA JUSTICIA RESTAURATIVA COMO PEDAGOGÍA DEL DAÑO

La idea de la justicia restaurativa como herramienta pedagógica que permita comprender el daño al agresor o a la comunidad hay que ponerla en relación con esa premisa de que, cuando se entiende el daño infligido, se asumen las instituciones que gestionan el delito como legítimas y se acepta más espontáneamente el castigo, cuando es preciso imponerlo. En ese contexto, la potencialidad responsabilizadora e integradora de la respuesta penal es mayor y a más largo plazo, así como también lo será la capacidad transformadora del agresor, pero también de su grupo de referencia. En supuestos como estos, en que la legislación se percibe como impuesta desde arriba, sin consenso con los destinatarios, la justicia restaurativa puede erigirse en herramienta de discusión horizontal y colectiva (Zapata 2017). Evidentemente, el diálogo restaurativo solo producirá

el otro. De hecho, Pranis (2007, 65) considera que es preciso atender las necesidades individuales tomando en consideración el impacto que tendrá en la colectividad.

[21] Insiste en que esa conectividad permite establecer puentes para pulir las diferencias que se entienden y se comparten, comprometen a las personas en un nivel significativo, refuerzan las relaciones saludables y construye comunidad, les permite llevar los valores del proceso al resto de su vida porque no es posible distinguir ámbitos, evalúa la práctica sin ser normativo, ofrece una respuesta para quienes disienten de nuestra posición (Pranis 2007, 67-72).

[22] En concreto, Llewellyn (2021, 384) entiende que "sin duda, una teoría relacional de la justicia se ocupa de la experiencia vivida de la justicia".

este efecto pedagógico si el agresor entiende que, quien enseña, tiene legitimidad para hacerlo.

4.1. La pedagogía del daño no comprendido ni asumido

Cuando el Derecho pretende transformar la sociedad mediante normas jurídicas no aceptadas unánimemente, como ocurre con la legislación sobre animales, algo de pedagogía será necesaria para fomentar la comprensión del Derecho y la colaboración con las instituciones. Y será necesario hacerlo sin demagogia. En el ámbito del Derecho penal, hacer pedagogía sobre las conductas tipificadas y sobre el sentido del derecho puede fomentar la conciencia social sobre el bien jurídico y social protegido[23]. Es una idea que comparte Robertazzi (2022, 144-145) cuando indica que la responsabilidad social "representa el resultado de un proceso de educación a la legalidad, cuyo objetivo es formar una 'estructura motivacional organizada y disciplinada' a través de la cual el cumplimiento de la norma no resulte del miedo, el hábito o la conveniencia, sino de la comprensión de la 'justicia' de su contenido". Asegura que "crucial a este respecto es un diálogo yo/tú que, a través de la dialéctica entre diferentes 'doctrinas comprehensivas razonables', conduce a ese 'consenso por intersección' indispensable para la formación de una adhesión interna a las normas". Quizás la justicia restaurativa puede contribuir a ese diálogo pedagógico que permite la asimilación del sentido de normas, valores, intereses y derechos por parte del agresor, pero también de su comunidad de referencia[24].

En los delitos contra los animales esa tarea pedagógica sobre el sentido de las normas es especialmente importante porque, como digo, todavía no existe una conciencia generalizada sobre el daño causado, sobre el valor del bien protegido y sobre la protección de la víctima[25]. Hay que recordar que los animales son las víctimas primarias y directas de los delitos en cuanto sufren el daño y es preciso reivindicar sus necesidades individuales y repararlas en la medida de lo

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[23] Para Damus (2024,2), esta orientación pedagógica resulta especialmente importante para "contrarrestar el enfoque neoliberal de la educación hegemónica, que contribuye a la destrucción del conocimiento (epistemicidio), de las identidades (identidades) y de las culturas (etnocidio), etnias (genocidio), entornos naturales (ecocidio) y animales (zoocidio)".

[24] En todo caso, Roche reconoce que la justicia restaurativa y sus acuerdos se cumplen más fácilmente cuando persiste la amenaza de una respuesta contundente que se impone en caso de incumplimiento de los acuerdos de reparación (Roche 2006, 235). De hecho, apuesta por abrir la mirada hacia una expansión de la justicia restaurativa porque la entiende como complemento del sistema penal que permite regular los conflictos y evita que lleguen a consolidarse y a criminalizarse. En esa línea pedagógica, asegura que todas las vías de justicia restaurativa tienen en común "una preferencia por la deliberación en lugar de la adjudicación, y una búsqueda de remedios que reparen el daño y fortalezcan los lazos de interdependencia" (Roche 2006, 234).

[25] Para Hill (2021, 238) también es importante en los delitos que se han cometido por negligencia o desconocimiento de las necesidades de los animales.

posible, haciendo que tengan una vida mejor. Es cierto que, aseguraba Johnston (2007, 11), cuando se comete el delito no debe preocuparnos tanto qué hacer con el agresor, sino qué hacer por la víctima. Sin embargo, para ser preventivos de la reincidencia y mejorar la vida de (todos) los animales, me parece importante que la respuesta institucional (restaurativa o penal convencional) logre transformar la actitud del agresor que objetiva al animal y asume que puede disponer de él libremente; así como el talante de la comunidad del agresor, que entiende el delito como aceptable, o no suficientemente importante para enfrentarse al agresor[26]. Por ello, aunque hacer referencia a la dimensión pedagógica de la justicia restaurativa pueda parecen *offender centric*, y quizás desmotive a quienes entienden que es preciso centrar el debate en el sufrimiento animal, creo que puede ser un enfoque más preventivo de la reincidencia y de la delincuencia contra los animales por su mayor impacto en un entorno social que consiente o encubre este tipo de violencia.

Destacaba que la posible dimensión pedagógica de la justicia obliga a facilitadores y animalistas a mirar hacia el agresor, sobre el que existen muchos estereotipos; pero que, en realidad, no siempre encaja en un modelo ideal. Y es que, si se ha hablado mucho sobre la víctima ideal, también podríamos hacer referencia al delincuente ideal para los procesos restaurativos. Para Maglione (2017, 27), sería ideal el que conscientemente causa un daño a una víctima en situación de vulnerabilidad, pero que acepta encontrarse con ella para poder reconocer el daño que ha causado y repararlo de acuerdo a sus necesidades. Sin embargo, tenemos que abrir la mirada hacia aquellos otros agresores que causan un daño por negligencia, pero también por una razón que entienden justificada o porque consideran que su estatus de dueño les da legitimidad para maltratar al animal. Cuando eso ocurre e interviene la justicia penal imponiendo un castigo, el agresor va a entender que la respuesta penal es desproporcionada y él es víctima de un sistema injusto[27]. Con este tipo de agresor, los diálogos restaurativos adquieren todo su sentido, porque parten de una situación de reconocimiento de los hechos, pero no del daño causado. Las dificultades en esa tarea pedagógica no solo tienen que ver con el agresor, sino con quién representa los intereses de los animales y con la propia labor de facilitación 'pedagógica'.

De entrada, es preciso avanzar que, para potenciar los efectos pedagógicos de la justicia restaurativa, deberemos creer que el agresor no es irrecuperable, sino que es una persona con posibilidad de aprendizaje y de cambio. Como

[26] Como asegura Robertazzi (2022, 137), "el reconocimiento del valor negativo de la ofensa facilita también el propósito de su irrepetibilidad, incentivando el nacimiento de una renovada capacidad de iniciativa".

[27] También Robertazzi (2022, 138) asegura que "si el delito representa la lesión del orden intersubjetivo, la imposición de una pena puede contribuir a reconstituir la relación jurídica perjudicada sólo si el infractor la percibe como razonable".

indica Motupalli (2018, 355), "la justicia reparadora satisface esa necesidad permitiendo a los infractores compartir su historia, escuchar las historias de los demás y expresar sus sentimientos". No se trata de justificar los hechos ni el daño, sino de abrir un proceso que permita al agresor contar su versión y contrastarla con quien representa los intereses del animal; que deberá escuchar al agresor sin prejuicios, asumiendo que cada caso es único. Posteriormente, si la comunidad no ha participado en el diálogo restaurativo, el agresor podrá compartir el aprendizaje con su entorno y, quizás, transformarlo. Motupalli (2018, 356) asume que la comunidad "proporciona un marco para dar forma a las nociones de delito, víctimas y delincuentes, pero también supone una presión importante para resolver conflictos". Por ello, parece aconsejable integrar a la comunidad de referencia del agresor en los diálogos para que enriquezcan la discusión con diferentes puntos de vista[28]. Tepper (2023, 117) muestra con gran sensibilidad y acierto el sentido de integrar a personas de la comunidad en el desarrollo de procesos restaurativos: "Solo asegurando la amplia participación de comunidades, ciudadanos, activistas, educadores, profesionales y personas comunes de las calles, granjas y ríos, se puede desentrañar y recomponer el *habitus* teniendo en cuenta a los parientes animales, hablando abiertamente sobre nuestra relación con ellos y cómo darles la oportunidad de prosperar"[29].

En los delitos contra los animales, el hecho de que las víctimas no tengan capacidad de hablar, hace que el daño causado deba expresarse mediante representantes de los intereses de los animales; y, en todo caso, hará que esta representación sea más cuestionada que cuando es la propia víctima la que habla de su sufrimiento. El maltratador puede no considerar legítima la representación del animal y la aspiración pedagógica fracasará. Indica Roche (2006, 234) que habrá que ser cuidadoso en el proceso, dado que la distancia con el mundo animal es mayor y menor la posibilidad de empatía con sus integrantes, o porque la concepción del animal como objeto está fuertemente arraigada y se apoya en tradiciones ancestrales. Según quién represente a los animales y cómo lo haga, el agresor o su comunidad pueden entender que tras la justicia restaurativa hay una pretensión demagógica sobre la causa animal y que se trata de imponer una visión del animal humanizada, idealizada y descontextualizada.

En esa tarea pedagógica juegan un papel esencial tanto los facilitadores como el resto de los participantes en los procesos restaurativos. En concreto, Roche plantea la necesidad de distinguir entre los roles que puede asumir el media-

[28] De hecho, cuando la actitud y actividad del agresor está respaldada o consentida por su comunidad, Lewis y Umbreit (2021) consideran que será preciso experimentar más profundamente las opciones que ofrecen los círculos restaurativos que trabajan el conflicto de una manera más holística y sistémica y con una pluralidad de agentes comunitarios.

[29] Y es que participar implica "la consciencia que adquieren los sujetos con respecto a la responsabilidad de intervenir en el desarrollo de su contexto, asumiendo desde perspectivas democráticas el abordaje positivo de problemáticas" (Zapata 2017, 217).

dor, como facilitador o como evaluador, en función del conflicto que se aborde. Asegura que "en un rol "facilitador", el mediador es responsable de establecer la comunicación entre las partes, asegurarse de que se identifiquen los problemas, alentar a las partes a reflexionar y, si es necesario, revisar sus opiniones y deseos, y ayudar en la formulación de cualquier acuerdo. En un rol "evaluador", el mediador es además responsable de intentar convencer a las partes para que acepten las recomendaciones hechas sobre la base de su conocimiento experto" (Roche 2006, 226). Asegura que el modo facilitador es más idóneo para situaciones de víctimas ideales y agresores convencionales. El rol evaluador puede resultar más apropiado cuando esa situación ideal no se produce, como es el caso de la victimidad animal, en la que el facilitador debe asumir un rol más propositivo[30].

Ahora bien, la potencialidad pedagógica va más allá del aprendizaje individual y comunitario sobre el daño causado y tiene una funcionalidad terapéutica y regenerativa[31]. Precisamente resulta terapéutica porque se centra "en comprender los efectos y las consecuencias de la ley penal, del proceso y su aplicación sobre el bienestar de aquellas personas que se ven involucradas" (Carnevalli 2022, 308). Como indica Hill (2021, 228), "las percepciones del daño pueden ser causas importantes que contribuyen al crimen, y pueden no ser válidas, pero es importante abordarlas, especialmente para romper los ciclos de reincidencia". Ya indicábamos que un comportamiento no comprendido como dañino (ni delictivo) puede acabar promoviendo que el agresor se considere víctima tratada injustamente por parte de las instituciones que le imponen una pena desproporcionada[32]. Afianzar esa misma dimensión pedagógica promueve una justicia regenerativa y reparadora. Regenerativa en tanto sea capaz de "regenerarnos a nosotros mismos, regenerar a los demás y reparar el pasado" (Damus 2024, 2). Será reparadora para la víctima (o potenciales víctimas) y para la comunidad cuando conciencie sobre la razón por la que el Derecho penal regula y castiga determinados comportamientos que causan un daño. En definitiva, reparan en cuanto colocan al agresor ante el sentido del Derecho.

En todo caso, el legislador debe repensar su estrategia de transformación social para no hacerlo únicamente desde el Derecho penal, sino intentando programas de escucha que permitan hacer *grassroots laws* que serán asumidas como propias y más legítimas por los colectivos afectados. En esa línea está Wheeldom (2015, 98) cuando asegura que "la justicia reparadora puede ofrecer un espacio transformativo para la reorganización de la comunidad y ejercicios

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30 Sobre si es recomendable o desaconsejable que el facilitador en este tipo de delitos tenga o no conciencia animalista, véase Bernuz (2024).

31 De hecho, la justicia restaurativa tiene como uno de sus principales objetivos "la rehabilitación del agresor" y no solo la reparación del daño causado a la víctima (Gal 2020, 349)

32 De hecho, el estudio de Varona (2023b, 9) aprecia en algunos agresores "la percepción de falta de justicia procedimental (que) se centra en la alusión a la desconfianza en el sistema penal que encuentran no respetuoso, discriminatorio, lento, ilógico o desproporcionado".

más deliberativos de democracia participativa que no tienen por qué existir como reacción a los fracasos del Estado para la reducción de daños".

4.2. La pretensión transformativa de la justicia restaurativa

Más allá de la responsabilización individual que genera la conciencia del daño causado a los animales está la propuesta de lograr una justicia que transforme nuestras relaciones con ellos. Como asegura Nocella (2011, 4), la justicia restaurativa no sólo aborda el conflicto entre la víctima y el delincuente, sino que "se esfuerza por utilizar el conflicto como una oportunidad para abordar injusticias sociopolíticas". De una manera más amplia, Motupalli (2018, 360) destaca que "dada esta capacidad de ofrecer una visión alternativa del mundo y de entender la delincuencia, podemos decir que la justicia reparadora es transformadora por naturaleza". Y, si podemos estar de acuerdo en algo, es en que, la cuestión animal en general y el maltrato y abandono de animales en particular, nos coloca ante una injusticia social no resuelta ni política ni jurídicamente.

Rossner y Taylor (2024, 363), desde su idea de promover una justicia transformativa, plantean algunas ventajas y críticas a la justicia restaurativa. De un lado, desde las ventajas que es preciso aprovechar para los delitos de maltrato animal está que el diálogo entre las partes implicadas en el delito y representantes de los intereses del animal para discutir sobre el mismo, sobre el daño causado y sobre las necesidades de la víctima puede permitir una transformación en la imagen, construida socialmente, que tiene el delincuente del animal. Pero también es útil para comprender (sin justificar) y transformar el contexto individual y social, legitimador de la violencia. Dado que algunos agresores se perciben como víctimas del sistema que los castiga por algo que no asumen como incorrecto y mucho menos como delito, "ven la justicia restaurativa como una herramienta para poder hacer comprender a las personas que les denunciaron y a las autoridades judiciales la situación en la que se encontraban para poder contextualizar su caso, sin perjuicio de posibles justificaciones que no serían admisibles en un proceso restaurativo" (Varona 2023b, 12). Al fin y al cabo, una justicia que escucha se percibe como más justa y la justicia restaurativa ofrece un espacio de escucha al agresor.

De otro lado, se critica que la justicia restaurativa tienda a centrarse estrictamente en el conflicto interpersonal generado por el delito. Rossner y Taylor (2024, 363) entienden que "no reconoce ni aborda las desigualdades estructurales y la violencia que están en el origen de buena parte de la delincuencia". Se puede estar de acuerdo en que prestar atención a ese inevitable trasfondo social o estructural de la violencia puede ayudar a los facilitadores a orientar la discusión sobre el daño causado y sobre la responsabilidad individual de manera coherente

y restaurativa. Al tiempo que permitirá determinar la responsabilidad de la comunidad en la prevalencia o consolidación de ciertos comportamientos[33]. Creo que abordar la violencia de todo tipo contra los animales en el marco de una sociedad antropocéntrica y una comunidad objetivadora de lo animal nos permite abordar las cuestiones del daño y la responsabilización de una manera más precisa y plantear una reparación con mayor alcance y más transformativa.

Ahora bien, para que esa justicia restaurativa sea transformativa a largo plazo debe ser percibida como legítima, tanto por el agresor como por la propia comunidad. Como indica Hill (2021, 229), dado que el agresor debe volver a la comunidad, es un reto para las comunidades de referencia poder implicarse en conversaciones sobre cómo perciben el delito y al agresor y qué pueden hacer para reintegrarlo. Desde la perspectiva del agresor, para Braithwaite (2007, 156) se puede vincular legitimidad y transformación desarrollando las prácticas restaurativas en el entorno del agresor que le permitan cambiar y asumir responsabilidades en su ambiente. Asegura, de acuerdo con el proyecto LIFERS, que "los internos que quieran aprender comportamientos socialmente más productivos no lo harán sentándose durante horas en sesiones terapéuticas de grupo, sino volviendo a sus comunidades y poniendo en práctica esos comportamientos positivos que quieren que formen parte de su vida"[34]. Desde la perspectiva de la comunidad, estamos de acuerdo con Braithwaite (2007, 158) en que la justicia será percibida como más legítima si la integra en la discusión y le permite reflexionar sobre el daño causado, sobre qué daños no pueden resultarnos indiferentes como comunidad y quiénes son las víctimas reales de los delitos contra los animales. Dzur (2015, 60) recoge de forma atinada esta idea cuando indica que la justicia reparadora "no se utiliza después de que una comunidad haya llegado a reconocer sus responsabilidades de pensamiento y acción deliberados en relación con el orden social, sino como parte de un proceso de construcción de la comunidad".

En definitiva, será necesario aprovechar esta dimensión transformadora de la justicia restaurativa a que se refieren los autores para promover una mentalidad social más respetuosa con los animales. Braithwaite (2003, 1) asegura que "la justicia reparadora no es simplemente una manera de reformar el sis-

[33] Tarea que no resulta evidente porque, como indica Maglione (2017, 27), aunque es una idea bien conocida en criminología que "las redes sociales pueden ser "lugares" en los que se aprenden, racionalizan y practican valores desviados", "las descripciones normativas más difusas de la comunidad no suelen tener en cuenta la posibilidad de que las relaciones comunitarias (a saber, la familia y los entre iguales entre iguales) puedan promover o facilitar comportamientos delictivos".

[34] No obstante, pone de manifiesto la aparente paradoja de que quien tiene legitimidad en la calle y puede transformar el entorno no son los ciudadanos considerados como 'correctos' para la mayoría de la población (Braithwaite 2007, 157). Por ello, habrá que afinar los casos, para evitar que quienes apuestan por la prisión en supuestos de delitos contra los animales sigan insistiendo en su posición.

tema de justicia penal, sino una forma de transformar todo el sistema jurídico, nuestras vidas familiares, nuestra conducta en el lugar de trabajo, nuestra práctica de la política. Es un cambio holístico en la forma en que hacemos justicia en el mundo". También indican Rossner y Taylor (2024, 373) que "abogamos por considerar la justicia reparadora tanto como un mecanismo para abordar daños concretos, como un proyecto político más amplio que pretende transformar los sistemas", comprendiendo no solo los sistemas normativos, sino también los sociales. Esta exigencia que se plantea desde la teoría y la práctica de la justicia restaurativa para conectar lo micro y lo macro nos permite discutir sobre los valores consolidados socialmente y los que están por reforzar, como lo son los relacionados con los animales. Y es algo en lo que, como indican Rossner y Taylor (2024, 374), no solo deben empeñarse los individuos empáticos con la causa animal, sino también las instituciones compasivas comprometidas con la tarea de minimizar el sufrimiento[35].

5. ALGUNAS CONCLUSIONES: LA JUSTICIA RESTAURATIVA COMO ¿JUSTICIA INTERESPECIES?

Creer que la justicia restaurativa es capaz de fomentar la empatía y el conocimiento necesarios para responsabilizar directamente al agresor y transformar indirectamente al entorno social que lo apoya supone confiar en que también puede ser una vía efectiva para fomentar la adhesión al Derecho, prevenir la delincuencia y solucionar los conflictos individuales y sociales. Es apostar por una justicia restaurativa material y procedimentalmente sólida capaz de modificar *habitus* pasados mediante la reflexión y comprensión del daño causado. De acuerdo con Zapata (2017, 218), se podría entender que estamos ante una justicia co-construída en la que "los actores involucrados en el conflicto encuentren que no es el proceso disciplinario la única salida" y puedan buscar soluciones negociadas que sean percibidas como más legítimas. Para ser transformativa, la justicia restaurativa no solo se preguntará por el conflicto concreto (qué daño, cómo reparar…), sino que debe permitir reflexionar sobre las razones de la propia acción y de la norma que la regula. Ahondar en el sentido del delito permite al agresor, sin justificar sus hechos, dejar atrás 'the narrow present' para tener en cuenta el 'deep past' que dirían Lewis y Umbreit (2021, 7). O, más precisamente, posibilita no solo tener en cuenta el conflicto que da lugar a la intervención, sino las prenociones que están en su origen.

[35] Vid. más extensamente sobre instituciones compasivas el trabajo de Gracia (2018). Sobre la posibilidad de hablar de justicia o de compasión en nuestras relaciones con los animales vid. Bertolesi (2017).

Ahora bien, es preciso ser consciente de que esa tarea debe sortear muchas limitaciones y derribar algunos mitos vigentes en mediadores y animalistas esencialmente, pero también en agresores y sus comunidades. Uno de esos mitos, muy difundido a nivel social, es la idea de que la justicia restaurativa es una justicia leve, que se resume en una conversación o en una carta de perdón, o es asimilable a una justicia privada que se resuelve con una negociación entre las partes. Esa visión puede hacer que los animalistas perciban esta derivación hacia la justicia restaurativa como un menosprecio de los delitos contra los animales. Es preciso hacer 'pedagogía' sobre lo que supone la justicia restaurativa. En concreto, conocer la formación de los facilitadores, la complejidad del proceso de preparación de las partes y, en su caso del encuentro, deberían permitirnos apartar la idea de que la justicia restaurativa es una justicia *light*, para mostrar un difícil y personal ejercicio de enfrentamiento al daño causado, a la culpa y a la individualización de la víctima. El reconocimiento del potencial responsabilizador, pedagógico y transformativo de los procesos restaurativos deberían dejar en segundo plano la respuesta punitiva más simbólica, representada por la cárcel, con un alto impacto social a corto plazo, pero con una baja (o negativa) efectividad para las partes y para la sociedad, a medio o largo plazo[36].

Otra de las ideas a superar es que la justicia restaurativa es una justicia humana, es decir, de personas para personas. Desde esa perspectiva, parte de los mediadores pueden entender que acoger delitos contra los animales es una forma de desprestigiar (o ridiculizar) la filosofía restaurativa. Es cierto que las premisas sobre las que se construye la justicia restaurativa son dialógicas y definen la justicia restaurativa como una conversación facilitada sobre el daño causado y la forma de repararlo de una manera significativa para las partes. También es preciso recordar que, incluso asumiendo esas premisas dialógicas, no siempre es posible el encuentro, que ese encuentro puede ser con víctimas o agresores vicarios, que las vías de participación de unos y otros son muy diversas. Y, en ese marco, entendemos que es posible retar a la justicia restaurativa como herramienta para discutir sobre el daño causado a las víctimas y siempre fomentando que efectivamente la víctima animal esté en el centro de la discusión, aunque no pueda participar mediante el lenguaje.

Desde otra perspectiva, puede generar suspicacia entre los representantes de los animales el hecho de que esta propuesta pedagógica (individual y comunitaria) y transformativa de la justicia restaurativa parezca estar más centrada en el agresor. Tendemos a pensar que en políticas sociales y criminales todo es explicable mediante una dinámica de vasos comunicantes. Y, en este caso, vendría a considerar que más atención al agresor supone un menosprecio para las víctimas,

[36] Para Varona (2021, 32) "La justicia restaurativa puede ofrecer al activismo animalista una manera de ser más coherente como movimiento emancipatorio, rechazando el punitivismo y diferenciando dos momentos en la criminalización".

en este caso, principalmente animales. Sin embargo, en ocasiones la realidad es más compleja y esa explicación resulta incompleta. Si una de las pretensiones de las víctimas y, en este caso, de quienes hablan en lugar de las víctimas, es que no se repitan comportamientos que hacen sufrir injustificadamente a los animales, es claro que habría que potenciar, junto a la reparación de las víctimas, la comprensión y responsabilización del agresor por el daño causado y la transformación de la visión del animal prevalente en el agresor y su comunidad de referencia que, en ocasiones, está subyacente en el delito. Visto así, el interés de la víctima, del agresor y de la comunidad caminan en una misma dirección.

Tras la propuesta del capítulo late la idea de que es preferible que el Derecho penal y su reacción punitiva vengan tras la muestra de repulsa social ante un comportamiento. Sin embargo, también es cierto que el Derecho no solo sigue el camino marcado por la ciudadanía, sino que señala pautas para la evolución y la transformación sociales. Cuando eso ocurre una parte de la población percibirá la normativa como impuesta desde arriba sin consenso ni justificación. Para evitar ese sentimiento y esa suspicacia ante el Derecho, que fomentará la desobediencia más o menos encubierta, creo que sigue siendo más útil promover un diálogo social sobre cuestiones en las que no existe aceptación y en las que, como ya indicaba, no existe conciencia del daño causado. Parece haberse mostrado que las medidas que surgen desde abajo y desde la práctica, tienen mayor eficacia que las que se imponen desde arriba[37]. La justicia restaurativa puede ofrecer este medio de discusión en los delitos contra los animales que siguen siendo tan controvertidos como el trato que les infligimos. Quizás se trate de "hacer juntos" y percibir en la justicia restaurativa una orientación hacia el futuro, hacia el cambio y hacia el fomento de unas relaciones respetuosas y justas (Fonseca y Mazzucato 2023, 349).

Asimismo, esa mayor empatía hacia el animal individual pero también un mayor respeto hacia la 'animalidad' que puede ser capaz de promover la justicia restaurativa podría estar en el origen de una justicia interespecie (o interespecífica) que, como indican Pineda-Pinto et alt. (2023, 9), "no se centra solo en los seres humanos o en comunidades más que humanas, sino en su interdependencia con el objetivo de promover el florecimiento mutuo". Esto es, no se trata únicamente de respetar la vida o la integridad física o psíquica de los animales, sino de promover una convivencia pacífica entre unos y otros. Los propios autores reconocen que "este reconocimiento más amplio de todas las formas de vida, incluidas aquellas 'otras' desvalorizadas y mal reconocidas, para formar

[37] Indica Zapata (2017, 218) que "la comunicación horizontal pretende articular de manera democrática las posturas de los sujetos que intervienen en un contexto determinado (...) la comunicación horizontal genera confianza, redistribuye el poder, anima a las voces hasta ahora silenciadas y permite poner en palabras todo aquello que daña y destruye, para eliminar el ánimo retaliatorio y buscar, en conjunto, oportunidades de cambio".

parte de la comunidad de justicia es un reposicionamiento de la justicia como 'quintaesencialmente relacional', de reconocimiento de obligaciones y deberes y de resistencia al excepcionalismo humano" (Pineda-Pinto et alt. 2023, 4). Al tiempo que supone ser coherentes con las últimas propuestas de reconocimiento moral de los animales. Matevia (2016, 189) establece que "si una sociedad está de acuerdo en que los animales tienen un estatus moral, también necesita una teoría de la justicia interespecies para dirimir los conflictos entre humanos y animales, cuando el resultado sea perjudicial para la salud de los animales".

Esa propuesta de una justicia interespecie que puede promover y alentar la justicia restaurativa está en la línea de conceptos como el *One Health* o el *One Welfare*: una única salud, un solo bienestar, el bienestar humano y el bienestar animal. Apostar por visibilizar la violencia contra los animales mediante actos de maltrato o abandono, mostrar el daño físico y psicológico que sufren, defender la ampliación de la victimidad a los animales, al tiempo que proponemos una mayor atención a la responsabilización real de los agresores y una concienciación de las comunidades, puede permitir ampliar la justicia social para integrar la justicia animal.

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EL MALTRATO ANIMAL EN LOS LABORATORIOS DE EXPERIMENTACIÓN. A PROPÓSITO DEL CASO VIVOTECNIA Y LAS RESPUESTAS EMPRESARIALES RESTAURATIVAS

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1. INTRODUCCIÓN

En abril de 2021, unas duras imágenes de animales sujetos a experimentación en los laboratorios de toxicología y seguridad de Vivotecnia, difundidas en redes sociales y obtenidas por una investigadora, generaron indignación y rechazo. La Asociación Europea de Investigación Animal (EARA[1]) declaró al respecto que lo mostrado en las imágenes constituían "ejemplos inaceptables aplicados a una serie de especies animales diferentes" (Arana, 2022). Por su parte, la pericial de la veterinaria de la Unidad Central Operativa de Medio Ambiente (UCOMA) de la Jefatura del Servicio de Protección de la Naturaleza (SEPRONA) de la Guardia Civil confirmó en su informe que se apreciaron quince escenas en los vídeos en las que se aprecian "indicios de prácticas compatibles con el maltrato animal" (Arana, 2022).

Los laboratorios de Vivotecnia[2] se fundaron en el año 2000 como filial de una compañía alemana. Se encarga de realizar los ensayos preclínicos *in vivo* de nuevos tratamientos de desarrollo y tiene su sede en Madrid. Se define como una organización completamente independiente, dedicada a la investigación por

[1] La Asociación Europea para la Investigación Animal (*European Animal Research Association*, EARA) es una organización de comunicación y apoyo cuya misión consiste en defender los intereses de la investigación biomédica y el desarrollo sanitario en Europa. EARA proporciona información precisa y basada en evidencias que demuestra los logros conseguidos a través del uso de animales de experimentación en la investigación biomédica. Véase en https://www.eara.eu/espana?lang=es.

[2] Información disponible en https://www.vivotecnia.com/es/nosotros/.

contrato (CRO) en las áreas de toxicología y seguridad farmacológica. Respecto al Bienestar animal, en su Declaración institucional sobre el uso de animales de experimentación se reconoce que:

> somos conscientes que la investigación animal juega un papel fundamental en el conocimiento de los mecanismos biológicos que están involucrados en las enfermedades y en el desarrollo de tratamientos médicos. Sin el uso de animales, no dispondríamos de la mayoría de las medicinas, antibióticos, vacunas y técnicas quirúrgicas que se aplican en medicina humana y veterinaria (...) el bienestar de los animales de experimentación es un tema fundamental para Vivotecnia, así como lo es el estricto respeto y cumplimiento de la legislación vigente sobre protección de animales utilizados en experimentación y otros fines científicos, incluyendo la docencia.

A tenor de lo cual se declara que los procedimientos de trabajo en Vivotecnia se adhieren a la Directiva 2010/63/UE del Parlamento Europeo y del Consejo, de 22 de septiembre de 2010[3], sobre protección de los animales utilizados para fines científicos, así como al Real Decreto 53/2013, de 1 de febrero, por el que se establecen las normas básicas aplicables para la protección de los animales utilizados en experimentación y otros fines científicos, incluidos la docencia[4].

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[3] En el ámbito del Consejo de Europa, considérese el Instrumento de Ratificación del Convenio Europeo sobre protección de los animales vertebrados utilizados con fines experimentales y otros fines científicos, hecho en Estrasburgo el 18 de marzo de 1986, publicado en el BOE de 25 de octubre de 1990. Vid. en https://www.coe.int/en/web/cdcj/laboratory-animals.

[4] Vid. el Real Decreto 118/2021, de 23 de febrero, por el que se modifica el Real Decreto 53/2013, de 1 de febrero, por el que se establecen las normas básicas aplicables para la protección de los animales utilizados en experimentación y otros fines científicos, incluyendo la docencia, por el que se incorporan las modificaciones realizadas por el Reglamento (UE) 2019/1010 del Parlamento Europeo y del Consejo, de 5 de junio de 2019, relativo a la adaptación de las obligaciones de información en el ámbito de la legislación relativa al medio ambiente. Dicho Real Decreto se refiere a la publicación de los resúmenes no técnicos de los proyectos. Vid. la web del Ministerio de Agricultura, Pesca y Alimentación en https://www.mapa.gob.es/es/ganaderia/temas/produccion-y-mercados-ganaderos/bienestanimal/en-la-investigacion/ y de la Sociedad Española para las Ciencias del Animal de Laboratorio en https://secal.es/legislacion-en-experimentacion-animal/. En la web del Ministerio se indica textualmente que el principio de las tres erres constituye un eje básico del concepto de protección animal en investigación y se cimenta en tres ideas: 1) el reemplazo de animales por otras opciones en las que éstos no se utilicen, como son, por ejemplo, los medios audiovisuales o las técnicas de realidad virtual; 2) la reducción de su número, gracias al desarrollo y aplicación de estudios estadísticos, que permitan establecer claramente cual es la cantidad mínima de individuos que permiten obtener resultados científicos satisfactorios, o de la elección de las especies animales más adecuadas al estudio a realizar; y 3) el refinamiento de las actuaciones sobre los animales, y la mejora de sus condiciones de vida. Asociados a esta idea se impulsan conceptos como el enriquecimiento ambiental, el uso de anestesia y analgesia, la clasificación de severidad de los procedimientos o el establecimiento de criterios de punto final tempranos. Cfr. la página web de la UE en este campo en https://environment.ec.europa.eu/topics/chemicals/animals-science_en. El Instituto

2. LA JUSTIFICACIÓN DE LA EXPERIMENTACIÓN ANIMAL COMO NECESIDAD

Diferentes factores están contribuyendo al aumento de la esperanza de vida en países desarrollados, entre otros, avances médicos y tecnológicos, reducción de las tasas de mortalidad infantil, cambios en los estilos de vida y el acceso de la población a los servicios sanitarios. En todo caso, persisten enfermedades para las que no hay tratamiento y debe continuar la investigación.

Hoy por hoy, la investigación biomédica precisa de animales para avanzar en el conocimiento de las enfermedades, al posibilitar la comprensión de procesos en los animales cuyos resultados puedan extrapolarse a lo que sucederá en las personas. Todos los animales nos parecemos en la mayor parte de los procesos biológicos, de tal manera que es posible identificar ciertas ventajas de los modelos animales (Muñoz, 2018):

- Tienen un ciclo vital más rápido, que permite acelerar las investigaciones.
- Tienen un alto índice de prolificidad, lo que permite realizar réplicas y evitar la variabilidad interespecífica.
- Se pueden establecer líneas de enfermedades con una prevalencia muy baja, aumentando la casuística de las mismas. El mapeado del genoma permite generar por ingeniería genética modelos de enfermedades.
- Así mismo, las terapias oncogénicas tienden a "avatarizar" el cáncer en ratones, para poder elegir la mejor terapia aplicable para cada paciente (Muñoz Mediavilla, 2018).

Diferentes regulaciones, como los códigos de ética internacionales para la investigación biomédica, consideran los ensayos con animales como un requisito para poder llevar a cabo ensayos clínicos en seres humanos (Rodriguez, 2012). Así, el Código de Nuremberg (1946) recoge, entre sus principios, que cualquier experimento realizado con seres humanos debe ser proyectado y basado sobre los resultados de experimentación animal.

Tras la publicación del Código de Nuremberg, surgieron los primeros códigos éticos de carácter específico. Es en la Declaración de Helsinki (1964) donde, entre los requisitos científicos y protocolos de investigación, se delimita que la investigación con participantes humanos debe ceñirse a los principios científicos generalmente aceptados y basarse en un profundo conocimiento de la bibliografía científica, otras fuentes relevantes de información y experimentos

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Max-Planck añade una tercera erre en relación con la responsabilidad. Vid. en https://www.ie-freiburg.mpg.de/5705928/legal_requirements.

adecuados de laboratorio y con animales, según cada caso. Destaca el deber de respetar el bienestar de los animales utilizados para la investigación.

Por su parte, el Informe Belmont (1978)[5] establece los tres principios éticos básicos que deben orientar toda investigación con seres humanos, como son el principio de respeto a las personas y a su autonomía, el principio de beneficencia y el principio de justicia. Es mediante el consentimiento informado, otorgado por la persona incluida en la investigación clínica, en el que expresa voluntariamente la intención de participar en un estudio, tras haber comprendido la información que se le ha dado sobre los objetivos del mismo, sus beneficios, molestias, posibles riesgos y alternativas, así como sobre sus derechos y responsabilidades. Supone un compendio de garantías para la protección de la persona sujeto de estudio en una investigación, siempre referido únicamente a seres humanos.

Como ya se ha indicado, en la actualidad no parece existir alternativas viables a la experimentación con animales[6]. Las técnicas de cultivo celulares y las simulaciones computacionales proporcionan datos parcialmente útiles y lo máximo a lo que aspiran es a disminuir el número de animales que se han de emplear en experimentación. A pesar de ello, ya se están estudiando otros enfoques para la experimentación animal como modelos informáticos (diseño de fármacos asistido por computadora, bioimpresión 3D y biochip), cultivos *in vitro* de células y tejidos, y organismos alternativos, siempre bajo la premisa de que el reemplazo de las pruebas con animales no significa poner en riesgo a los pacientes humanos ni detener el progreso médico.

En definitiva, los ensayos clínicos, esto es, la experimentación con humanos es una necesidad para los avances biomédicos que ineludiblemente requiere una serie de estudios previos con animales, los denominados ensayos preclínicos. Este proceso posibilita la selección de los tratamientos más eficaces y el descarte de aquellos que puedan ocasionar efectos adversos, minimizando los riesgos sobre los seres humanos. En consecuencia, el empleo de animales para avanzar en la investigación biomédica se justifica en aras de los beneficios que nos aporta y que no podríamos conseguir de otra manera, lo que, evidentemente, constituye una óptica instrumental que se entiende, por la mayoría de la sociedad, como justificada, sin perjuicio del debate sobre sus formas y límites.

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[5] Véase el Informe Belmont (1978), fruto del trabajo realizado por la *National Commission* por encargo del Congreso estadounidense para elaborar una guía acerca de los criterios éticos que debían guiar la investigación con seres humanos. Este documento es considerado la carta de identidad de esta nueva disciplina, los principios contenidos en ella se hicieron extensivos a toda la bioética. Vid en https://www.paho.org/es/documentos/informe-belmont-principios-eticos-directrices-para-proteccion-sujetos-humanos.

[6] La experimentación para cosméticos es otro tema muy diferente. La prohibición de los ensayos con animales en el Reglamento sobre cosméticos de la UE sólo cubre los ensayos realizados para demostrar la seguridad del producto de acuerdo con el Reglamento sobre cosméticos de la UE. Cfr. https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3995.

3. LA EXPERIMENTACIÓN ANIMAL, ¿NECESIDAD?

La dignidad de la persona es el fundamento de los Derechos Humanos, la clave para ser miembro de la comunidad moral y política. Sin embargo, en las últimas décadas, el movimiento animalista propone extender las fronteras de la persona, la comunidad y los derechos más allá y más acá de la especie humana (Cortina, 2009), por lo que se demanda un comportamiento ético de los seres humanos hacia los animales.

La conveniencia del uso de animales en la experimentación es un debate polarizado y con opiniones variadas[7]. Aunque la ética animalista, como disciplina propiamente dicha, surge a comienzos de los años setenta del siglo pasado, la pregunta por el trato que los seres humanos deben dispensar a los animales ha estado presente en todas las culturas y tradiciones intelectuales desde los orígenes de la historia humana (Cortina, 2009).

El bienestar animal es un tema complejo con múltiples dimensiones científicas, éticas, económicas, culturales, sociales, religiosas y políticas. Por tanto, se trata de un asunto que suscita un interés creciente en la sociedad civil y constituye una de las prioridades de la Organización Mundial de Sanidad Animal (OMSA)[8]que entiende que un animal está en buenas condiciones de bienestar, "si está sano, cómodo, bien alimentado, en seguridad, puede expresar formas innatas de comportamiento y si no padece sensaciones desagradables de dolor, miedo o desasosiego".

Sin perjuicio de las diferentes catalogaciones de los animales en una normativa compleja, el artículo 13 del Tratado de Funcionamiento de la Unión Europea (TFUE, 1957) señala que la Unión y los Estados miembros tendrán plenamente en cuenta las exigencias en materia de bienestar de los animales como seres sensibles, respetando al mismo tiempo las disposiciones legales o administrativas y las costumbres de los Estados miembros relativas, en particular, a ritos religiosos, tradiciones culturales y patrimonio regional "al formular y aplicar las políticas de la Unión en materia de agricultura, pesca, transporte, mercado interior, investigación y desarrollo tecnológico y espacio…"[9].

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[7] A modo de ejemplo "*El debate sobre la experimentación animal*" celebrado en la Universidad Pompeu Fabra (UPF), organizado por el grupo ESLA (Estudiantes por la Lucha Animalista), del 18 al 22 de febrero de 2019. Vid. en https://ellipse.prbb.org/es/debate-sobre-la-experimentacion-animal/.

[8] Véase en https://www.woah.org/es/inicio/ .

[9] Considérese la jurisprudencia de la Corte Europea de Derechos Humanos en esta materia. El Tribunal Europeo de Derechos Humanos (TEDH) ha reconocido que la protección de los animales constituye "una cuestión de interés general" garantizada por el artículo 10 (libertad de expresión) (TEDH, 8 de noviembre de 2012, PETA Deutschland c. Alemania, apartado 47; 16 de enero de 2014, Tierbefreier E.V. c. Alemania, apartado 59). Además, en un asunto sobre la caza del zorro, el Tribunal ha aceptado, en el apartado 50, que la prevención del sufrimiento de los

La concepción de los animales como "seres sintientes" ha cambiado recientemente en España y se expresa en el artículo 333 bis del Código civil al disponer la obligación del propietario, poseedor o titular de cualquier otro derecho sobre un animal de ejercer sus derechos sobre él y sus deberes de cuidado, respetando su cualidad de ser sintiente y su bienestar, conforme a las características de cada especie y las limitaciones establecidas en ésta y las demás normas vigentes.

Por su parte la Ley 7/2023, de 28 de marzo, de protección de los derechos y bienestar de los animales tiene como objetivo principal regular el reconocimiento y la protección de la dignidad de los animales por parte de la sociedad. Por tanto, no se regula a los animales como un elemento más dentro de nuestra actividad económica, a los que se deban unas condiciones por su capacidad de sentir, sino que regula nuestro comportamiento hacia ellos como seres vivos dentro de nuestro entorno de convivencia. Es en el artículo 3K de la Ley 7/2023, donde define el "Bienestar animal" como el estado físico y mental de un animal en relación con las condiciones en que vive y muere, en paralelismo con los términos definidos por la OMSA.

Como postura moral, el bienestarismo animal defiende que, si bien es lícito que los humanos posean y utilicen animales para alimento, experimentación científica, vestimenta o entretenimiento, se les debe evitar, como seres sintientes que son, cualquier sufrimiento innecesario. La cuestión no es si son o no útiles para avanzar a nivel científico, sino una pregunta más de base; ¿está justificado a nivel moral utilizarlos para nuestro beneficio? En este sentido, Paez (2017) sostiene una postura en contra de cualquier uso de los animales para nuestro beneficio, ya que esto consiste en especismo, esto es, considerar los intereses de los otros animales inferiores a los de los humanos simplemente por ser de otra especie. Además. no toda la experimentación con animales persigue fines biomédicos, por lo que la experimentación con animales con otros fines como medioambientales, cosméticos o militares debe ser, por lo tanto, rechazada.

El especismo podría ser entendido como una consideración o tratamiento injustificadamente desventajoso de aquellos que no pertenecen a una o varias especies particulares por el solo hecho de pertenecer a otra especie (Horta, 2010, citado por Vázquez y Valencia, 2016). El especismo ha sido percibido como parte de un antropocentrismo o androcentrismo mucho más extenso, que

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animales puede -por razones de protección de la moral- justificar una injerencia en el artículo 11 (libertad de asociación, en este caso, el derecho del demandante a reunirse con otros cazadores). Recientemente, en relación con costumbres religiosas, en un asunto sobre sacrificios rituales (13 de febrero de 2024), el Tribunal aceptó en una sentencia unánime que la protección del bienestar de los animales puede vincularse a la "moralidad pública", que constituye un objetivo legítimo por el que el Estado podría restringir justificadamente el artículo 9 del CEDH (libertad de religión). En este caso, el Tribunal aceptó que era coherente con el Convenio que los Estados legislaran para que los animales fueran aturdidos antes de ser sacrificados ritualmente.

igualmente discrimina a mujeres, minorías étnico-raciales o clases sociales bajas (Vázquez y Valencia, 2016).

La comunidad académica no es ajena y, desde una filosofía antiespecista, mantiene que nos encontramos en un cambio de paradigma, quizá, la construcción de una nueva hegemonía no especista (Vázquez y Valencia, 2016). Si bien, puede justificarse el uso de los animales para experimentación científica, por tener como fin el uso en alimentación, salvar vidas mediante terapia y liberar de sufrimiento a seres humanos, dicho uso impone al ser humano la responsabilidad moral de respetar al animal experimental, no haciéndole sufrir innecesariamente, ya que nos encontramos ante seres vivientes y sintientes.

Por tanto, puede cuestionarse la tendencia hegemónica actual en el uso de animales experimentales desde una visión antropocéntrica, en la que se reconoce al ser humano como el único ente moral. En el antropocentrismo fuerte, el ser humano tiene todas las prerrogativas para manipular y usar los recursos naturales a su antojo (Rodriguez, 2012). Una corriente más moderada, presente, al menos de forma incipiente, en las pautas éticas arriba mencionadas, es la de un antropocentrismo débil que se desliga de una relación con la naturaleza meramente instrumental. Se reconoce que el ser humano es capaz de transformar la naturaleza, pero la naturaleza también tiene el poder de modificar al ser humano, por lo que la relación con la naturaleza es complementaria y cualquier daño que se le inflija termina por afectar al ser humano (Velayos, 1996).

4. LA EXPERIMENTACIÓN ANIMAL UNA ACTIVIDAD REGULADA

Como ya se ha mencionado, en España, la experimentación con animales es una actividad cuyo marco legal se conforma por la Ley 32/2007, de 7 de noviembre, para el cuidado de los animales, en su explotación, transporte, experimentación y sacrificio y el RD 53/2013. La Ley 6/2013, de 11 de junio, modificó la Ley 32/2007 para habilitar la transposición de una parte de la Directiva 2010/63/UE del Parlamento Europeo y del Consejo de 22 de septiembre de 2010, relativa a la protección de los animales utilizados para fines científicos. A tenor de lo cual, se modificó el ámbito de aplicación de la Ley 32/2007 para incluir los animales invertebrados tales como los cefalópodos y determinadas formas fetales de mamíferos para que el régimen de infracciones y sanciones les resultara aplicable y se estableció el sentido desestimatorio del silencio administrativo en la autorización de los proyectos.

Se reguló el principio general de que no se utilizará un procedimiento si se dispone de otro método científicamente satisfactorio y contrastado que posibilite obtener el resultado buscado sin utilizar animales. El RD 53/2013 dispone que sólo se podrán utilizar animales cuando su uso esté justificado por la fina-

lidad que se persigue, valorando su oportunidad siempre en términos de sus potenciales beneficios. En el preámbulo de este Real Decreto se señala que el mismo "se marca como objetivo último el total reemplazo de los animales en los procedimientos". En este sentido, como apunta Arana (2022), para que un experimento con un animal sea legal, es preceptivo que se considere necesario para alcanzar un bien de rango "superior", como la salud humana, y también que no existan procedimientos alternativos a la experimentación con animales vivos.

En aras de la transparencia el RD 53/2013 dispone la obligatoriedad de publicar anualmente información estadística sobre los animales utilizados en España. De ahí que el Ministerio de Agricultura, Alimentación y Medio Ambiente, en el Informe anual del año 2023 sobre el "número de usos" de animales utilizados por primera vez o en animales reutilizados, un total de 1.144.214, señala que se utilizaron por primera vez 1.126.458 usos totales y se reutilizaron 17.756; de los cuales para investigación básica fueron 315.671 (27,59%) y para investigación traslacional y aplicada 659.290 (57,62%).

En el informe se observa que el número de animales utilizados en procedimientos científicos se ve reducido si se utiliza el mismo animal en más de un procedimiento, en los casos en que ello no vaya en contra del objetivo científico ni tenga como consecuencia un bienestar insuficiente del animal. No obstante, las ventajas de la reutilización de animales deben evaluarse con respecto a los efectos negativos sobre su bienestar, teniendo en cuenta lo experimentado por un animal a lo largo de toda su vida. Por ello, infiere que un animal que ya haya sido utilizado en uno o varios procedimientos no deberá ser reutilizado en un nuevo procedimiento, a menos que se cumplan las siguientes condiciones:

a. La severidad de los procedimientos anteriores no haya sido clasificada como "severa".
b. El animal está en buen estado y ha recuperado totalmente su salud general.
c. El nuevo procedimiento no se clasifica como "severo".
d. Un veterinario ha realizado una evaluación favorable, realizada teniendo en cuenta las experiencias del animal a lo largo de toda su vida.

Conforme a lo establecido en el RD 53/2013, el proceso para la autorización de proyectos en animales trata de garantizar la mayor protección de los animales comprobando, entre otros aspectos, que los objetivos son relevantes, que está justificada la utilización de animales, que se aplican los principios de las "tres erres"[10], que están previstas medidas eficaces para evitar, reducir y aliviar

[10] Como ya se ha indicado anteriormente, reemplazo de animales por otras opciones; reducción de su número; y refinamiento de las actuaciones sobre los animales y la mejora de sus condiciones de vida.

cualquier forma de sufrimiento de los animales, que las condiciones de alojamiento y los métodos de eutanasia son adecuados, y que el personal implicado está capacitado o formado. Cada criador, suministrador y usuario establecerá un órgano encargado del bienestar de los animales (OEBA). En los usuarios, este órgano se denominará comité de ética de experimentación animal (CEEA).

A modo ilustrativo, el CEEA en la UPV/EHU es un órgano colegiado integrado en la estructura operativa de la Comisión de Ética para la Investigación y la Docencia (CEID). Es el órgano habilitado por el Ministerio de Ciencia e Innovación para evaluar proyectos que experimenten con animales. El CEEA evalúa, con imparcialidad e independencia, y hace el seguimiento de todos los proyectos de investigación y docencia que requieran el uso de animales para que éstos se lleven a cabo de acuerdo a los principios éticos y normativas legales vigentes. Así, todos los proyectos de investigación realizados en la UPV/EHU o en colaboración con ella necesitan, previo a su inicio, así como para acceder a las convocatorias de financiación, un informe favorable del CEEA de la parte en la que se utilicen animales.

Por otra parte, los investigadores obtienen financiación a través de proyectos de investigación que requieren de publicaciones científicas. Dentro de las revistas científicas (p. ej., *Nature*) existe un comité de expertos que evalúa los resultados y el grado de impacto del estudio, incluyendo el informe ético favorable que lo avala. Si no cumplen con el baremo establecido no se admiten dichos estudios en las publicaciones, asegurando así una calidad tanto en el estudio, como en el método y el resultado de dicha investigación. En este sentido, existe un doble control de la investigación. Una primera barrera legal y ética, establecida por los comités de éticas de cada centro y las autoridades u organismos competentes. Y una segunda barrera establecida por las revistas científicas y la obtención de financiación en los que se controla aún más la importancia y la calidad de la investigación.

Sin embargo, a pesar de los principios de protección, prevención de riesgos y bienestar animal recogidos en la legislación, no siempre se reconoce a los animales como víctimas en la práctica jurídica (Varona, 2024).

5. ¿*COMPLIANCE* PARA LA PREVENCIÓN DEL DELITO DE MALTRATO ANIMAL?

Aunque se produjo en 2021, el caso Vivotecnia nos sitúa en un escenario de un posible delito de maltrato animal experimental, lo que ocasiona la aplicación de la Ley Orgánica 3/2023, de 28 de marzo, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (CP), en materia de maltrato animal. Esta introduce en el libro II un nuevo título XVI bis que se rubrica “De

los delitos contra los animales" que contiene cuatro nuevos artículos numerados como 340 bis, 340 ter, 340 quater y 340 quinquies, que regulan el maltrato animal. Esta norma se propone como objetivo "reforzar la protección de los animales y posibilitar una respuesta penal más eficaz ante las diferentes formas de violencia contra ellos" por lo que amplía la lista tasada de animales protegidos por el CP. Junto con los animales domésticos, domesticados o que convivan con el ser humano incorpora, mediante la expresión "animal vertebrado", a los animales silvestres que viven en libertad que, si no pertenecían a especies protegidas, carecían de cualquier tipo de protección legal.

Esto representa un hecho de enorme relevancia en el ámbito de la responsabilidad de las personas jurídicas, dado que la ley incorpora los delitos contra los animales en la lista de los delitos corporativos que generan responsabilidad penal para las empresas, asociaciones y entidades en general. El nuevo artículo 340 quater CP establece que cuando, una persona jurídica sea responsable de alguno de los delitos contra los animales, se le impondrá penas de multa de hasta tres años e incluso la disolución de la persona jurídica, la suspensión de actividades, la clausura de sus locales o establecimientos de hasta cinco años.

De esta manera el legislador reclama a las personas jurídicas reforzar sus controles internos si no quieren ver aumentada su exposición al riesgo penal. En aquellos casos en los que, por el tipo de actividad o sector al que pertenece una empresa, se confirme la posibilidad de comisión de este tipo de delitos (esto es, no únicamente las empresas que realicen actividades de ganadería o relacionadas directamente con animales, también las empresas del sector alimentario, farmacéutico o cosmético), deben realizar una actualización del mapa de riesgos legales y una revisión de los controles existentes para que se puedan elaborar e implementar las medidas de prevención adecuadas en cada caso[11].

En el caso de Vivotecnia, en la que se realizan ensayos preclínicos *in vivo* de nuevos tratamientos de desarrollo con animales, dispone de una autorización administrativa, concertada con empresas públicas en la provisión de animales para experimentación en laboratorios. De ahí que quizás, el refuerzo que el legislador ha pretendido en la exigencia de responsabilidad penal al sector empresarial deje fuera este tipo de actividad. Por tanto, *a priori*, los programas de *compliance* para la prevención de este tipo de delito en laboratorios de experimentación con animales autorizados, no permiten mucho recorrido.

[11] En cuanto al delito de maltrato animal como delito corporativo, véase, entre otras fuentes, https://compliancecms.com/delito-de-maltrato-animal-comisible-por-la-persona-juridica/ y https://www.todanelo.com/es/actualidad-juridica/aumenta-la-responsabilidad-penal-de-las-empresas-el-maltrato-animal-entra-en-la.

En este contexto se ha de poner en la balanza el incremento en importancia y valoración social de bienes jurídicos colectivos como la economía, el medio ambiente o la salud, entre otros, que están significando una importante regulación administrativa.

En este orden de cosas, la sentencia del Tribunal Constitucional (Sala 1.ª), de 8 de junio de 1981 (sentencia TC, de 8 de junio de 1981), en su F.2º, afirmó por primera vez que "los principios inspiradores del orden penal son de aplicación, con ciertos matices, al derecho administrativo sancionador, dado que ambos son manifestaciones del ordenamiento punitivo del Estado, tal y como refleja la propia Constitución (art. 25, principio de legalidad) y una muy reiterada jurisprudencia de nuestro Tribunal Supremo" [12].

De ahí que, es posible considerar que entre ambos sistemas existen diferencias cuantitativas, donde los ilícitos más graves deben pertenecer al sistema penal y los más leves al ordenamiento administrativo sancionador. Una propuesta político-criminal de un "modelo común" (Nieto, 2008a) para todo el *ius puniendi* en lo relativo a la responsabilidad de las personas jurídicas respecto al maltrato animal puede contribuir a la necesaria coherencia punitiva elemental entre el Derecho penal y el Derecho administrativo sancionador (Esteve, 2002).

Este planteamiento del *continuum* sancionador de la potestad sancionadora del Estado, en relación a la persona jurídica y con base en los escritos del criminólogo australiano John Braithwaite, está en línea con el modelo de ejecución piramidal, en cuya base se asientan los mecanismos de control social existentes en la sociedad y en el ordenamiento jurídico. En efecto, un sistema piramidal antes de pasar a medidas punitivas intenta que la empresa se autorregule, aconsejando y negociando con la empresa el mejor modo de cumplir con la legalidad. La base de la pirámide estaría dedicada a propiciar el modelo dialogado de *compliance*, mientras que las sanciones con carácter preventivo general únicamente aparecen en la cúspide de la pirámide, que se corona con una sanción como es la habilitación destinada a expulsar del sistema aquellas empresas manifiestamente incompetentes o reticentes a cumplir con la legalidad (Nieto, 2008b).

La utilidad que tiene esta herramienta, en temas como el que ahora nos ocupa, demuestra que el cumplimiento normativo trasciende de la propia esfera de la sociedad mercantil para incorporarse al mundo de conseguir una sociedad mucho mejor (Magro, 2023).

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[12] Aunque la STC, núm. 246/1991 de 19 de diciembre (RTC 1991/246), F.2º añade que "no lo es menos que también hemos aludido a la cautela con la que conviene operar cuando de trasladar garantías constitucionales extraídas del orden penal al derecho administrativo sancionador se trata. Esta operación no puede hacerse de forma automática, porque la aplicación de dichas garantías al procedimiento administrativo sólo es posible en la medida que resulten compatibles con su naturaleza (STC, 22/1990 [RTC 1990/22])".

6. EL MALTRATO ANIMAL COMO CONFLICTO ENTRE LAS PERSONAS DE LA COMUNIDAD

En la mesa redonda titulada "Victimología corporativa. Empresas restaurativas ante riesgos medioambientales", celebrada con motivo del XIV Encuentro Victimológico en homenaje al Prof. Dr. Dr. h.c. Antonio Beristain, organizada por la Cátedra A. Beristain del Instituto Vasco de Criminología (IVAC-KREI), el 19 de noviembre de 2024, se puso de manifiesto la insuficiencia del régimen sancionador en la respuesta por delitos cometidos en el seno de personas jurídicas. En este sentido, Nieto (2023) califica de decepcionante, la forma en que el derecho penal o el sistema jurídico en su conjunto resuelve los casos. En ocasiones, esta forma de resolución conlleva la causación de daños, tras los graves perjuicios ocasionados por grandes empresas al medio ambiente o los derechos humanos, entre otros. Es en esta inoperancia en la que se presenta la oportunidad a lo "restaurativo", con un enfoque no necesariamente alternativo al sistema penal tradicional. Además, se debe tener en consideración que determinados conflictos desbordan ampliamente el ámbito del caso concreto y se internan en el terreno de la organización y de su funcionamiento. Además, la justicia restaurativa empresarial se inspira en normativa y casos donde pueden encontrarse ya elementos restaurativos.

Tal es el caso de la Responsabilidad Social de la Empresa o Corporativa (RSC)[13], de tal manera que, la gestión empresarial no sólo debe realizarse cumpliendo con las normas jurídicas (*compliance*). Las empresas deben comportarse como buenos ciudadanos (*6000 citizen corporations*), lo que implica la adquisición de responsabilidad social (*social responsibility*) con el fin de contribuir al desarrollo social y económico de las zonas en que actúen y comprometerse a cumplir niveles de exigencia mayores que los que se desprenden del simple respeto a las normas (Nieto, 2004). Esto lleva a proponer a Simon (2005) el concepto de "responsividad" como la necesidad de responder a las "expectativas legítimas de quienes esperan unos beneficios que la empresa puede proporcionar, por razones de prudencia y por razones de justicia, que son dos caras de la ética". Estas razones de justicia tienen lugar cuando entendemos que cualquier afectado por una actividad, que tenga con respecto a ella expectativas legítimas, tiene que ser tenido en cuenta. Este posicionamiento no está exento de cuestionamiento (Parsons, 2005).

Así mismo, como advierte Nieto (2023) el avance de la justicia restaurativa únicamente será posible si jueces, fiscales, agencias administrativas y también

[13] En la revista *Economics,* en el suplemento llamado "Capitalismo y Ética", se vierte una crítica feroz a la responsabilidad social corporativa. Se afirma que muchas de las acciones que algunas empresas enmarcan dentro de la responsabilidad social corporativa son puramente acciones para limpiar la fachada y que la empresa privada no sólo debe de actuar dentro de la legalidad, sino también dentro de la ética.

empresas que, por ejemplo, desean remediar extrajudicialmente el daño ocasionado por su actividad, la adoptan y la desarrollan.

En este marco se estaría disponiendo los mimbres para proveer nuevas respuestas de política criminal a la experimentación con animales ante riesgos de maltrato animal desde una óptica de "una sola salud" (*One Health*), impulsado por la OMSA con un enfoque integral y unificador. Ello supone equilibrar y optimizar la salud de las personas, los animales y los ecosistemas, mediante el reconocimiento y respeto de los vínculos de interdependencia existentes.

En este sentido, la concepción del maltrato animal como un problema de orden interrelacional con múltiples aristas conforma la puerta de entrada a la justicia restaurativa, sobre todo al potenciar una reacción más eficiente a la hora de abordar este fenómeno de manera que entrañe consecuencias prácticas.

Los animales sujetos a experimentación se constituyen potencialmente en víctimas especiales dada su imposibilidad de ser oídas, de poderse defender, de resarcirles del daño infringido, cuyo victimario es un centro de experimentación autorizado para una actividad en la que un determinado nivel de sufrimiento es "admisible" en aras de la investigación, y donde el límite de la legalidad y la moralidad es a veces muy sutil. En este entorno, además, su bienestar y la prevención del maltrato animal exige un compendio de garantías que, ineludiblemente, precisa de personas, hombres y mujeres, sensibles a las necesidades de aquellos en organizaciones con una cultura del respeto a los animales, así como en la erradicación de cualquier acto de maltrato a los mismos.

Los animales tienen intereses propios independientes de los humanos. La gran mayoría de los animales que se usan son seres sintientes, con capacidad para sufrir debido a nuestras acciones, sujetos de una vida que puede verse afectada para bien o para mal por el efecto de éstas. Para una creciente línea de investigadores, son seres conscientes del mundo y de lo que les ocurre, y eso implica relevancia y responsabilidad (Regan, 2016). Todo ello los hace objeto de consideración moral, lo cual supone restricciones o cambios en el modo de relacionarnos con ellos y, en concreteo, generándonos ciertas obligaciones.

Quizás la cuestión estriba en que, en el maltrato animal, de alguna manera cristaliza la desconsideración a "lo humano" al vulnerar la confianza en el cuidado de cualquier ser vivo.

7. EL CASO VIVOTECNIA, ¿OPORTUNIDAD PARA UN PROCESO RESTAURATIVO?

La situación descrita en el caso Vivotecnia, ante un posible maltrato animal, entreabre una eventual coyuntura para un proceso restaurativo, a través

de las diferentes metodologías restaurativas en las que este puede cristalizar: mediación, encuentros, círculos restaurativos, foros, etcétera. Por tanto, resulta aconsejable, desde una visión transversal del conflicto, generar espacios en los que diferentes personas de la organización, gerencia, investigadores/as, trabajadores/as e, incluso, alumnado en prácticas dialoguen en la comprensión de lo acontecido y sus consecuencias.

Con todo, un escenario de cumplimiento normativo, con la correspondiente autorización administrativa, fija un cumplimiento de mínimos en el bienestar animal. Siendo necesario, no es suficiente, por lo que para una potencial operación exitosa de un programa restaurativo se precisa, en primer lugar, de la existencia de una cultura organizacional favorable, sensible al bienestar animal, que implique a todas las personas de la organización en sus diferentes niveles de responsabilidad en un determinado proceder. Así, por ejemplo, la implementación de un sistema interno de gestión en la organización y/o empresa como el Modelo de Gestión Avanzada[14] (MGA) orienta a las empresas en la necesaria búsqueda de mejoras de competitividad, integrando conceptos de gestión aportados desde diferentes ámbitos como la Gestión del Conocimiento, la Excelencia en la Gestión, Innovación, y RSC, entre otras. En la cuestión que nos interesa, favorece el alineamiento de los valores, inquietudes (ambientales, sociales, etc.) y necesidades de las personas con las actividades y responsabilidades que desarrollan y con el propósito, misión, visión, valores, principios éticos y compromisos de la organización. Por tanto, supone una determinada forma de ser y estar que trasciende a la organización y contempla a la sociedad como un grupo de interés relevante.

Así mismo, en este recorrido, hay que señalar que, de alguna manera, un buen programa de cumplimiento normativo implica un gran «aprendizaje» para cada una de las personas de la empresa en el propio devenir personal en su vida privada. Al final y al principio, el *compliance* es una traslación de la cultura de cómo comportarse mejor en sociedad.

Llegado el caso, si somos testigos o tenemos conocimiento de un caso de maltrato animal, lo más importante es denunciarlo. Para ello, podemos acudir a una asociación o protectora de animales, o presentar una denuncia ante la administración correspondiente con competencias sobre animales, ante la fiscalía o ante un juzgado. No se puede admitir que ante el maltrato animal exista una especie de «silencio cómplice» de la sociedad y que se mire hacia el otro lado cuando seamos conocedores de la existencia de animales que están sufriendo indefensos este tipo de conductas (Magro, 2023).

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[14] El Modelo de Gestión Avanzada (MGA) es fruto de la participación y del consenso de personas expertas en gestión pertenecientes al Club de evaluación y a relevantes organizaciones e instituciones coordinadas por EUSKALIT. Vid. en https://www.euskalit.net/archivos/202301/modelogestionavanzada_2023.pdf?0 .

En el caso objeto de estudio, el diseño e implementación del programa restaurativo, ineludiblemente exige otorgar prioridad a la reparación del daño ocasionado al animal víctima del maltrato. Estos animales deben tratarse de manera especial y ayudarles a recuperar, si es posible, un buen estado de su salud general.

La incorporación de los intereses del animal maltratado se produce mediante la inclusión de la perspectiva animalista en la reparación y/o compensación razonable de los perjuicios ocasionados al animal. Así, las organizaciones no gubernamentales (ONG) están llamadas a ostentar un rol relevante, porque, al fin y al cabo, representan una forma de dar voz en el conflicto a la comunidad y una manera de procurar una reacción social.

En la implementación de este programa de justicia restaurativa, la figura del mediador/a-facilitador/a personifica una función básica para la comprensión del alcance de la conducta antisocial, lo que disminuiría la posibilidad de reincidencia. La persona facilitadora supone un catalizador que estimula el desarrollo del proceso, para lo que asiste a las partes, fundamentalmente, mediante la escucha; incentiva el entendimiento; y promueve el acuerdo. Todo ello teniendo en consideración las especiales características de la víctima de una forma de violencia que atenta contra la dignidad y el bienestar del animal maltratado, reconociendo dolor sufrido.

8. CONCLUSIONES

- La investigación sobre los Laboratorios Vivotecnia reveló prácticas compatibles con el maltrato animal, lo que provocó una gran indignación pública y puso en evidencia la necesidad de reforzar los controles y regulaciones en la experimentación animal.
- Aunque la experimentación animal es fundamental para el avance de la investigación biomédica, existe un importante debate ético sobre su moralidad. A pesar de que, en los avances en técnicas alternativas, como los cultivos celulares y las simulaciones computacionales, se están produciendo importantes pasos, aún no existen métodos completamente viables para reemplazar la experimentación con animales.
- La experimentación con animales está regulada por leyes y directivas que buscan proteger el bienestar animal. Sin embargo, el caso Vivotecnia demuestra que, a pesar de las regulaciones, es necesario un mayor cumplimiento y supervisión para evitar el maltrato animal.

- No parece que la responsabilidad penal de la persona jurídica tenga entrada en actividades administrativas autorizadas que regulan el empleo de animales para la investigación biomédica y, en su caso, provea una respuesta satisfactoria.
- La justicia restaurativa puede representar una oportunidad para abordar el maltrato animal como conflicto, sugiriendo que las empresas deben adoptar una responsabilidad social más amplia y comprometerse a cumplir con niveles de exigencia mayores que los establecidos por la ley.
- Un proceso restaurativo posibilita trabajar en el desarrollo de la responsabilidad de las personas y la organización, enfrentándoles al dolor ocasionado.

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RESTAURACIÓN AZUL: EL IMPACTO DE LAS NUEVAS ENTIDADES COMO LÍMITE PLANETARIO DENTRO DE LA JUSTICIA RESTAURATIVA VERDE[1]

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1. INTRODUCCIÓN

En el actual contexto global, donde estamos presenciando cómo los impactos antrópicos y, especialmente, el cambio climático y la degradación ambiental son cada vez más evidentes, los daños ecológicos y los también conocidos como crímenes medioambientales, de su vocablo en inglés environmental crimes, se posicionan como uno de los desafíos más urgentes para la salud planetaria. Desde la criminología verde, como línea de investigación que marca este estudio y, teniendo en cuenta que esta perspectiva pone el foco de atención sobre el daño medioambiental de origen antropocéntrico, los crímenes medioambientales no solo representan infracciones a los códigos penales, sino que suponen un fracaso ético y estructural para proteger los bienes comunes de la humanidad y las generaciones futuras. La criminología verde, como parte de la denominada criminología "crítica", considera que estas conductas, daños. e incluso, crímenes medioambientales tienen una vinculación con los sistemas económicos que priorizan el crecimiento económico por encima de la protección y conservación de la naturaleza (White, 2013).

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Por tal motivo, desde la criminología verde se definen los crímenes medioambientales como aquellas conductas humanas que, de manera intencional, imprudente o negligente, provocan un daño significativo al medio ambiente. Esta definición planteada aborda cuestiones de gran complejidad desde el punto de vista ecológico. El parámetro valorativo de "significativo" plantea una comprensión que difícilmente puede tener encaje en el contexto jurídico. Pese a esta construcción del término, podemos indicar que por significativo entendemos aquellas conductas que pueden generar un desequilibrio en el ecosistema, de tal forma que ocasionan o pueden ocasionar consecuencias negativas para el conjunto del sistema biológico del que forman parte. Algunas de estas conductas pueden ser contrarias a normativas diseñadas para proteger los ecosistemas y recursos naturales, incluso dentro de los diferentes órdenes jurisdiccionales (civil, penal y administrativo serían los ejemplos más ilustrativos). Con esta visión, algunos autores califican como crímenes medioambientales conductas no tipificadas e incluso algunos comportamientos que, aún estando dentro de los parámetros legales establecidos, provocan daños medioambientales de tal intensidad que pueden tener consecuencias a largo plazo (García Ruiz y Morelle-Hungría, 2023).

Dentro de los crímenes verdes o ambientales, existen diferentes clasificaciones atendiendo a la diversidad de conductas y/o daños generados, de forma que existen algunas clasificaciones. Lynch y otros (2017) realizan una categorización de estas conductas e incluyen desde actividades que generan contaminación masiva hasta la explotación no sostenible de los recursos. No obstante, cabe indicar que todos estos comportamientos afectan a los ecosistemas en su conjunto; algunas pueden afectar a la biodiversidad (flora, fauna e incluso a la especie humana), pero todas tienen un efecto ecosistémico. No podemos obviar que están interrelacionadas todas las especies (Morelle-Hungría, 2020a). En este marco, los océanos se convierten en un medio de gran interés, pues el uso que se realiza de estos es de gran intensidad. Algunas de las actividades humanas producen daños medioambientales y crímenes verdes que son un foco de atención para la criminología. El agua es el componente mayoritario del planeta y, por ende, el gran manto azul que forman mares y océanos permite que sean considerados factores clave para el bienestar y el equilibrio planetario. Como reguladores climáticos globales y fuentes esenciales de biodiversidad, los mares y océanos enfrentan amenazas críticas derivadas de las diferentes presiones antrópicas que ejerce nuestra especie, donde la frenética actividad desde la Revolución Industrial ha incrementado actividades que derivan en contaminación, la sobreexplotación pesquera y la destrucción de hábitats marinos, entre otras (Morelle-Hungría y Serra-Palao, 2025).

El impacto de los crímenes medioambientales (también denominados crímenes verdes) sobre los mares y océanos es especialmente alarmante (Belhabib y Le Billon, 2022). La contaminación marina, particularmente por plásticos y

microplásticos, es una de las principales formas de impactos ecológicos que derivan en daños medioambientales a gran escala (Rojo-Nieto y Montoto, 2017). Los microplásticos representan una nueva forma de contaminación que ha impactado de forma desproporcionada en nuestro día a día, afectando de forma multidimensional. Se trata de partículas de componentes plásticos con diámetro inferior a 5 mm, resultado de la descomposición de otros productos plásticos denominados fuentes primarias, principalmente productos empleados por nuestra especie, como ropa, productos químicos cosméticos o incluso otras fuentes secundarias derivadas de plásticos más grandes (Wang y otros, 2019; Nikiema y otros, 2020).

Estudios recientes han demostrado que las alteraciones ocasionadas por este tipo de contaminación son realmente preocupantes por ir más allá de la afectación a la composición del agua o su calidad. En algunos casos, estas pueden actuar como vectores de otras sustancias químicas tóxicas, incrementando el peligro de estas sobre los ecosistemas (Wright y Kelly, 2017; Nikiema y otros, 2020). Desde un prisma antropocéntrico, también interesa atender a este problema de gran impacto. La producción e incremento de esta contaminación ha llegado hasta las cadenas tróficas con tal intensidad que, en toda la red alimentaria, se puede detectar esta contaminación; su impacto alcanza todos los niveles tróficos, desde zooplancton hasta los mamíferos marinos situados en la parte más alta de estas cadenas (Lam y otros, 2018). Si vinculamos estos dos impactos, se observa cómo existen algunos polímeros plásticos que contienen una gran toxicidad al poder liberar otros aditivos que pueden tener efectos incluso cancerígenos, lo que amplifica el peligro de estas sustancias (Lithner y otros, 2011; Nikiema y otros, 2020). Ante esta evidencia, que demuestra el potencial efecto nocivo de este tipo de contaminación, debemos sumar que nuestra especie consume entre 74,000 y 121,000 partículas de microplásticos al año, cifra que puede incrementarse significativamente si se consideran las tasas actuales de contaminación (Cox y otros, 2019; Nikiema y otros, 2020). Con esta panorámica podemos decir que estamos ante una auténtica amenaza global para los ecosistemas marinos (Hoyo-Álvarez y otros., 2022).

Desde la perspectiva de la criminología verde, estos fenómenos no pueden entenderse de manera aislada, al ser un ejemplo de manifestaciones de sistemas de producción y consumo que priorizan el beneficio económico. Con el fenómeno de la globalización, se ha intensificado esta problemática, facilitando no solo el comercio de productos contaminantes, sino también la aparición de conductas o comportamientos nuevos o adaptados a la nueva situación generada en el ámbito internacional. De esta forma, vemos cómo han aparecido nuevos comportamientos delictivos en el ciberespacio o bien modalidades delictivas ya conocidas pero adaptadas a las características que impone la globalización, como puede ser el tráfico ilegal de especies. También podemos observar cómo han irrumpido nuevos

comportamientos delictivos transnacionales, como el tráfico ilegal de desechos a países con regulaciones ambientales menos estrictas (White, 2018).

El presente estudio tiene como objetivo principal analizar el impacto de las nuevas entidades, como los contaminantes químicos y los microplásticos, en los ecosistemas marinos, dentro del marco conceptual de los límites planetarios y la justicia restaurativa. A través de este análisis, se busca identificar estrategias efectivas de restauración marina que incorporen principios restaurativos, promoviendo no solo la reparación ecológica, sino también la justicia ecológica. En este sentido, los objetivos específicos incluyen la exploración del concepto límites planetarios para reforzar su relevancia en la protección medioambiental, caracterizar las nuevas entidades contaminantes, como uno de esos límites y evaluar el impacto que pueda tener con un enfoque interdisciplinarios; identificar casos relevantes de restauración marina con este enfoque y evidenciar como el enfoque integral permite abordar problemas de gran complejidad.

La metodología cualitativa empleada ha incluido la revisión documental como estrategia principal para recoger y analizar la información. Con este enfoque se realiza una exploración profunda de conceptos, marcos teóricos y casos específicos relacionados con la restauración marina y su conexión con los límites planetarios. Este enfoque metodológico cualitativo y la inclusión de una identificación de casos proporcionan una base sólida para cumplir con los objetivos del estudio. La combinación entre revisión documental y análisis empírico de iniciativas o casos concretos amplían el conocimiento de la restauración marina y su relación con estos valores umbral de forma que potencian la eficacia de los instrumentos normativos que se elaboren a través de esta evidencia.

2. CRIMINOLOGÍA VERDE COMO PUNTO DE PARTIDA PARA VALORAR LA RESTAURACIÓN AZUL

La criminología verde es una perspectiva que, dentro de la Criminología, dispone de la incorporación de enfoques filosóficos, epistemológicos y teóricos que permite esa visión multidimensional necesaria para analizar los daños medioambientales desde un enfoque crítico e integral (Morelle-Hungría, 2020a; Potter, 2013). Con esta perspectiva se puede categorizar los diferentes crímenes verdes, en atención al daño medioambiental, de esta forma tenemos en dos grandes categorías de actividades que por su potencial impacto pueden ser considerados como crímenes verdes: primarios y secundarios. Los primarios son aquellas conductas que causen o puedan generar un daño directo al medio ambiente (que puede afectar a los integrantes del medio ambiente: factores bióticos o abióticos), con esta argumentación podemos identificar actividades antrópicas como la deforestación, la pesca ilegal o la contaminación industrial

(Morelle-Hungría, 2017; Potter, 2017). En este contexto la deforestación masiva en zonas de gran interés para el equilibrio ecológico planetario como puede ser la selva amazónica, muchas veces impulsada por actividades agrícolas y mineras, no solo destruye hábitats terrestres, pues además de ese impacto con este tipo de actividad se contribuye a la alteración de los ciclos hídricos o inclusive, ciclos biogeoquímicos, y puede aumentar la sedimentación de aguas costeras (Lynch y otros., 2017). Además, se incluyen actividades que, pese a no ser delictivas, generan un daño medioambiental significativo, especialmente, por algunas de las técnicas de pesca empleadas como el arrastre (Bessudo y otros., 2021; Morelle-Hungría, 2017). Las presiones antrópicas descritas generan un gran impacto sobre los ecosistemas afectados potenciando la peligrosidad en todos los eslabones del ecosistema lo que dificulta los programas de recuperación o restauración que se pretendan implantar (Magdaleno Mas, 2023).

Las actividades englobadas dentro de los denominados crímenes verdes secundarios incluyen prácticas identificadas por muchos estados como delictivas - sancionadas por el Derecho penal - como la corrupción. A estas hay que sumar otras conductas como el incumplimiento normativo que junto al resto de conductas tienen un efecto potenciador del daño medioambiental (Escobar Mejía, 2023). Como ejemplos podemos citar la concesión de autorizaciones o permisos para realizar actividades industriales contaminantes, estas pueden contemplar comportamientos delictivos como delitos de falsificación documental, cohecho, prevaricación, entre otros (Potter, 2017). Esto es especialmente relevante en países en desarrollo, donde los sistemas de gestión, protección o regulación son todavía frágiles, con estas dinámicas que suelen ser particularmente prevalentes, pueden afectar a los mecanismos implantados de control y gestión lo que repercutirá sobre el daño medioambiental de determinadas actividades y, además, pueden perpetuar la degradación ecológica (Driesen, 2006). Como ya hemos comentado este tipo de comportamientos para nuestra perspectiva se pueden englobar como expresiones estructurales de un modelo o sistema económico implantado que busca, principalmente, la obtención de un rendimiento económico por encima de otras variables, lo que supone la desvalorización de la propia naturaleza y, por ende, de los recursos naturales necesarios para garantizar los servicios ecosistémicos (White, 2013).

Llegados a este punto es necesario profundizar sobre algunas de las conductas antes explicadas. Dentro de los crímenes verdes primarios existen algunas actividades que, atendiendo a su potencial daño medioambiental tienen consecuencias sobre uno de los límites planetarios, la pérdida de la biodiversidad por la destrucción de hábitats y recursos naturales. Como vemos estas pueden incluir numerosas actividades que tienen consecuencias significativas para los ecosistemas afectados. Además, existen nuevas prácticas que suponen una nueva amenaza para los mares y océanos, como pueden ser las prácticas de

extracción de la minería submarina (Beiser, 2023). Es una actividad que tiene como finalidad la obtención de minerales de interés para uso a diversos, pero estas prácticas tienen una cuestión extra para tener en cuenta: no se conocen todas sus consecuencias de las técnicas empleadas, pero su capacidad de destrucción de ecosistemas ubicados a gran profundidad sí que ha sido puesto en evidencia (Katona y otros., 2023).

Para la criminología verde estos actos o comportamientos son síntomas o manifestaciones de una crisis sistémica promovida por la globalización que requiere transformaciones profundas en los marcos legales y normativos con una perspectiva multinivel incluso a nivel global (Brisman, 2007; White, 2013). Especialmente interesantes son los estudios e investigaciones que argumentan la necesidad de un cambio de paradigma en los mecanismos jurídicos medioambientales, siendo necesaria una visión ecosistémica (Morelle-Hungría, 2020b). La modificación legislativa basada en un incremento punitivo ha demostrado ser insuficiente e incluso ineficaz, al no abordar las causas estructurales de los crímenes medioambientales ni priorizar la reparación de los daños generados (Marqués i Banquè, 2019). En este sentido, resulta especialmente interesante como la criminología verde se incorpora a enfoques restaurativos que incluyen no solo la reparación ecológica, sino también la participación activa de las comunidades afectadas en los procesos de justicia ecológica (Colás Turégano y Morelle-Hungría, 2020; Varona, 2023).

Un ejemplo de enfoque restaurativo es la implementación de programas de rehabilitación de hábitats marinos en áreas afectadas por la contaminación y la pesca excesiva (Pomare Vásquez y Furto Silva, 2023). Estas iniciativas, aunque limitadas, representan un paso hacia la integración de principios de justicia ecológica en la gestión de recursos naturales (Baker y Constant, 2020). Sin embargo, la criminología verde nos permite introducir una nueva variable en ese cambio necesario, la necesidad de contar con mecanismos que tiendan a adaptarnos y estos esfuerzos deben ir acompañados de cambios estructurales más amplios, incluyendo la regulación efectiva de las actividades industriales y una transición hacia sistemas económicos más sostenibles (Parenti, 2013; Brisman, 2015). En este sentido, resulta interesante la adopción de medidas integrales, tanto de adaptación como mitigación, planteadas como un mecanismo sinérgico para poder modular la respuesta a dar por parte del ordenamiento jurídico (Morelle-Hungría, 2020b). El impacto de estas prácticas en los océanos, que representan el corazón de los sistemas ecológicos globales, subraya la urgencia de adoptar enfoques interdisciplinarios y transformadores para abordar esta crisis (Hübschle y Lindley, 2024; García-Ruiz y South, 2022). A medida que los océanos continúan enfrentando desafíos sin precedentes, es imperativo que las políticas públicas, el derecho internacional y las prácticas de justicia ambiental se alineen con los principios de sostenibilidad y equidad ecológica (McCabe, 2023).

2.1. Microplásticos: consecuencias históricas de la contaminación por plásticos

El planeta está siendo sometido a una cantidad de contaminantes que lo asfixian y dirigen hacía un punto de no retorno. Estamos ante una de las formas de contaminación de mayor peligrosidad, ante lo conocido por la evidencia científica y lo que todavía nos queda por conocer. Se producen más de 400 millones de toneladas de plástico (UNEP, 2021), siendo dos tercios de vida corta, lo que permite en cuestión de segundos el plástico generado se convierta en basura que luego inunda nuestros mares y océanos y que, finalmente, acaba introduciéndose en la cadena alimentaria de los diferentes ecosistemas afectados (Alomar, Estarellas y Deudero, 2016). La producción de plástico ha alcanzado niveles históricos, en 2015, se registraron 380 millones de toneladas fabricadas con un total acumulado de 8,3 mil millones de toneladas desde 1950. Por sectores industriales podemos mencionar como la industria de bebidas genera más de 500 mil millones de botellas de plástico de un solo uso cada año (Greenpeace, s.f.). En 2018, en Europa se produjeron 61,8 millones de toneladas de plástico, mientras que en Asia la producción global fue un 51% de la producción mundial, destacando China con un 30%. Otros continentes como América del Norte y Europa ocuparon el segundo y tercer lugar con un 18% y 17% respectivamente (Greenpeace, s.f.; Geyer, Jambeck, y Law, 2017). Los microplásticos, son aquellos fragmentos menores a 5 mm generados, bien por la degradación de productos plásticos más grandes o fabricados intencionadamente a esa escala, los cuales se han infiltrado en todos los ecosistemas marinos, desde las aguas superficiales hasta los sedimentos profundos (Sharma y otros., 2024). Esta dispersión masiva que continúa durante un espacio temporal extenso constituye un tipo de actividad a la que podemos identificar e incluso denominar crimen medioambiental silencioso, este tipo de conductas por sus consecuencias y la escala de producción han sido ignoradas sistemáticamente por las estructuras legales tradicionales (Lynch y otros., 2017).

La expansión global de los microplásticos viene derivada de un modelo insostenible económico que antepone los beneficios de una única especie, la humana, y ello, lo podemos considerar como una de las crisis de mayor complejidad dentro de la actual situación ecológica planetaria. A diferencia de otros contaminantes, los microplásticos tienen una persistencia casi infinita, cuestión que viene derivada de la resistencia química de los polímeros que los componen. Esto, junto con su tamaño, facilita su incorporación en las cadenas alimenticias marinas, afectando tanto a organismos microscópicos como al nivel trófico superior y que, puede, incluso superar los ecosistemas marinos (UNEP, 2020, 2021).

Si realizamos una búsqueda de las causas vemos como la contaminación por plásticos es producto de un modelo de desarrollo económico basado en el con-

sumo masivo y el desecho. Si nos remontamos a la década de 1950, el plástico se promocionaba como un material revolucionario, pero su adopción masiva ignoró deliberadamente las implicaciones ambientales a largo plazo. Hoy, los microplásticos han sido detectados incluso en áreas remotas como el Ártico, lo que subraya la magnitud global de este problema (Kanhai y otros., 2020; Jambeck y otros., 2015). Estos hallazgos son consistentes con la hipótesis de que los plásticos han superado los límites planetarios al provocar alteraciones irreversibles en los sistemas ecológicos (Steffen y otros., 2015). Se han detectado en todos los mares y océanos, incluso en la Antártida donde han evidenciado la presencia de microplásticos en sedimentos de aguas profundas y aguas superficiales incluso se han estimado concentraciones primarias de microplásticos procedentes de productos de cuidado personal y de la colada (Waller y otros., 2017).

2.2. Impacto de los microplásticos en la contaminación marina

El impacto de los microplásticos podemos clasificarlos atendiendo, entre otras cuestiones, al impacto o daño medioambiental que pueda generar, de esta forma, estos contaminantes pueden producir impactos físicos y químicos. En relación con los primeros, los fragmentos plásticos pueden producir alteraciones fisiológicas sobre determinadas especies lo que puede conllevar, entre otras, a consecuencias sobre organismos marinos al obstruir sus sistemas digestivos lo que deriva en una reducción y alteración de su capacidad de alimentación (Prata y otros., 2021). Si analizamos los impactos químicos, debemos tener en cuenta que pueden actuar como vectores de contaminación química atendiendo a la capacidad de los microplásticos de absorber otras sustancias. Esta capacidad incluye la posibilidad de que se incluyan algunas sustancias tóxicas que se encuentran presentes en el medio acuático como: pesticidas, metales pesados y otras. Con esta transformación se puede ocasionar que los microplásticos contengan aditivos tóxicos que pueden acabar en la dieta de las especies marinas e inclusive, a otras especies fuera de los ecosistemas acuáticos, alterando las cadenas tróficas (Castañeta y otros., 2020; Rochman y otros., 2013). Este proceso, al igual que otros de los ya mencionados, tiene un potencial efecto sobre otros ecosistemas al ocasionar alteraciones de ecosistemas e incluso puede tener implicaciones directas para la seguridad alimentaria y la salud humana, dado que muchas comunidades dependen de los océanos como fuente primaria de proteína (Ruiz-Santoyo y otros., 2025; Barboza y otros., 2018).

Este tipo de contaminación, en criminología verde, puede ser considerada como un daño medioambiental deliberado pues conociendo los efectos nocivos de la misma, no hemos sido capaces de articular una regulación efectiva frente a los daños medioambientales que se han evidenciado. En parte esa falta de regulación y de implicación institucional puede ser debida a lo antes mencionado, las grandes corporaciones, que son las responsables de la

producción masiva de plásticos, vienen evitando su responsabilidad mediante un entramado burocrático a diferentes niveles que incluyen, estrategias de greenwashing, esto ocasiona que la atención se focalice hacia los consumidores, por ejemplo, en relación a las prácticas de reciclaje de los consumidores y no sobre los productores (White, 2018).

3. LÍMITES PLANETARIOS Y SU IMPLANTACIÓN COMO PARÁMETRO PRIORITARIO EN LA VALORACIÓN DEL DAÑO MEDIOAMBIENTAL

Para la (re)construcción de los mecanismos de protección, conservación y restauración de daños medioambientales es necesario implantar instrumentos de valoración de estos con valores cuantitativos. Por este motivo creemos que atendiendo a que la comunidad científica ha establecido valores umbral para los sistemas planetarios que garantizan el equilibrio que permite la vida en el planeta, serían estos los que debemos incorporar para analizar estos impactos. El concepto de límites planetarios se refiere a los umbrales biofísicos que, en caso de ser traspasados, pueden desencadenar cambios ecológicos abruptos e inclusive, potencialmente irreversibles a escala global. Este marco, propuesto por un grupo de científicos liderado por Johan Rockström (2009) ha sido ampliado posteriormente por otros autores (Steffen y otros., 2015). Desde los inicios de esta evidencia, se han identificado nueve procesos clave del sistema terrestre: el cambio climático, la integridad de la biosfera, la acidificación de los océanos, la alteración de los ciclos biogeoquímicos, el cambio de los usos terrestres, la alteración de los ciclos hidrológicos, las partículas de aerosoles, la capa de ozono y las nuevas entidades contaminantes). Lo que ha evidenciado la comunidad científica es que es necesario operar dentro de estos límites, pues resulta esencial para mantener la estabilidad y resiliencia de los ecosistemas que sustentan el equilibrio del planeta y que su vez garantizan la vida humana.

En este contexto, las nuevas entidades a las que se identifican como uno de esos límites se definen como compuestos químicos sintéticos, que incluyen a organismos modificados genéticamente, nanomateriales y microplásticos introducidos en el medio ambiente debido a actividades humanas (Steffen y otros., 2015). Estas sustancias, muchas de las cuales son persistentes y bioacumulativas, representan riesgos significativos para los ecosistemas marinos. Por ejemplo, los microplásticos, fragmentos diminutos de plástico de menos de 5 mm, se han detectado en todos los océanos del mundo y pueden ser ingeridos por una amplia gama de organismos marinos, desde el plancton hasta grandes mamíferos marinos, afectando su salud y, potencialmente, la salud humana a través de la cadena alimentaria (Alomar y Deudero., 2020; Ríos Fuster y otros., 2019; Barboza y otros., 2018).

La influencia de estas nuevas entidades en los ecosistemas marinos es multifacética. Los microplásticos pueden actuar como vectores de contaminantes químicos, transportando sustancias tóxicas adheridas a sus superficies, lo que incrementa la exposición de los organismos marinos a estos compuestos nocivos (Rochman y otros., 2013). Además, la acumulación de microplásticos en los sedimentos marinos puede alterar las propiedades físicas del hábitat, afectando procesos ecológicos fundamentales como la filtración de agua y la disponibilidad de nutrientes.

Desde la perspectiva de la ecocriminología, es crucial analizar cómo la producción y liberación de estas nuevas entidades constituyen una forma de daño medioambiental que trasciende las fronteras nacionales y afecta a la comunidad global. Morelle-Hungría (2022) destaca la necesidad de integrar el concepto de límites planetarios en las estrategias de seguridad integral para abordar eficazmente amenazas como el cambio climático y la contaminación por nuevas entidades. Este enfoque permite una comprensión más profunda de las interacciones entre las actividades humanas y los sistemas ecológicos, promoviendo políticas que buscan prevenir y mitigar los daños antes de que se alcancen puntos de no retorno.

4. RESTAURACIÓN AZUL: LA RECONEXIÓN CON LA NATURALEZA PARA HACER FRENTE A LA NUEVA REALIDAD

El proceso estratégico que busca revertir los daños causados por actividades antrópicas o fenómenos naturales es calificado como restauración. La finalidad es intentar recuperar a estos hábitats su biodiversidad, la funcionalidad ecológica que disponían como sistemas naturales y, a su vez, reconstituir la capacidad para proveer servicios ecosistémicos esenciales previos a la situación derivada. Por ello, vemos como se reconoce el valor intrínseco de los ecosistemas y el papel que juegan en el equilibrio planetario, siguiendo lo descrito por los límites planetarios de Rockström y otros (2009). En este sentido, debemos tener en cuenta, tal y como ya hemos establecido, que, en el caso de los ecosistemas marinos, estamos ante sistemas naturales que se consideran de gran importancia. Se trata de una actividad ambiciosa y de gran complejidad al tratarse de ecosistemas que presentan una gran biodiversidad y que, además, tienen funciones de importancia planetaria, por ejemplo, se identifican como sumideros de carbono y esto permite regular el clima, de ahí la compleja situación a la que nos enfrentamos.

Entre los sistemas ecológicos a los que se han generado daños medioambientales de gran intensidad se encuentran, entre otros, hábitats marinos calificados de prioritarios. Por ejemplo, praderas submarinas de especies fanerógamas, los arrecifes de coral, los hábitats bentónicos y las zonas de reproducción y desove

de peces. Algunas de estas especies, como la *Posidonia oceanica*, actúan como mecanismo de lucha contra el cambio climático por ser sumideros de carbono y permitir la reducción de la acidificación de mares y océanos (Morelle-Hungría, 2023), o también los arrecifes de coral que protegen las costas de la erosión y sirven de refugio para numerosas especies marinas (Duarte et al., 2020), cuestión que muestra la urgencia de implantar mecanismos eficaces que reviertan los daños medioambientales o impactos generados.

Desde un punto de vista ecológico, con la restauración se implantan mecanismos dirigidos a revertir la pérdida de biodiversidad e incluso, restablecer funciones ecosistémicas críticas o vulnerables. Tener mares y océanos en un buen estado ambiental, contribuye al secuestro de carbono, por incluir especies que actúan como un sumidero de gases de efecto invernadero. O incluso, desde un punto de vista antropocéntrico, socialmente, protege a las comunidades costeras frente a fenómenos extremos como tormentas e inundaciones (Beck y otros., 2018).

Aunque se ha tardado mucho en elaborar normas de protección sobre el medio marino con un enfoque integral y holístico. En la actualidad, se ha reforzado el marco normativo implantado, pese a estos esfuerzos es necesario plantearse si habremos llegado a tiempo. El Reglamento (UE) 2024/1991 del Parlamento Europeo y del Consejo, de 24 de junio de 2024, relativo a la restauración de la naturaleza, ha supuesto un avance significativo en la implantación de mecanismos de acción con enfoque ecosistémico especialmente en el caso analizado. Estamos ante un instrumento normativo que establece un marco vinculante para la restauración de ecosistemas degradados en toda la Unión Europea (UE). Como se observa, se extrae o al menos se puede inferir que la naturaleza tiene un valor intrínseco para el conjunto del planeta y que la restauración de los daños medioambientales que hemos generado y producido resulta esencial no solo para los servicios que proporciona al ser humano, sino también para respetar los límites planetarios descritos por Rockström y otros. (2009) y de esta forma garantizar el equilibrio necesario para el mantenimiento de la vida.

Del reglamento, además, se desprende que se han superado algunos de los umbrales críticos evidenciados por la comunidad científica, particularmente, en los ecosistemas marinos, terrestres y de agua dulce. Incorpora, el legislador, disposiciones específicas para restaurar ecosistemas marinos, asimismo se destaca el destacado papel que estos sistemas naturales disponen en la regulación climática y en la provisión de servicios ecosistémicos esenciales. Por ejemplo, se incluyen indicaciones para hacer frente a la pérdida de hábitats, la biodiversidad marina o inclusive, en la regulación de actividades humanas que pueden alterar negativamente a estos sistemas naturales o sus componentes. En este sentido, el artículo 5, aborda la restauración de hábitats marinos con

la indicación expresa de implementar medidas de restauración de aquellas zonas degradadas priorizando aquellos hábitats con funciones críticas, como pueden ser las praderas de fanerógamas marinas, especialmente las de posidonia, al ser reconocidas como el pulmón del Mediterráneo (Morelle-Hungría y Serra-Palao, 2024). En este contexto, además, se exige que la restauración de al menos el 30% de estos hábitats degradados sea una realidad para 2030. Esta indicación ambiciosa no se queda ahí, se prevé seguir incrementando la cifra, llegando al 60% para 2040 y al 100% para 2050. Otro aspecto de interés es que se introduce que las medidas que se adopten deben alinearse con la Directiva Marco sobre la Estrategia Marina (2008/56/CE), que establece el "buen estado ambiental" como objetivo para los ecosistemas marinos, como expresa el artículo 6. Se incluyen indicadores como los incorporados en las estrategias marinas, por ejemplo, la distribución de especies clave, la conectividad entre hábitats marinos y la reducción de presiones antropogénicas, como contaminación y sobrepesca, ello supone una muestra de como se intenta recolectar con las diferentes normas con perfil ecosistémico que se han implantado en el medio marino.

El reglamento pese a que de forma expresa no aborda tal concepto, sí que permite introducir de forma indirecta el concepto de límites planetarios, lo hace al subrayar que la restauración de los ecosistemas marinos permite contribuir a evitar el colapso de sistemas esenciales para la estabilidad planetaria. Teniendo este argumento como premisa se permite abordar algunas de las actividades antrópicas que generan inestabilidad en algunos de los límites planteados, por ejemplo: la sobrepesca, la contaminación marina y la destrucción de hábitats. Son actividades que han propiciado, junto a otras, una pérdida de biodiversidad en el planeta que puede comprometer la capacidad del océano para regular el clima y sostener la vida marina (Steffen y otros., 2015; Morelle-Hungría, 2022).

La restauración ecológica azul para mares y océanos debe basarse en principios fundamentales que guían su implementación. Según el marco proporcionado por el Programa de las Naciones Unidas para el Medio Ambiente (UNEP, 2020), la restauración debe de contemplar las interconexiones de los diferentes componentes del ecosistema afectado, es decir, un enfoque ecosistémico; además, deben diseñarse con la capacidad de mejorar la capacidad del ecosistema de resistir futuras perturbaciones, incrementando la resiliencia de los ecosistemas afectados; todas las medidas elaboradas deben surgir de procesos participativos de los diferentes sectores sociales, una cuestión clave para garantizar la aceptación de las medidas a implementar y conseguir el éxito de las mismas; por último, atendiendo a la complejidad del funcionamiento ecosistémico se deben e introducir herramientas que permitan adaptar a nuevas situaciones las medidas implantadas de forma que garantice su eficacia.

5. CASOS DE ÉXITO DE RESTAURACIÓN DE ECOSISTEMAS ACUÁTICOS

A continuación, queremos abordar, de forma breve, algunos casos en los que se han realizado restauración de ecosistemas acuáticos y que consideramos cumplen con los objetivos marcados en el presente estudio. En el primer caso, abordamos la restauración de un ecosistema de gran interés a nivel global, el coral. En la Gran Barrera de Coral, los programas de restauración se han centrado en trasplantar fragmentos de coral cultivados en viveros submarinos para intentar revertir la situación actual. Estos proyectos, liderados por instituciones como la Great Barrier Reef Foundation, han utilizado tecnologías innovadoras, como robots submarinos para distribuir larvas de coral en áreas degradadas. De esta forma vemos como la incorporación de las nuevas tecnologías resultan de gran interés en estos casos. Los resultados han mostrado mejoras significativas en la cobertura coralina y en la biodiversidad local (Great Barrier Reef Foundation, 2020). Por ejemplo, hay estudios de reintroducción de 400 toneladas de coral tras el paso de un ciclón en la Isla Hook (Reef Resilience Network, 2019) lo que demuestra que este tipo de prácticas pueden ser interesantes para revertir situaciones o consecuencias negativas por catástrofes naturales. Sin embargo, cabe plantearse si ello basta o bien es necesario abordar otros límites que conectan con esta problemática, como es la acidificación oceánica (Morelle-Hungría, 2022).

En segundo lugar, tenemos las reforestaciones de manglares en el sudeste asiático; los manglares son un tipo de ecosistema clave en la protección de las costas y en la captura de carbono al ser sistemas ecológicos anfibios. En países como Filipinas e Indonesia se han implementado programas de reforestación realizados por ONGs como Mangroves for the Future que han involucrado a las comunidades indígenas locales en la plantación y monitoreo. El resultado de estas prácticas ha sido muy positivo, según la UNEP (2020) además de recuperar las funciones ecológicas de estos ecosistemas se ha contribuido a una mejora de las comunidades locales. En este sentido resulta de interés analizar el caso de Celestún, donde las causas de desaparición del manglar fue la construcción de carreteras principales. Con esta obra se interrumpió el flujo de agua superficial lo que alteró las condiciones fisicoquímicas provocando el incremento de la salinidad durante periodos largos llegando a casi duplicar los valores de la zona. En este caso se construyó un canal que conectó nuevamente el agua de la laguna con la zona impactada para rehabilitar la hidrología en la zona, contando con la participación activa de las comunidades locales (Teutli-Hernández y otros., 2020).

El tercer caso al que queremos referirnos es la restauración de praderas marinas en el Mediterráneo. Algunos países como España e Italia han implementado casos de éxito con algunas fanerógamas marinas, especialmente *Posidonia oceanica,* al ser esenciales para la biodiversidad marina y la mitigación del cambio climático. Los casos que han obtenido más éxito han sido la plantación direc-

ta de la especie y la implementación de medidas o instrumentos sectoriales hacía algunas de las actividades más peligrosas en zonas de gran afluencia turística marina (Morelle-Hungría y Serra-Palao, 2024). También se han descrito métodos más innovadores en algunas zonas específicas, como por ejemplo, el proyecto del Instituto de Ciencias del Mar de Barcelona en el canal de Menorca y en la Costa Brava. Mediante el llamado sistema "Bádminton" restauran el fondo marino mediante la plantación de la especie con el uso de estructuras que se parecen a las raquetas de bádminton. Este peculiar instrumento está marcado con semillas que se insertan en el lecho marino, un método que además de respetar el medio ambiente protege a las semillas durante la implantación pues se trata de especie de gran fragilidad lo que reduce el riesgo de desplazamiento por las corrientes (Álvarez, 2024).

La restauración marina no solo es una estrategia de mitigación, sino también una forma de justicia ecológica. No podemos obviar que estos ecosistemas han sido víctimas de una explotación desproporcionada, llegando a soportar una presión antropogénica que refleja desequilibrios a diferentes escalas. Como se ha observado, implantar programas de restauración que integran principios de equidad y sostenibilidad tienen el potencial de corregir algunas de estas injusticias, al tiempo que abordan los daños ecológicos acumulativos. Pese a ello, con la restauración no basta, pues deben de reducirse este tipo de presiones e incluso prohibir algunas de ellas consideradas las más destructivas. En muchos casos, las mismas corporaciones que financian proyectos de restauración son responsables de las actividades que dañaron los ecosistemas en primer lugar. Por ello, la criminología verde aboga por un enfoque preventivo y transformador que combine la restauración con la implementación de marcos regulatorios más estrictos y efectivos (White, 2018).

6. DISCUSIÓN

Los mecanismos introducidos por el legislador para hacer frente a conductas que atentan o ponen en peligro a ecosistemas se han centrado en la imposición de sanciones punitivas, sin embargo, estas han resultado ser insuficientes e ineficaces. Las sanciones económicas no resultan suficientes para hacer frente a los daños generados, especialmente causados por grandes corporaciones, por ello, además no resultan eficaces para disuadir a estas de la comisión de estas conductas. A ello hay que sumar la falta de mecanismos efectivos para supervisar el control de esas sanciones lo que repercute en la dimensión social y ecológica del daño causado, en sentido que estos enfoques punitivos suelen ignorar estas dimensiones. La implementación de modelos de justicia restaurativa en casos como el planteado se enfrenta a barreras significativas. No existen marcos legales claros a nivel internacional, por la falta de consenso como hemos

venido presenciando en la normativa de plásticos en la propia Unión Europea, por ejemplo. A ello se suma las desigualdades de poder entre los actores involucrados, comunidades locales frente a grandes corporaciones.

La integración de los límites planetarios en las políticas a nivel internacional representa una oportunidad clave para poder transformar la gobernanza de mares y océanos. Posibilita, entre otras cuestiones, establecer valores umbrales claros y cuantificables para evitar daños irreversibles a los ecosistemas. Pero, para alcanzarlo, se deben romper barreras de gran complejidad, la falta de consenso a nivel internacional o los intereses económicos de los modelos implantados generadores de los daños medioambientales descritos en esta investigación, son sólo algunos ejemplos. En este caso es necesario incorporar mecanismos éticos en cuanto a los sistemas de consumo y producción de plásticos.

En los procesos de restauración se deben de conjugar con programas preventivos que inciden sobre las causas estructurales del daño ocasionado. Por ello será necesario incluir e implementar regulaciones más estrictas, incentivos para adoptar prácticas verdaderamente sostenibles y promover la educación medioambiental en diferentes escalas. Con estas medidas se posibilitará que la sociedad que debe de formar parte de este proceso transformador hacía una justicia restaurativa verde participe de forma crítica y activa que, unido a los instrumentos normativos implementados con un enfoque ecosistémico, potenciarán la transformación de todo un sistema socioeconómico para hacer frente a un contaminante silencioso en un mundo de gran fragilidad como es el medio marino.

7. CONCLUSIONES

Se ha mostrado como la contaminación por plásticos y los crímenes ecológicos requieren un cambio de paradigma, especialmente en la implementación de una verdadera justicia ecológica. El modelo de protección medioambiental centrado en incorporar un marco regulador sancionatorio ha sido puesto en evidencia por su clara y manifiesta ineficacia, ello perpetúa un modelo de producción y consumo insostenible. En este contexto los enfoques descritos basados en modelos de justicia restaurativa surgen como una alternativa para afrontar ese cambio necesario, pero se enfrenta a grandes dificultades y barreras. La falta de un marco normativo claro para su implantación, así como las desigualdades de poder entre los sectores implicados en la gobernanza marina dificultan su aplicación. Por ello es necesario una revisión integral de los sistemas regulatorios y, además, reforzar los planteamientos con mecanismos éticos que prioricen la salud planetaria y el bienestar de todas las especies.

Pese a lo anterior, en este estudio se ha puesto de manifiesto que abordar la contaminación por microplásticos desde la restauración de los ecosistemas

degradados resulta de gran complejidad. Los impactos de este contaminante impactan a diferentes escalas, desde ecosistemas marinos hasta la propia especie humana, a través de los servicios ecosistémicos como la alimentación. Es necesario transformar el modelo globalizado de producción y consumo que ha llevado a la situación actual, con la proliferación de estos contaminantes. Para alcanzar este objetivo se ha puesto de manifiesto que será necesario incrementar el marco normativo de tal forma que se restrinja la producción y el uso de sustancias nocivas a cualquier escala. Pero esto no bastará y será necesario implantar estrategias a diferentes niveles como, por ejemplo, en la educación.

Integrar los límites planetarios en las políticas globales es prioritario, contar con valores umbrales que cuantifiquen el impacto antrópico podría ser un mecanismo efectivo, siempre que se acompañe de compromisos estatales de reducir el resto de los contaminantes. En estas medidas contar con las comunidades locales será fundamental para alcanzar el éxito de la eficacia de la medida. El conocimiento sobre el medio que pueden aportar estas comunidades resultará de gran valor al aportar información que únicamente puede ser incorporada a través de quienes mejor conocen los ecosistemas. Pese a ello, todavía existen grandes dificultades que deben ser tenidas en cuenta, existe una falta de consenso internacional y las presiones de las grandes corporaciones o potencias que persiguen intereses económicos quieren seguir priorizando un modelo insostenible.

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PERSPECTIVAS DESDE DIFERENTES CONTINENTES/ PERSPECTIVES FROM DIFFERENT CONTINENTS

CRIMINOLOGÍA VERDE Y JUSTICIA RESTAURATIVA COMO UN MARCO EMANCIPADOR

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1. INTRODUCCIÓN

El campo emergente de la Victimología verde se considera una lente útil para comprender las complejidades de la victimización resultante del daño ambiental, particularmente en el contexto de la colonización, los paradigmas de desarrollo occidentales y el privilegio epistémico, así como el colonialismo científico persistente. Esta área disciplinar amplía la Victimología tradicional al reconocer que las víctimas de los delitos ambientales no se limitan a los seres humanos, sino que también incluyen entidades no humanas, como animales, plantas y ecosistemas (Goyes & South, 2019). Esta perspectiva más amplia desafía el enfoque antropocéntrico de la Victimología dominante que, en gran medida, ha pasado por alto las dimensiones ambientales de la victimización, aunque resulten esenciales para abordar la naturaleza multifacética e interseccional de la victimización ambiental y el acceso a la justicia. Este cambio es especialmente relevante en el continuo colonial-postcolonial, en el que las poblaciones indígenas se han enfrentado históricamente a injusticias tanto sociales como medioambientales debido a la explotación colonial o a la «maldición de los recursos», y a la imposición de ideologías de desarrollo occidentales que priorizan el crecimiento económico sobre la sostenibilidad ecológica. Marx (ci-

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tado en Morrison, 2005, pp. 300-301) señaló que los albores de la producción capitalista fueron posibles gracias a la explotación de los pueblos y los recursos de África, Asia y América.

Según Blaustein, Pino, Fitz-Gibbon y White (2018), muchas políticas y prácticas de desarrollo están arraigadas en la orientación colonial de que los «no europeos» o las comunidades indígenas y los sujetos coloniales se consideraban «atrapados» en tradiciones primitivas y eran vistos simplemente como barreras para el «progreso». Esta devaluación moral de los sujetos coloniales se vio alimentada por la explotación de los recursos naturales y la mano de obra que, en última instancia, amplificó las desigualdades entre los amos coloniales y los países colonos, así como dentro de las propias colonias, y estableció unas relaciones duraderas, en el continuo colonial-poscolonial, basadas en la dependencia económica, reforzando la etiqueta de países «subdesarrollados» (Peacock, 2023).

Por todo ello, los siguientes apartados mostrarán la necesidad de una comprensión del medio ambiente no sólo en términos materiales, sino dentro de un marco indígena eco-filosófico, restaurativo y crítico para volver a centrar una ontología, epistemología y axiología indígena abundante en sus valores culturales y relacionales para, en última instancia, mejorar la protección y la justicia ambiental más allá de la ortodoxia de la arquitectura del derecho penal occidental o la hegemonía de los conceptos occidentales de desarrollo y ciencia.

2. DE LOS MÁRGENES AL CENTRO

Aliverti, Carvalho, Sozzo y Chamberlen (2021) destacan la centralidad del «crimen y los criminales» como puntos nodales en la mentalidad imperial cuando la «ciencia del crimen» se utilizó como herramienta crucial en la producción de conocimiento sobre una sociedad desconocida desde el punto de vista del colonizador. En lo que respecta a la necesidad de seguir siendo conscientes del nexo entre el derecho y la justicia penal y las esferas histórica, geopolítica, cultural y económica de la sociedad -y, por lo tanto, de ir más allá de los estrechos marcos constitucionales y legales-, cabe señalar que las prisiones, como instituciones totales, se importaron al Sur global junto con la policía colonial, y fueron fundamentales en el régimen colonial para subyugar y regular la conducta de los súbditos colonizados mientras se explotaba su mano de obra y sus tierras, pero también para seguir construyendo la dominación capitalista y la cultura de control de la modernidad colonial. O lo que Reiman (2004) denomina «Los ricos se hacen más ricos y los pobres van a la cárcel».

De manera similar a las leyes y reglamentos de la época colonial en el sur de África, que fueron diseñados específicamente para criminalizar la caza furtiva -a pesar de que la caza y la pesca han sido prácticas tradicionales de subsisten-

cia para las comunidades indígenas- y a los colonos coloniales a los que se les permitió seguir cazando (Dore, Hübschle y Batley, 2022), los criminólogos críticos contemporáneos (Roth y Kauzlarich, 2014) demostraron cómo las élites políticas siguen manteniendo sus privilegios, estatus e intereses, no sólo mediante la definición de los delitos, sino también dando forma a las respuestas de la justicia penal a los mismos. El régimen del apartheid en Sudáfrica es un buen ejemplo. En el centro de las violaciones masivas de los derechos humanos se encontraba la necesidad de mano de obra barata y de fácil suministro para garantizar la explotación continuada de la gran riqueza mineral del país por parte de la élite blanca (Peacock, 2011). Ya en la década de 1990, el antropólogo colombiano-estadounidense Escobar (1995) afirmó que

> ha quedado claro no sólo que el capitalismo deteriora o destruye las condiciones sociales y medioambientales en las que se basa (incluidas la naturaleza y el trabajo), sino también que la reestructuración capitalista se produce cada vez más a expensas de esas condiciones (p. 200).

La naturaleza controvertida del derecho medioambiental en un contexto poscolonial está profundamente influida por las prácticas culturales indígenas y los marcos jurídicos que las rigen. Los derechos indígenas, especialmente en relación con la gobernanza medioambiental, suelen quedar marginados en los sistemas jurídicos contemporáneos. Aunque la Corte Interamericana de Derechos Humanos, la Corte Africana de Derechos Humanos y la Corte Constitucional de Colombia han reconocido gradualmente el alcance de los derechos colectivos de los pueblos indígenas a la libre determinación y a la tierra y los recursos naturales, Izquierdo y Viaene (2018) opinan que, a pesar de estos importantes avances, la hegemonía de los derechos humanos permanece. Ello es así porque aún no se han abordado los desafíos divisorios a los que se enfrentan muchos pueblos indígenas en sus experiencias del mundo como no dual, interrelacionado e interdependiente, sin separación entre lo material, lo cultural y lo espiritual. No sólo los seres humanos se consideran sagrados, sino que también las colinas, las cuevas, el agua, las casas, las plantas y los animales tienen agencia (Peacock, 2023).

La intersección de los legados coloniales y la legislación medioambiental moderna crea, por tanto, un paisaje complejo en el que los pueblos indígenas luchan por el reconocimiento y la justicia. En Australia, por ejemplo, el reconocimiento jurídico de los derechos indígenas al agua sigue estando plagado de dificultades. Jackson y Palmer (2015) destacan que el estatus jurídico formal del agua medioambiental suele equipararse a los derechos de consumo, una perspectiva que las comunidades indígenas cuestionan al buscar un trato equitativo en un sistema caracterizado por una intensa competencia por los recursos hídricos. Esto demuestra la tendencia más general de que las reivindicaciones indígenas sobre los recursos ambientales a menudo son dejadas de lado por los

marcos jurídicos imperantes que priorizan los intereses estatales sobre los derechos indígenas (Goyes & South, 2019). Esta lucha por la justicia del agua es emblemática de la contienda más amplia por el reconocimiento de las estructuras de gobernanza y los protocolos culturales indígenas, que son esenciales para la gestión eficaz de los recursos naturales (Jackson, & Barber. 2013). La situación es igualmente compleja en Indonesia, donde los derechos *ulayat* de los pueblos indígenas no se abordan adecuadamente en el ordenamiento jurídico. La transición a la autonomía regional no se ha traducido necesariamente en una mejora de la gobernanza medioambiental para las comunidades indígenas; por el contrario, a menudo se ha traducido en una transferencia de responsabilidades medioambientales de los gobiernos centrales a los locales, sin un apoyo adecuado a los derechos indígenas (Halkis & Amri, 2019). Lo anterior pone de manifiesto una laguna crítica en el reconocimiento jurídico de las prácticas medioambientales indígenas que, a menudo, se desestiman en favor de iniciativas de desarrollo dirigidas por el Estado que no tienen en cuenta los conocimientos ecológicos tradicionales (Datta y Marion, 2021).

A escala mundial, la aparición de movimientos indígenas ha empezado a reconfigurar el discurso en torno a la gobernanza medioambiental. Los grupos indígenas reivindican, cada vez más, sus derechos en el contexto del ecologismo mundial, desafiando los patrones históricos de exclusión de los esfuerzos de conservación. Este cambio es significativo, ya que altera las narrativas tradicionales que a menudo han retratado a los pueblos indígenas como obstáculos para el desarrollo en lugar de como administradores vitales del medio ambiente. El reconocimiento del conocimiento y las prácticas indígenas es crucial para lograr resultados ambientales sostenibles, como lo demuestra el creciente cuerpo de literatura que aboga por la integración de las perspectivas indígenas (y de género) en la política ambiental (Goyes & South, 2019; McGregor, 2004; Milne et al. 2023).

Sin embargo, los marcos jurídicos que rigen la protección del medio ambiente a menudo no incorporan adecuadamente los derechos indígenas. Por ejemplo, los principios del Consentimiento Libre, Previo e Informado (CLPI) con frecuencia no se aplican de forma adecuada, lo que conduce a la explotación continua de las tierras y los recursos indígenas (Rahail et al., 2018). El incumplimiento de estos principios no solo socava la soberanía y la agencia indígenas, sino que también perpetúa las injusticias ambientales que afectan de manera desproporcionada a las comunidades marginadas (McGregor, 2004; Whyte, 2017).

Además de las omisiones mencionadas, los fallos de la noción metafísica de retribución y los conceptos teológicos de expiación inherentes a la anacrónica y anatemática institución occidental arcaica de control y castigo siguen estando muy extendidos hoy en día -tanto en el Norte como en el Sur globales-, a pesar de los avances realizados en nuestra comprensión científica de los conflictos y las situaciones problemáticas (Peacock, 2023). No es de extrañar que el estudio

piloto de Dore, Hübschle y Batley (2022) demostrara igualmente los fracasos de las respuestas tradicionales de la justicia penal a la hora de abordar eficazmente la oleada contra el tráfico de especies silvestres en Sudáfrica, a pesar de haberse transformado en una empresa casi militar que recuerda a la ideología de la ley y el orden del régimen del Apartheid, sin perjuicio de los límites constitucionales. La impugnación de los preceptos occidentales importados de «ilegalidad», las lagunas normativas, los delitos cometidos por empresas estatales y la negación de las prácticas culturales en el marco del paradigma de la conservación fortificada, que concede derechos de acceso excluyentes a actores poderosos como los turistas, mientras que los habitantes originales de la zona son tachados de intrusos, son algunos de los diversos factores que contribuyen a que la caza, el comercio y el tráfico de especies silvestres sigan siendo una empresa de bajo riesgo y alta recompensa. Más allá de la metafísica, una sólida investigación empírica ha hecho tambalear la fe intuitiva en el efecto disuasorio del castigo, ya sea en transgresiones contra el medio ambiente, la violencia u otros tipos de conflicto (Fattah, 2020).

Un marco crítico de justicia restaurativa sería útil para volver a centrar las visiones del mundo, las experiencias, las necesidades y los contextos culturales de los pueblos indígenas, con preferencia respecto a las interpretaciones y respuestas eurocéntricas a la victimización indígena y al daño medioambiental. Dicho marco debe tener en cuenta las realidades locales y la singularidad del contexto, sin abandonar del todo las perspectivas globales en un mundo poscolonial globalizado de injusticias transnacionales, al integrarse en torno a un centro indígena dinámico para acumular más prácticas de conocimiento tradicional, situadas dentro de un elemento cultural. Los valores relacionales de la justicia restaurativa se presentan con un alejamiento del individualismo y la mercantilización de los recursos medioambientales (incluida la superexplotación de la mano de obra) hacia el reconocimiento de la interdependencia (global) y la valoración de las comunidades y su patrimonio cultural. Sin embargo, sigue siendo crucial no confundir la justicia indígena con la justicia restaurativa, ya que las comunidades indígenas constituyen globalmente un grupo heterogéneo con más de 476 millones de indígenas que viven en 90 países de todo el mundo y que mantienen, al menos o en parte, sistemas de conocimiento, creencias y valores culturales distintos, así como diferencias en los sistemas sociopolíticos, jurídicos y económicos (Cunneen, 2018; Peacock, 2023). Sin la debida consideración a tal variabilidad y diferenciación, la implementación de prácticas restaurativas podría verse como otra ola de colonización dentro del dominio actual del control social, asegurando también la hegemonía y el respaldo del sistema eurocéntrico de justicia importado, en lugar de la reafirmación y el reconocimiento de alternativas basadas en la costumbre, en nuestros esfuerzos por avanzar en la justicia ambiental y social.

El proyecto pionero de Dore, Hübschle y Batley (2022) hacia la justicia restaurativa medioambiental adoptó un marco conceptual para hacer que el sistema de justicia penal fuera más eficaz y receptivo, con la formación de alianzas institucionales, el desarrollo de prácticas localizadas sólidas y la creación de mecanismos de colaboración que impulsan la transformación del sistema en su conjunto (véase también Hübschle, Dore y Davies-Mostert, 2022). Aunque es loable abordar la reducción de daños o la idea errónea de que los daños ambientales (y los delitos contra la vida silvestre, en concreto) no tienen víctimas, Fattah (2006) advierte de la ampliación de la red de control social cuando se introducen principios restaurativos para reformar el sistema de justicia penal como medida para corregir sus déficits o como remedio a sus fallos, sin reflexionar sobre la contradictoria filosofía punitiva intacta que subyace, impregna y derrota todo intento de reforma de la justicia penal. También está ampliamente aceptado hoy en día que aumentar el poder del sistema de justicia penal puede ser contraproducente cuando se trata de abordar las causas estructurales subyacentes de la delincuencia, la desigualdad y la victimización. También existe el riesgo de que cualquier estrategia policial proactiva se utilice para atacar de forma desproporcionada a las comunidades marginadas. En este sentido, conviene no olvidar, por ejemplo, las investigaciones de Chris Cunneen (2007) y Harry Blagg (2008) sobre la victimización de los aborígenes en Australia o las prácticas policiales discriminatorias en EE.UU. (Siegler & Admussen, 2021).

La saludable advertencia de Louk Hulsman (1986) sobre la necesidad crucial de trascender las conceptualizaciones comparativas y a veces absorbentes de la justicia penal, en relación con la victimización y el acceso a la justicia, también sería aplicable aquí, de lo contrario, se correría el riesgo de quedar atrapado en una red de oposiciones de apoyo del modelo de justicia penal en lugar de desafiar verdaderamente las ideologías punitivas de defensa social. Sin ese desafío, se daría lugar a más dolor y a situaciones más problemáticas.

3. LA VICTIMOLOGÍA VERDE COMO MARCO EMANCIPADOR

La descolonización de la ciencia se considera un discurso crítico que debe cuestionar y desmantelar los arraigados legados coloniales que han configurado históricamente la investigación científica y la producción de conocimientos. Se considera una respuesta vital a las injusticias históricas y a la violencia epistémica que han marginado los sistemas de conocimiento y las perspectivas indígenas en los Estados colonizadores. Los conceptos de privilegio epistémico occidental e injusticia ontológica, que desempeñan un papel importante en la comprensión de las complejidades de la producción de conocimientos en relación con la interconexión entre la injusticia social y medioambiental, serían fundamentales en este discurso dentro de la Victimología verde. Los enfoques

indígenas críticos reconocerían la incongruencia entre las concepciones indígenas y occidentales de la comprensión ontológica del yo. El enfoque occidental entiende la naturaleza del yo en un contexto individualizado y autónomo, mientras que los grupos indígenas se centran principalmente en la comunalidad y la interconexión. Por ejemplo, la filosofía africana del *ubuntu* habla de la esencia misma del ser humano y predica que la humanidad de uno está inextricablemente ligada a compartir un todo mayor, en particular en lo que se refiere al medio ambiente, profundamente entrelazado con conceptos de interconexión y relacionalidad que son fundamentales para muchas culturas africanas (Peacock, 2019). Esta interconexión se articula a menudo a través de sistemas de conocimiento indígenas que enfatizan el valor intrínseco del medio ambiente y la agencia de las entidades no humanas. Esta filosofía fomenta una comprensión integral de la existencia, en la que los seres humanos, los animales, las plantas y el sistema ecológico más amplio se perciben como componentes de un todo cohesionado. Sin embargo, este vínculo relacional se debilita y disminuye con la degradación medioambiental y cuando las comunidades son oprimidas y tratadas como si fueran menos dignas que otras (Tutu, 1999). El énfasis en la pertenencia y la armonía en la ecofilosofía africana tiene profundas implicaciones para la ética medioambiental y la sostenibilidad.

Así pues, la injusticia ontológica se refiere a las formas en que se niega a determinados grupos el reconocimiento de su existencia y la legitimidad de sus experiencias debido a los marcos epistémicos dominantes o a las «formas de conocer». En el contexto de la justicia restaurativa, pero en la tradición positivista, Lode Walgrave (2024: 30) opina, por ejemplo, que:

> la buena ciencia es esencial para alcanzar el *conocimiento común* (énfasis propio). La ciencia busca *hechos y dinánimas generales* (énfasis propio) detrás de experiencias y procesos únicos. Trata de extraer enseñanzas que trasciendan las *intuiciones subjetivas* (énfasis propio) y las convicciones del investigador individual, de modo que las conclusiones científicas puedan ser aceptables para el mayor número posible de personas (p. 30).

En una celebración de una «gran verdad» «objetiva», los sistemas de conocimiento indígenas se consideran «sabiduría» e «intuitivos», en contraste con la naturaleza «racional» y «analítica» de la ciencia. Además, «la generalización científica es indispensable para construir plataformas de acuerdo en las que se puedan basar la reflexión y la acción comunes posteriores», pero «el conocimiento indígena se dirige a las comunidades locales, y es más "conservador", ya que se basa en experiencias y tradiciones locales pasadas. En consecuencia, su difusión es más limitada» mientras que "La construcción del conocimiento científico busca alcanzar una especie de universalismo" (Walgrave, 2024, p. 33).

Esta forma de injusticia epistémica es especialmente relevante en el contexto de la degradación medioambiental, donde las comunidades indígenas

suelen llevarse la peor parte de los daños ecológicos mientras que sus sistemas de conocimiento o la llamada «sabiduría» y sus experiencias se pasan por alto sistemáticamente (Robinson, et al, 2021). El legado colonial de desposesión y marginación ha dado lugar a una profunda desconexión entre estas comunidades y sus entornos, lo que agrava aún más los efectos de la degradación medioambiental. La intersección de la injusticia ontológica y el daño medioambiental es evidente en las experiencias de las comunidades marginadas, que a menudo se enfrentan a riesgos medioambientales desproporcionados y a la falta de acceso a la justicia. Por ejemplo, McCreary y Milligan (2018) destacan cómo las estructuras del colonialismo de colonos y el capitalismo racial continúan normalizando la desposesión y cargan a las comunidades marginadas con daños ambientales, a pesar del creciente reconocimiento institucional de sus preocupaciones. Esta marginación persiste y la injusticia cognitiva subrayan la necesidad de un enfoque decolonial que reconozca la interconexión de las injusticias sociales y ambientales.

Para desafiar lo que podría percibirse como un colonialismo científico ininterrumpido en el Sur global, o el dominio de las estructuras eurocéntricas y el privilegio epistémico (o formas de conocer) dentro de las relaciones globales Norte-Sur (Refaei, 2020), seguiría siendo crucial no limitarse a rechazar a los investigadores no indígenas y sus cánones de trabajo. Habría que comprometerse críticamente con el privilegio y el estatus epistémicos occidentales, a través de la descolonización de las construcciones hegemónicas de la victimización y criminalización indígenas, o arriesgarse simplemente a sustituir una concepción hegemónica estéril del conflicto y la victimización o una situación problemática por otra, dando lugar así a la inclusión o singularidad de perspectivas y experiencias (Peacock, 2023). Cunneen (2018) se refiere, por ejemplo, a cierta similitud entre los enfoques indígenas emancipadores y los principios políticos del marxismo, la pacificación, la teoría crítica de la raza y el feminismo radical del Norte global. Además, la afirmación de Foucault de que el conocimiento está inextricablemente vinculado a las estructuras de poder (Bevir, 1999), permite un examen crítico de cómo las epistemologías occidentales han marginado históricamente los sistemas de conocimiento indígenas y se alinea con el proyecto decolonial más amplio que busca desmantelar las estructuras hegemónicas que perpetúan la colonialidad en la producción de conocimiento.

La exploración de Foucault sobre el poder, el conocimiento y la subjetividad sería especialmente relevante a la hora de analizar los legados coloniales que siguen dando forma a las prácticas y epistemologías científicas, ya que el concepto de poder de Foucault no es meramente represivo, sino que también es productivo, dando forma al conocimiento, las subjetividades y la práctica de maneras profundas. Al aplicar también los puntos de vista de Foucault al discurso sobre la descolonización, las complejidades de la construcción del co-

nocimiento y la necesidad de integrar diversas perspectivas se alinearían con la crítica de Foucault contra las narrativas singulares para subrayar la necesidad de un enfoque más pluralista de la producción de conocimiento dentro de un marco restaurador verde, pero también para rechazar las dislocaciones perpetuadas por la mirada colonial.

La expropiación y la explotación del medio ambiente dejaron huellas perdurables en las sociedades colonizadoras, tanto en el Norte como en el Sur. La toxicidad de las naciones industrializadas, y su impacto medioambiental en el Sur global colonizado ya devastado, pero ahora también con consecuencias universales, demuestra cómo el mundo global también se presenta como una multiplicidad dinámica (Peacock, 2023). Al poner en primer plano ese legado sureño de atrocidades, el Sur se hace evidente también dentro del Norte global a través, entre otros, del cambio climático. Según Walklate y Fitz-Gibbon (2018), es en estos complejos puntos de encuentro y abrasiones entre el Norte y el Sur globales donde podrían obtenerse inestimables conocimientos sobre la naturaleza de nuestro orden mundial contemporáneo, pero también sobre la conflictiva relación entre las luchas anticoloniales y un recentramiento poscolonial de la identidad y la justicia social y medioambiental. Los espacios marginados y desatendidos ofrecen, a menudo, oportunidades para la innovación en la estrategia de la justicia reparadora y para el replanteamiento de los conceptos recibidos en relación con la Victimología verde.

4. CONCLUSIÓN

Al examinar los supuestos subyacentes que informan la ciencia, las definiciones jurídicas y las prácticas de justicia penal, los académicos y los activistas pueden trabajar para desmantelar los sistemas de opresión que persisten en la sociedad contemporánea. Esto requiere un esfuerzo matizado y concertado para amplificar y volver a centrar las voces de quienes han sido marginados históricamente y para abogar por reformas que den prioridad a la justicia y la equidad social y medioambiental. La Victimología verde surge así como una lente crítica a través de la cual examinar estas cuestiones polifacéticas, reconociendo la interseccionalidad de los derechos medioambientales y las dimensiones culturales de la victimización. Al situar los daños medioambientales en el contexto más amplio de las dinámicas coloniales y poscoloniales, este campo no sólo pretende arrojar luz sobre las experiencias de quienes sufren, como consecuencia de la degradación ecológica, sino también abogar por una comprensión más integradora de la victimización que abarque entidades tanto humanas como no humanas. Este cambio es esencial para desarrollar respuestas reparadoras eficaces a los daños medioambientales y para fomentar un enfoque más equitativo y sostenible de la justicia medioambiental.

Las implicaciones de este análisis se extienden más allá de los confines del Sur Global, ya que pueden observarse dinámicas similares en diversos contextos de todo el mundo. El sistema capitalista mundial se caracteriza por profundas desigualdades que, a menudo, se ven exacerbadas por marcos jurídicos punitivos y prácticas de justicia penal. Como tal, un examen crítico de estas cuestiones es esencial para comprender las implicaciones más amplias del derecho y la justicia penal en la perpetuación de las injusticias sociales y la degradación medioambiental. El legado del colonialismo y la actual influencia de las élites políticas sirven para reforzar las dinámicas de poder existentes y perpetuar las desigualdades sistémicas. Al comprometerse críticamente con estas cuestiones, los estudiosos de la Victimología verde pueden contribuir al desarrollo de marcos más justos y equitativos que aborden las necesidades y la capacidad de acción de las comunidades marginadas y desafíen las diversas estructuras de opresión, científicas, jurídicas y de cualquier otro tipo, que siguen profanando y moldeando nuestro mundo natural.

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THE ROLE OF POLICE/LAW ENFORCEMENT IN POLICING THE ENVIRONMENT: APPLIED GREEN VICTIMOLOGY

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1. INTRODUCTION

Police involvement with environmental matters has been most obvious on the initiation of para-military tactics to suppress members of the green movement (Saunders, 2013). The newsworthiness of confrontations between police and environmentalists is not in doubt. Should the police, however, have a more proactive role in preserving and/or conserving the environment?

The traditional functions of the police often conjure up concepts of crime prevention, law enforcement and public safety, as well as assisting people in times of crisis. Since the turn of the century, their responsibilities have increasingly extended beyond conventional crime and into the realms of environmental crime. Across Australia, climate change and associated events such as bushfires and floods, for example, has transformed the landscape of policing (White 2009, 2011; see also Matczak & Bergh 2023; Jany & Miller 2025). Other issues, such as threats to Australia's biodiversity (Secretariat of the Convention on Biological Diversity (SCBD), n.d.), disposal of hazardous waste (O'Brien, 2011) and smuggling of fauna and flora (Davies, 2002), have also impacted the role of police.

Environmental crime is as serious as any other crime affecting communities, indeed nations. It demands attention from police and other law enforcement agencies in Australia and worldwide. Drawing on policing in South Australia, this chapter delves into the multifaceted role of the police in policing the environment, highlighting, among other tasks, the importance of enforcing laws that affect the environment. Before that, the chapter introduces several key terms: environmental crime and green victimology. It also gives a brief overview on the definition of

victim of such crime. The chapter's overarching premise is that the police, in their own rite and in partnerships, should place greater emphasis on environmental law enforcement and mitigating environmental harm. Furthermore, the chapter suggests that in addition to traditional criminal justice responses to environmental crime, the police could employ restorative practices.

2. WHAT IS ENVIRONMENTAL CRIME?

Humans have impacted the environment for thousands of years but that intensified with the onset of industrialisation and has accelerated since the second world war (Polónia & Pacheco, 2017). Environmental crime is variously described in the literature, including international treaties and domestic legislation. Fisher (1992), for instance, details wide and narrow interpretations. Widely environmental crime refers to illegal activities that harm the environment. The more obvious activities can include actions like:

- Illegal dumping or improper disposal of hazardous waste (Du, Xu & Zuo, 2021)
- Illegal logging, leading to deforestation and biodiversity loss (Gascoigne, 2021)
- Poaching and trafficking of protected wildlife species (Carter, López-Bao, Bruskotter, Gore, Chapron, Johnson, Epstein, Shrestha, Frank, Ohrens & Treves, 2017)
- Pollution of air, water, and soil by industries beyond legal limits (Thushari & Senevirathna, 2020)
- Illegal fishing, which can harm ecosystems and deplete fish populations (Mackay, Hardesty & Wilcox, 2020)

These crimes often have long-lasting effects on ecosystems, contribute to climate change, and endanger the health and livelihoods of local communities. According to the Environmental Investigation Agency (EIA) (2008), the prime reason for these crimes is "financial gain and its characteristics are all too often familiar: organised networks, porous borders, irregular migration, money laundering, corruption and the exploitation of disadvantaged communities" (p.2)

Furthermore, these crimes are not only perpetrated by illicit organisations, but rather profit motivated industries have been reluctant to undertake environmental precautions (Hinchey, 1986). Corporate bodies, for example, have found that illicit shipping of waste across international borders is more profitable than modifying production processes to reduce or treat waste (see, for example, Bullard, 2000). Waste can be relocated to a place that has no, or few, dumping restrictions or is poorly policed (Scarpitti & Block, 1987;

Environmental Investigation Agency, 2008). In addition, governments have allowed activities to happen for the purpose of industrial growth and economic growth (Schnaiberg, 1980). As stated by Walter, environmental harm in some places is often caused by a lawful activity and justified by the political power due to financial benefits, or even promoted by the state. The distinction between legal and illegal activities can be somewhat blurred (Haller, 1990).

Less obvious is the impact of some conventional crime on the environment. In South Australia, for example, there are over sixty Acts of Parliament that incorporate provisions relating to the environment, and many of these empower police to act ex officio as inspectors or authorised persons. For example, under the *Fisheries Management Act* 2007 and the *National Parks and Wildlife Act* 1972 that, among other purposes, regulate fishing and poaching in protected areas, the police can enforce these laws. This helps conserve biodiversity, protect threatened species, and ensure sustainable fish stocks in ecosystems.

The South Australia *Road Traffic Act* 1961 includes regulations on vehicle maintenance and emission standards to reduce harmful pollutants from vehicles. Police are also empowered to confiscate and impound the vehicles of 'hoon drivers' (for example, drivers doing burnouts or doughnuts). Consistent with this point, the British High Court has examined the use of Traffic Regulation Orders to reduce environmental degradation the Lake District National Park (see: *Stubbs (on behalf of Green Lanes Environmental Action Movement) v Lake District National Park Authority & Ors [2020] EWHC 2293 (Admin)).*

Bushfire prevention laws authorise police to prosecute a person who throws a cigarette butt from a vehicle during a fire ban season or drops or throw a cigarette butt where it will come into contact with flammable vegetation. Noise control is enforced under the *Environment Protection Act 1993*, which covers excessive noise from events, as well as dwellings. Police respond to noise complaints thereby helping to maintain quality of life for communities and protecting natural areas from noise pollution that can disrupt wildlife. These laws are not unique to South Australia. Other states and territories have similar legislative provisions. Despite the legislative authorities, until recently police involvement with environmental matters has remained largely peripheral. Yet, for decades, police have, perhaps unconsciously, been involved in policing crimes that affect the environment.

3. WHAT IS GREEN VICTIMOLOGY?

Green criminology (Ruggiero and South, 2010) includes the study of (Hall 2013, 2014; Johnson, 2017; Ahmadi & Khosroshahi, 2017; White, 2018; Shamlu, Ahmadi, & Khosroshahi, 2017; Norgaard & Roebuck, 2023):

- Victims (i.e., human, other species, and inanimate objects like air, water, soil, and earth) and perpetrators (i.e., individuals, business, multi-nationals and governments)
- Remedies: criminal justice sanctions; civil damages; restoration of environmental damage; and alternative approaches to justice.

Green victimology emerged as a critical approach to the criminal justice system that emerged in the 1990s. It was then a sub-set of criminology and drew on some theories with victimological concepts. Recent definitions state that green victimology is the study of victims of environmental harm, including the social and institutional responses to them (Angkasa, 2020). It is based on ecocentrism, that is environmental entities have intrinsic value. Traditional victimological discourse has focused on anthropocentrism - humans as victims. For instance, illegal logging resulting in deforestation can be explored from the perspective of the impact on nature, animals, insects as well as from the perspective of the effects on the people for whom the forest is integral to their livelihood. Thus, White (2018) describes green victimology as "the study of the social processes and institutional responses pertaining to victims of environmental crime" (p. 239). Yet, environmental crime is often perceived as 'victimless', which has until recently meant governments and enforcement agencies have failed to respond to this crime as a priority. It is not, however, victimless. Many of the victims are 'hidden' - victims are not always aware of the fact that they have been victimised (Skinnider, 2011). Many are not human (Cullinan, 2003; Stone 1972). Hence, modern victimologists, describe environmental crime in the context of 'circles of impact': individuals, communities and nations, as well as future generations; and non-human species; and the environment (local and global). Moreover, as Angkasa (2020) has aptly stated,

Green victimology has expanded the object of victims in terms of the environment and based on the value of eco-centrism, which means that recognizing the intrinsic values of each object can contribute to the protection of environmental harm (p. 234).

Green victimology, therefore, is a welcome advance in victimological field that has directed greater attention not only to crimes that affect the environment but importantly to the harm done.

4. DOES THE VICTIM PLAY A PART IN THEIR VICTIMISATION?

Early victimologists – Hans von Hentig (1948) and Beniamin Mendelsohn (1956) – devised victim typologies. Von Hentig claimed there is a real mutuality in the connexion of perpetrator and victim; whereas Mendelsohn differentiated victims in relation to their degree of culpability for their victimisation. Both attributed varying degrees of responsibility to the victim relative to the responsibility of the offender.

For example, Mendelsohn (1956) wrote about the involvement of the victim in his or her demise to shift blame some or all blame away from the perpetrator, and on to the victim. In other words, precipitation is used to mitigate the actions of the criminal (O'Connell, 2024; Cortina, 2021; O'Connell & Hayes, 2019).

Consistent, research by Wolfgang (1958) and Amir (1971) indicates that some victims precipitate their victimisation – that is they are actively involved in their victimisation. Wolfgang (1958) analysed Philadelphia homicide cases and introduced the concept of victim precipitation, suggesting that in some cases, victims' actions could play a role in the occurrence of crimes. Amir's (1967, 1971) studies examined Philadelphia rape cases and controversially suggested that victim behaviour could, in some instances, influence the dynamics of sexual assault. Amir's work has been criticised for victim-blaming and has since been reconsidered within victimology, particularly through more victim-centred approaches (Knapen & Herbers 2006).

Contrary, victims of environmental crime are generally not considered complicit in their victimisation, as the causes and effects of environmental harm are often beyond individual control. As mentioned, many environmental crimes result from large-scale corporate, industrial, or governmental activities such as pollution, deforestation, and resource extraction, where local communities or ecosystems suffer the consequences without direct involvement in the harmful actions.

Green victimology recognises that attributing blame to victims in cases of environmental crime is often inappropriate, especially because such crimes frequently involve vulnerable communities with limited power to prevent or mitigate the damage. Studies (Understanding Houston, n.d.; UNEP, 2021; Sustainable Earth, 2023) show that marginalized communities often bear the brunt of environmental degradation due to proximity to hazardous facilities or lack of political leverage, reinforcing the idea that these victims are not complicit but rather positioned in circumstances of risk by powerful external actors (see also Simmons, Vardy & Stevenson, 2023; Johnson, 2017).

While some might argue that consumer behaviour indirectly contributes to environmental harm, green criminology largely attributes primary responsibility to corporate and regulatory negligence or failure, viewing consumers and communities as "passive victims" of broader systemic issues rather than active contributors to the crime.

5. WHAT IS THE CIVIL POLICE ROLE IN A DEMOCRACY?

In a democracy, the role of the civil police is crucial in maintaining public order, protecting citizens' rights, preventing crime and enforcing laws while upholding democratic values. Key functions include:

Crime prevention: Sir Robert Peel who is said to be the 'father' of civil police held that crime prevention was the primary function of the police, and the absence of crime was the most important measure of their success. Today, the police work to prevent crime and disorder through a range of activities, including foot and mobile patrols, community engagement, and intelligence gathering.

Community Engagement and Service: Democratic policing emphasizes building relationships with communities. This involves engaging with residents, addressing their concerns, and creating a sense of safety and trust. Community policing, a model commonly used in democracies, helps in understanding community needs, fostering cooperation, and reducing crime through initiative-taking and preventative measures (UEP, 2021)

Law Enforcement: The civil police enforce laws by preventing, investigating, and responding to crime. In a democracy, this function is conducted with a commitment to fairness and impartiality, applying laws equally to all citizens without bias. The police's accountability to the public and adherence to legal and ethical standards is essential to maintain trust and legitimacy in democratic society (Sustainable Earth, 2023).

Protection of Civil Rights: In democratic societies, the police are responsible for protecting the civil rights of individuals, including freedom of speech, assembly, and the right to a fair trial. They must balance maintaining order with respecting individuals' freedoms, allowing for peaceful protests and public gatherings as part of democratic expression (Understanding Houston, n.d.).

Safeguarding Democratic Processes: Civil police protect democratic processes by securing elections, ensuring public safety at political events, and upholding laws against voter intimidation and election-related offenses. This role is essential in safeguarding the democratic process from internal threats and ensuring citizens' rights to participate in government without fear or interference (Understanding Houston, n.d.).

In summary, the civil police in democracies function as guardians of public safety and civil rights, aiming to balance order with freedom, thus strengthening democratic values and public trust.

6. WHAT IS THE POLICE ROLE IN PROTECTING THE ENVIRONMENT?

Mainstream policing focuses on conventional crimes, and environmental harms often fall under the purview of environmental regulators and other enforcers. Several decades ago, however, Kwasniak (1992; see also Norberry,

1993) suggested that governments should "consider whether the objectives of environmental laws would be further advanced if … traditional enforcers of criminal law had a larger role in environmental law enforcement". Hurley (1992) asserted that police were well suited to provide a cost effective, integrated approach to the investigation of environmental crime. He identified several advantages, including experience and credibility; effective and proven routines; ready access to intelligence; and existing linkages to other domestic and international police organisations. Furthermore, Chappell and Norberry (1992) devised a list of potential police roles that included training regulatory personnel; assistance for regulatory agency officials; active referral of citizens' reports or incidents; investigations and enforcement; and membership of multi-agency task forces (either convened by police or by secondment of police).

Today, the police play an essential role in policing environmental crimes, acting as both enforcers of environmental law and protectors of communities affected by environmental degradation (Davies, 2002). Their responsibilities in this area generally include:

Enforcement of environmental laws: Civil police collaborate with environmental agencies to enforce local, national, and international environmental laws. They investigate crimes like illegal dumping, poaching, deforestation, and pollution, often working alongside specialized environmental agencies. The enforcement of these laws helps to reduce harmful activities that may threaten ecosystems and public health (Greendeed, 2023).

Prevention and investigation of environmental crimes: Police investigate environmental crimes using tools like surveillance, forensic analysis, and community reporting. Preventative measures are also increasingly central to policing environmental crime, with police working to raise public awareness about illegal activities that harm the environment, thereby promoting community vigilance and compliance (Greendeed, 2023).

Community engagement and education: Effective environmental policing in democracies requires collaboration with communities. Civil police often participate in educational campaigns and partner with local organizations to foster community responsibility and reporting. Engaging communities enables police to access information about environmental harms, while educating the public reinforces compliance with environmental protections. In South Australia, environmental matters have been raised to revitalise community interest in the fledgling neighbourhood watch program. Street Watch, where local people adopt a section of a street and, among their functions, collect litter and revegetate, for example. River Watch, where local people partner the police to monitor the activities of people boating,

fishing or engage in other water-based activities. The emphasis in on prevention through, for instance, natural surveillance.

Protecting vulnerable communities: Marginalised or rural communities are often most affected by environmental crimes due to proximity to illegal waste dumping or industrial pollution. Police play a crucial role in protecting these communities by responding to environmental violations that can harm health, livelihood, and quality of life, ensuring that these crimes are addressed equitably.

Assisting communities during crises: For decades, police have been called upon to respond to crises such as bushfires, earthquakes, and cyclones. Experts warn that the police will face even more climate-related crises in the future (Jany & Miller 2025). During such crises the police struggle to balance their day-to-day, regular duties with extraordinary tasks such as enforcing evacuation orders, assisting displaced people and battling blazes alongside firefighters as well as partnering other emergency services to rescue people and animals.

Concisely, the civil police help safeguard the environment by enforcing laws, investigating crimes, collaborating with communities, and supporting agencies dedicated to environmental protection. Through these actions, they support a healthier environment, which is central to public welfare and democratic values.

7. TRADITIONAL JUSTICE APPROACHES TO CRIMES THAT AFFECT THE ENVIRONMENT

In South Australia, the police investigate some crimes that affect the environment. In addition, there are specialist agencies such as National Parks and Wildlife and the Environment Protection Agency. Individuals accused of committing crimes that affect the environment can be prosecuted via criminal proceedings, or as an alternative in some cases an application can be made to the Environment, Resources and Development Court to recover a civil penalty where there is adequate evidence of the perpetrator's guilt. The maximum penalty that can be ordered is the same as the criminal maximum penalty, but the contravention need only be proven on the balance of probabilities. The advantage for the perpetrator is the removal of the stigma of criminal prosecution, but they can choose to opt out and be dealt with by criminal proceedings with its concomitant higher standard of proof should they prefer.

In sentencing, a court exercising criminal jurisdiction must consider the harm done by the perpetrator. Victim impact statements (i.e., individual, neighbourhood and social) are an essential medium of victim and community involvement in communicating the harm suffered to a court. These statements alert the

perpetrator to the harm done and help the court understand the impact of a crime on the victim before sentencing. Booth (2014) states, victim impact statements "introduced restorative elements into the sentencing hearings observed".

Three cases illustrate the potential to use victim impact statements to explain to the perpetrator and the sentencing court the harm resulting from the environmental crime. First, several trees were marked to be loped because they were deemed withered and or unhealthy, but those tasked cut down other trees as well. Members of the local neighbourhood watch group complained to the police and environmental agency. These members also proposed that should the perpetrators be prosecuted; they would apply to make a victim impact statement on behalf of the neighbourhood and the 'destroyed' trees. The police were responsible for the preparation and submission of victim impact statements.

Secondly, in the early 1990s fossils were stolen from the Flinders Ranges and Kangaroo Island (Boyd, 1998). One of the environmental officers involved with the investigation and preservation of the remaining fossils asked if the thieves were convicted, would they be entitled to make a victim impact statement on behalf of the fossil (an innate object) and the state. The Victim Impact Statement Co-ordinator reviewed the law and advised that it would be possible. The law required the prosecutor (who might be a police officer) to furnish particulars of the injury, loss or damage resulting from the offence for which the perpetrator was found guilty.

Thirdly, in 2017 after the successful prosecution of several men who involved in running the state's biggest clandestine drugs laboratory out of a property at a small town on the banks of the River Murray, the Commissioner for Victims' Rights made a neighbourhood and a social impact statement. The commissioner pointed out that local residents worried that their town were be tainted with a "druggie" stigma, and because the perpetrators were pouring precursor chemicals into the ground it was likely the chemicals would pollute the river, which is a significant source of fresh water for the majority of the state's population. After hearing the statement, one of the perpetrators submitted a written letter of apology to locals.

Victim impact statements are not the only way the police could integrate restorative practices in dealing with environmental crimes. The next section of this chapter examines the use of restorative practices to deal with environmental crimes.

8. ADDRESSING ENVIRONMENTAL CRIMES THROUGH RESTORATIVE PRACTICES

Worldwide interest in restorative practices has generated an extraordinary body of literature (Weitekamp & Kerner, 2002; O'Connell, 2017). Yet, there are limited widely publicised examples specifically of police officers using restorative

practices for environmental crimes. Notwithstanding, there are relevant case studies and examples of restorative practices being applied to environmental harm that are insightful and indicate that these practices can be a highly effective approach for addressing crimes against the environment. Restorative practices focus on repairing harm, fostering accountability, and promoting healing for both the community and the environment (Johnstone & Van Ness, 2007; Braithwaite, 2002; Marshall, 1999). Hence, because environmental crime affects humans and non-humans, it is useful to ask whether restorative practices have the potential to ensure the achievement of justice for all victims of these kinds of crime, and if so, what role could the police play.

Engaging Stakeholders through Circles:

- Police can organise restorative justice circles (Zehr, 1990, 2002; Marshall, 1999) that bring together the victim, the perpetrator, and other stakeholders involved in or impacted by the environmental crime. This might include the person responsible for the crime, victims (such as local communities, affected wildlife, or ecosystems), environmental experts, and the community. In these circles, stakeholders could discuss the harm caused by the crime, the impact on the environment, and the community. The focus might be on understanding the consequences of the actions and engaging the offender in acknowledging the damage done.
- In the UK, the Restorative Justice Council has worked on developing restorative practices in a variety of crime areas, including environmental crimes. Though specific police-led cases are not always publicised, there have been examples where local authorities and environmental agencies have used restorative principles in addressing pollution-related offences. Consistent with these principles, in a case of illegal waste dumping or pollution, restorative justice circles might be used to bring perpetrators (individuals or businesses responsible for the dumping) together with community members impacted by the pollution.

Encouraging Accountability and Remorse

- Restorative practices emphasise the perpetrator's personal responsibility in a way that helps them reflect on the harm caused (Brathwaite, 2002; Zehr, 2002). In environmental cases, this could involve helping the perpetrator understand the ecological impact of their actions—whether it is pollution, deforestation, poaching, or illegal dumping—and encouraging genuine remorse. Furthermore, rather than traditional punitive measures, restorative practices may lead to an agreement between the victim, the perpetrator and other stakeholders (Braithwaite, 2002; Marshall, 1999). Agreed outcomes might include making amends by restoring the

environment, paying restitution, or engaging in community service that contributes to environmental conservation.

- In New Zealand, 'restorative justice' has been used in environmental crimes (Pain, 2018; Wijdekop, n.d.), particularly those related to land use, pollution, and resource depletion. While not always police-led, restorative justice processes in the country have included law enforcement and local authorities. For example, where landowners were held accountable for illegally diverting a watercourse, restorative justice circles were used to facilitate dialogue between the landowners, local Māori communities, and environmental authorities. The agreement included actions to restore the watercourse and ensure future compliance with environmental regulations.

Repairing the Harm

- The police, in collaboration with other stakeholders, could create restorative agreements that address the specific needs of the crime. This might involve funding environmental initiatives, volunteering for conservation efforts, or ensuring long-term monitoring of the restoration work. In addition, perpetrators might be involved in 'projects' to, for instance, directly repair the damage caused (Braithwaite, 2002; Marshall, 1999; Umbreit, 1998; Sherman & Strang, 2007).
- In the case of illegal logging or land degradation, for example, perpetrators could participate in reforestation or rehabilitation of the area. In the case of wildlife poaching, the perpetrator might be asked to engage in wildlife conservation efforts, support anti-poaching education programs, and work alongside local communities to rebuild habitats. By working on environmental projects, perpetrators would show their commitment to repairing the harm (Zehr, 2002). This also involves others impacted, who might take part in efforts such as cleaning up polluted areas, planting trees, or helping restore wildlife habitats. Engaging the community in restorative practices can also lead to stronger environmental stewardship.

Restoring Relationships

- Environmental crimes often erode trust between those affected, authorities, the community, and even the natural world. Restorative practices offer a way to rebuild relationships by, as mentioned above, focusing on dialogue, accountability, and active involvement in restorative actions (Pranis, 2007). These practices allow for positive, transformative outcomes rather than solely focusing on retribution (Braithwaite, 2002) The police could help mediate these processes, fostering a sense of collective responsibility.

- In the U.S., there have been growing efforts to apply these methods in cases of environmental violations, particularly in local or community-based contexts (Office of Public Affairs, 2024). In a small town in the Midwest, for example, a chemical company participated in pollution. The police and local authorities helped facilitate a meeting where the community could express the environmental harm they experienced. The company agreed to fund local environmental cleanup and contribute to educational programs on sustainable waste management. The meeting also helped rebuild trust.

Promoting Preventative Measures

- Restorative practices can be used to educate perpetrators about environmental issues, sustainability, and the long-term consequences of their actions (Cameron & Thorsborne, 2001). This could reduce future harm by encouraging perpetrators to adopt more eco-friendly practices.
- In Africa, where poaching and illegal wildlife trade are significant issues, there have been instances where restorative justice approaches have been used, though often through collaborative efforts with conservation groups rather than direct police involvement (Dore, Hübschle, & Batley, 2022; see also on restorative justice in general Gabagambi, 2018). However, police have occasionally facilitated these restorative processes. For example, In Tanzania, the Ngorongoro Conservation Area has seen some pilot restorative justice efforts where poachers, after being caught and arrested, participated in community-driven dialogues. Perpetrators are made aware of the ecological damage they caused, with the intent of preventing re-offending. While not directly led by police, officers helped to facilitate the process of accountability and reparation.

9. CHALLENGES AND OPPORTUNITIES

Policing environmental matters presents challenges at societal, organisational, and individual levels. Despite their critical role, the police face various challenges in effectively policing the environment. Limited resources, competing priorities, and jurisdictional complexities can hinder their capacity to address environmental crimes comprehensively. Moreover, the transnational nature of some environmental offences necessitates international cooperation and coordination among law enforcement agencies, presenting logistical and diplomatic challenges.

Criminologists have argued that the effects of climate change will, among other outcomes, compromise safety and security. Hence, it is necessary to consider the intersection between climate change and policing. Climate change is already affecting the functioning of policing organisations, as evidenced by

the devastating wildfires across Los Angles and surrounds (Jany & Miller 2025). As the police grapple with the impact of climate change, they should be wary of looking for solutions exclusively from their traditional, para-military perspective, and instead draw on lessons from other perspectives. Matczak and Bergh (2023, p6), for example, concluded, "There is growing evidence that restorative justice and therapeutic jurisprudence (which examines the therapeutic properties of law and/or law reform) are more adequate responses to environmental harms (P. 6).

For the police, restorative practices can be challenging. Two decades ago, Daly (2003) noted that there are gaps between restorative practice theory and practice because, unlike other forms of interaction with the criminal justice system, the police, among others, have a limited, or no, 'mental map' as to what this approach to justice looks like. The pointers raised in this chapter and the examples cited give an insight into the theory in practice, and the resultant opportunities to do more than simply sanction wrongdoing. They provide an operational context to encompass both police-led and police-engaged restorative practices. These practices offer a new framework, with an emphasis on new roles and expectations that are different from traditional practices and thinking about crime, including crimes that affect the environment (Alarid & Montemayor, 2012).

10. CONCLUSION

In conclusion, the police have a vital role in protecting the environment. By enforcing laws, and tackling crimes that affect the environment, as well as assisting those impacted by environmental events, the police help mitigate the harm done.

The role of the police in policing the environment is indispensable for safeguarding our planet's ecological integrity and ensuring sustainable development. From protecting ecosystems and combating wildlife crime to enforcing environmental laws, the police and other law enforcement agencies play a pivotal role in preserving our natural heritage for future generations. As we confront the urgent challenges of climate change, biodiversity loss, and environmental degradation, the collaboration between the police, governments, civil society, and the private sector becomes increasingly crucial in addressing these pressing issues. By recognising and supporting the vital role of police in environmental protection, it is more likely that a more just, equitable, and environmentally sustainable world will be attained.

While direct examples of police officers leading restorative practices specifically for environmental crimes are rare, this chapter has shown there are instances where restorative practices have been applied in environmental contexts. These examples often involve a collaborative effort between police, conservation groups, local authorities, and affected communities. The key objectives in these efforts are repairing harm and fostering accountability,

with perpetrators engaging in, among other agreed outcomes, restoration projects that contribute to the well-being of both the environment and the community. By using restorative practices, police can promote healing, provide meaningful consequences for environmental crimes, and foster a greater sense of responsibility toward environmental protection within the community.

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LA MEDIACIÓN AMBIENTAL EN LA GOBERNANZA DEL AGUA EN BRASIL

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1. INTRODUCCIÓN

La gobernanza de los recursos hídricos en Brasil enfrenta desafíos complejos, derivados tanto de las desigualdades regionales en la distribución del recurso como de la implementación de los instrumentos de una política pública innovadora que debe seguir directrices tales como la participación y la convivencia de la multiplicidad de usos. A pesar de que el país posee una proporción significativa del agua dulce mundial, la distribución desigual, la falta de saneamiento básico, la contaminación y los desastres ambientales recientes evidencian un escenario de crisis. En este contexto, la mediación ambiental se presenta como un instrumento capaz de promover el diálogo, fortalecer la participación social y contribuir a la transformación de las relaciones entre la sociedad y la naturaleza.

La relevancia del tema proviene de las dificultades para conciliar múltiples intereses y dimensiones socioambientales en el uso del agua. La necesidad de mecanismos ágiles, inclusivos y eficaces para la resolución de conflictos se vuelve evidente ante el agotamiento de los modelos tradicionales de gobernanza. En este sentido, la mediación ambiental surge como una alternativa coherente con la Política Nacional de Recursos Hídricos, fortaleciendo espacios como los Comités de Cuenca y haciendo viables prácticas más democráticas de asignación del recurso.

Este capítulo tiene como objetivo presentar el papel y la eficacia de la mediación ambiental en la gobernanza hídrica brasileña, analizando sus potencialidades, limitaciones, ejemplos prácticos de aplicación y su capacidad para promover transformaciones sociales. La estructura del estudio se inicia con un panorama

histórico y normativo de la gestión de las aguas en Brasil, pasando por un análisis crítico de la participación social y del uso de instrumentos alternativos, hasta llegar a la discusión sobre la mediación ambiental como estrategia para abordar conflictos y ampliar la corresponsabilidad en la gestión hídrica.

2. LAS AGUAS EN BRASIL – PRINCIPALES CUESTIONES Y PROBLEMAS

La crisis hídrica global refleja, en gran medida, problemas de gestión. Aunque Brasil concentra el 12% del agua dulce mundial, las desigualdades regionales y sociales agravan la crisis. La región amazónica alberga el 80% de los recursos hídricos, pero allí vive solo el 5% de la población. En el Nordeste, la escasez es crónica debido a la distribución desigual y al histórico de sequías. En áreas urbanas como São Paulo, la contaminación hídrica y la ausencia de saneamiento comprometen el abastecimiento (ANA, 2007).

La exclusión en el acceso al agua potable causa más muertes que los conflictos armados, según el PNUD (2006). La pobreza y la falta de saneamiento básico intensifican la desigualdad en el país, afectando directamente a las poblaciones más vulnerables. La aparente abundancia hídrica brasileña oculta un panorama de desigualdad y de presión creciente debido al cambio climático y al crecimiento poblacional (Soares, 2022).

Entre 2014 y 2016, São Paulo enfrentó una grave crisis de abastecimiento, seguida por Brasilia. Dos grandes ciudades que, a pesar de su localización geográfica, vivieron períodos de severa escasez hídrica, sometiendo a una gran parte de la población al racionamiento. En 2015 y 2019, el país experimentó dos grandes desastres ambientales con el rompimiento de represas en las ciudades de Mariana y Brumadinho, en Minas Gerais, con pérdidas humanas y daños ambientales cuya recuperación continúa hasta hoy (Soares, 2022).

Ya no es posible mantener la antigua imagen de abundancia hídrica; Brasil forma parte, definitivamente, del escenario global de crisis en la gobernanza del agua. Por ello, es imperativo dirigir esfuerzos hacia la gestión de este bien vital, garantizando a la población el recurso en cantidad y calidad adecuadas (CEPAL, 2013; UNESCO, 2015; Soares, 2022).

2.1. Historial y cambio de paradigma en la gestión de las aguas brasileñas

Durante mucho tiempo, los gobiernos brasileños mostraron escaso interés en implementar políticas para la gestión del agua, ya fuera por la creencia en la abundancia del recurso para consumo humano o por la preferencia por solu-

ciones privadas. Un ejemplo de ello es la construcción del Acueducto de Lapa, la primera obra de abastecimiento público, en 1723. Solo en el siglo XX, ante la insatisfacción de la población con la calidad de los servicios de saneamiento y generación de energía, el Estado asumió una postura más activa, haciéndose responsable de regular, fiscalizar e incluso prestar directamente estos servicios (ANA, 2007). En ese contexto surge el Código de Aguas, que priorizaba el sector energético y adoptaba un enfoque técnico (Guivant y Jacobi, 2003). Sin embargo, los conflictos entre diferentes usuarios del agua solían resolverse mediante normas legales como los "derechos de vecindad", manteniendo los principios del derecho privado por encima de los del derecho público (Freitas, 2005).

En la década de 1970, la degradación de los recursos hídricos debido a desechos urbanos e industriales comenzó a preocupar a las autoridades. En 1976, ante los graves problemas con los ríos de la región metropolitana de São Paulo, el Estado y el Ministerio de Minas y Energía firmaron un acuerdo para abordar estas cuestiones. La interacción entre ambos órganos resultó en la propuesta de creación del Comité Especial de Estudios Integrados de Cuencas Hidrográficas (CEEIBH), con el objetivo de promover el uso racional de las aguas de los ríos de dominio de la Unión, mediante la integración de estudios de diversas instituciones involucradas (Pompeu, 2006).

No obstante, la participación limitada a representantes del Estado, la falta de un marco legal y la escasez de recursos financieros llevaron a la paralización del proyecto. Sin embargo, la experiencia fue fundamental para iniciar un proceso de cambio en la política de gestión del agua, pasando de un enfoque centralizador a una gestión más participativa. Las experiencias generadas en Minas Gerais y São Paulo con los CEEIBH contribuyeron, por ejemplo, a la creación de la Ley Paulista 7.663 de 1991, que formalizó la creación de los Comités de Cuenca, compuestos por representantes del Estado y la sociedad civil, entre cuyas atribuciones se encontraban la promoción de entendimientos, acuerdos y conciliaciones entre los usuarios del agua (Pompeu, 2006).

La década de 1980 trajo cambios importantes en la gestión pública, con la formación de colegiados y consejos, como parte del proceso de democratización posdictadura. La participación de la sociedad civil en estos nuevos espacios de interacción y negociación se convirtió en un elemento clave de esta transformación, junto con la descentralización del poder. Este movimiento estaba relacionado con "el cuestionamiento sobre el papel del Estado como principal agente impulsor de las políticas sociales" (Jacobi, 2000, p. 27).

Con la Ley 6.938/81, que instituyó la Política Nacional de Medio Ambiente, los recursos hídricos pasaron a ser regulados por instrumentos de fiscalización y control, como el licenciamiento ambiental de actividades contaminantes, integrados en el Sistema Nacional de Medio Ambiente (SISNAMA), que involucraba órganos colegiados con la participación de la sociedad civil, muchas veces de

forma minoritaria. El SISNAMA buscaba innovar en la gestión ambiental mediante la descentralización y la adopción de organismos colegiados.

La Constitución Federal de 1988 aportó importantes innovaciones, al extinguir el dominio privado de las aguas, que pasaron a ser bienes de la Unión o de los Estados, además de crear el Sistema Nacional de Gestión de Recursos Hídricos (SINGREH) y atribuir a la Unión la competencia para legislar sobre aguas y energía eléctrica (art. 22, inc. IV, CF/88).

2.2. La Política Nacional de Recursos Hídricos – Innovaciones y controversias

La Ley 9.433, sancionada en 1997, instituyó la Política Nacional de Recursos Hídricos (PNRH) y el Sistema Nacional de Gestión de Recursos Hídricos (SINGREH), cumpliendo la exigencia constitucional. La Ley se basó en los siguientes principios:

a. El agua es un bien de dominio público, un recurso natural limitado y con valor económico;
b. La gestión de los recursos hídricos debe permitir su uso múltiple, con prioridad para el consumo humano y la saciedad de la sed de animales en situaciones de escasez;
c. La cuenca hidrográfica se estableció como unidad territorial de gestión;
d. La gestión debe ser descentralizada y contar con la participación del Poder Público, los usuarios y las comunidades (Ley 9.433/97, art. 1º, inc. VI).

El SINGREH está compuesto por órganos colegiados deliberativos, como el Consejo Nacional de Recursos Hídricos, los Consejos Estatales y los Comités de Cuenca Hidrográfica; órganos ejecutivos como la Agencia Nacional de Aguas (ANA) y las Agencias de Aguas; además de otros órganos públicos federales, estatales y municipales involucrados en la gestión de los recursos hídricos. Estos órganos deben actuar conforme a las directrices establecidas por la PNRH, que incluyen la integración con la gestión ambiental, la articulación con políticas sectoriales y la cooperación entre la Unión y los Estados para la gestión de recursos hídricos de interés común.

Con ello, la antigua política sectorial, definida por el Código de Aguas, comenzó a dar lugar a un nuevo modelo de gestión política, con énfasis en la integración, articulación, descentralización y participación. La gestión descentralizada e integrada de los recursos hídricos implica negociaciones entre distintos niveles de gobierno, usuarios y sociedad civil organizada. Esta última, ahora presente en los órganos colegiados que deliberan sobre las actividades

que afectan la cantidad y calidad de las aguas, pasó a tener el poder de cobrar por el uso de los recursos hídricos, a través de las agencias de cuenca, que aún se hallan en proceso de implementación.

Según Canali (2002), a diferencia de la Política Nacional de Medio Ambiente (PNMA), la Ley 9.433 privilegia mecanismos económicos que incentivan el uso racional del agua y la solución de conflictos de forma adecuada a los intereses de los usuarios y las comunidades. Esto representa una gran innovación en las políticas públicas, al apartarse de los tradicionales instrumentos de mando y control. El gobierno ve este cambio como esencial para mejorar las condiciones de gobernabilidad y gobernanza, ofreciendo mayor transparencia, participación social y cooperación entre los diferentes niveles de gobierno y con la sociedad civil, además de adoptar instrumentos de gestión basados en incentivos económicos (ANA, 2007:47).

Las innovaciones aportadas por la PNRH incluyen:

a. Mayor participación activa de la sociedad civil en la gestión de los recursos hídricos;
b. Superación de las fronteras político-administrativas de los Estados, permitiendo la gestión de recursos hídricos compartidos en una cuenca hidrográfica;
c. Integración con la gestión ambiental, con los sistemas estuarinos y costeros, y articulación con políticas sectoriales de uso del suelo y planificación regional, estatal y nacional;
d. Gestión orientada a la cooperación y a la resolución alternativa de conflictos.

El proceso de construcción de la gestión de las aguas en Brasil, especialmente después de la dictadura, revela un cambio significativo de paradigma, pasando de la "hidrotécnica" a la "hidropolítica" (Guivant y Jacobi, 2003). La interacción entre diferentes discursos y el cambio en las relaciones sociedad/Estado proporcionaron una nueva forma de ejercer la ciudadanía (Jacobi, 2000), siendo los Comités de Cuenca Hidrográfica fundamentales en este proceso, al posibilitar el debate y la negociación sobre los usos de los recursos hídricos (Jacobi, 2006a).

2.2.1. Los Comités de Cuenca Hidrográfica y su papel en la gestión de las aguas

Dentro de esta estructura, el Comité de Cuenca Hidrográfica (CBH) asume la responsabilidad de la gestión del agua en una unidad territorial, siendo el órgano más cercano a las cuestiones enfrentadas por los usuarios y la sociedad civil. Sus competencias incluyen la aprobación y el acompañamiento de

la ejecución del Plan de Recursos Hídricos de la Cuenca, el establecimiento de mecanismos de cobro por el uso del agua y la sugerencia de los valores a ser cobrados. Formado por representantes del Estado, la Unión, los Municipios, los usuarios y la sociedad civil, el CBH trae a la arena política los conflictos socioambientales y sus protagonistas, permitiendo el debate y las negociaciones sobre los usos del agua. La estructura colegiada del CBH facilita la articulación, aumenta la transparencia y reduce los riesgos de desvío de los objetivos públicos en favor de intereses privados, siempre que la sociedad civil esté bien organizada (Guivant y Jacobi, 2003).

A pesar del aumento del número de CBHs de 2007 a 2018, el sistema aún está en proceso de implementación. En 2007 existían 140 CBHs, pero solo dos contaban con su agencia de cuenca y todos los instrumentos implantados (ANA, 2007). En 2018, se habían implementado 233 CBHs, pero no todos poseían planes de gestión o agencias de cuenca en funcionamiento (ANA, 2018). La lentitud en la implementación de la política, sin embargo, permite el aprendizaje progresivo de los actores involucrados (Guivant y Jacobi, 2003). El cambio de paradigma es un proceso gradual que exige cambios de comportamiento, algo difícil para actores acostumbrados al modelo anterior y que aún no se han adaptado a la cooperación y la gestión participativa, lo que representa un obstáculo para el buen funcionamiento del nuevo sistema (Soares, 2022).

La Política Nacional de Recursos Hídricos (PNRH), comparada con otras políticas ambientales, como la Política Nacional de Medio Ambiente, la Política Nacional de Saneamiento Básico y la Política Nacional de Residuos Sólidos, presenta un diseño institucional que posibilita un mayor grado de efectividad en la participación social (Soares, 2012). Debido a sus características, los Comités de Cuenca Hidrográfica (CBHs) son reconocidos como órganos de deliberación, articulación y resolución de conflictos (Canali, 2002). Sin embargo, no siempre las personas o las instituciones se sienten cómodas para exponer sus intereses o utilizar el CBH como mecanismo para tratar los conflictos relacionados con el uso del agua. A menudo, estos comités enfrentan limitaciones estructurales e institucionales, además de la falta de profesionales capacitados para manejar los conflictos entre los usuarios de la cuenca hidrográfica. Asimismo, en algunos casos, pueden encontrar en las relaciones políticas externas, como entre Municipio y Estado, las alianzas necesarias para resolver sus demandas o incluso obstáculos para actuar.

Otros factores, como la carencia de información por parte de la sociedad civil, la predominancia del discurso técnico, la lentitud en la asignación de recursos y la ausencia de garantías de poder decisorio, debilitan el papel esencial del CBH en la gestión ambiental, limitando su actuación como órgano articulador, deliberativo y de resolución de conflictos (Jacobi, 2006a). La asimetría de poder, la posibilidad de cooptar a la sociedad civil en lugar de promover una verdadera

participación ciudadana, también generan preocupaciones sobre la justicia en las negociaciones entre los diversos actores dentro del CBH (Jacobi, 2006b). Estas cuestiones, a su vez, son relevantes para una comprensión más amplia de las dinámicas y desafíos que enfrenta este órgano.

2.2.2. La asignación negociada como mecanismo de resolución de disputas sobre recursos hídricos

Los Comités de Cuenca Hidrográfica (CBH) no tienen la exclusividad para tratar los conflictos entre usuarios de los recursos hídricos. Estas disputas también surgen en procesos bajo la responsabilidad de otras entidades, como aquellas encargadas de la concesión (outorga) y la fiscalización. Por ello, dichos conflictos deben ser gestionados de forma que contribuyan al sistema integrado de gestión de las aguas, con sus instrumentos orientados a abordar la tensión constante entre los usos múltiples de los recursos hídricos. Pretender lo contrario sería un error, especialmente debido a la fragilidad y realidad de los comités.

La idea de que el CBH no puede ser el único responsable de los conflictos llevó al desarrollo de otros instrumentos, como la asignación negociada, coordinada por la Agencia Nacional de Aguas (ANA) (ANA, 2017) y algunas entidades estatales del Sistema de Gestión de Recursos Hídricos (SIGRH), cuando existen conflictos entre los usuarios de una cuenca hidrográfica.

Campos y Studart (2002) definen la asignación y reasignación del derecho de uso del agua como el proceso de distribución o redistribución de los recursos hídricos entre los usuarios, asegurando el derecho de uso. Para ello, los autores proponen un proceso en cuatro fases, comenzando con un diagnóstico técnico sobre la disponibilidad hídrica, fase en la que solo participan técnicos. En las etapas siguientes, se incorpora a la sociedad civil y a los conocimientos técnicos y jurídicos. Sin embargo, los autores no presentan una metodología de negociación específica ni discuten la forma y la calidad de la participación de la sociedad civil y de los técnicos durante el proceso. Enfatizan, no obstante, que el informe producido en la fase de diagnóstico debe ser claro, para que quienes toman las decisiones y la sociedad civil comprendan sus conclusiones.

Contar con una metodología de negociación definida es fundamental para esclarecer cuestiones importantes, también debatidas en procesos de justicia restaurativa, tales como: a) ¿quiénes son los participantes legítimos de las reuniones?; b) ¿todos los participantes tienen igualdad en el diálogo?; c) ¿los acuerdos reflejan realmente los intereses de todos?; d) ¿cuál es la influencia del discurso técnico en las decisiones?; e) ¿cómo se establecen las reglas de las negociaciones?; f) ¿cómo se conducen las reuniones?; g) ¿cómo se tratan las asimetrías de información?

La ANA realiza la asignación negociada en regiones de escasez, donde existe potencial para disputas. Entre 2014 y 2016, la agencia formalizó 34 términos de asignación, con la participación de usuarios, representantes estatales y en articulación con los CBHs (ANA, 2017). Esta cifra revela la creciente importancia de este instrumento en poco tiempo.

En un estudio de caso, como el de Pinheiros et al. (2011), se observa que el análisis del conflicto y su historial no considera la diversidad de modelos de negociación presentados por la doctrina. El uso del término "negociación" no va acompañado de una propuesta metodológica clara para el análisis. El estudio menciona los participantes y sus intervenciones, pero estas descripciones no son suficientes para responder las preguntas clave ya planteadas.

2.2.3. Consideraciones críticas y controversias sobre el nuevo modelo de gestión de las aguas en Brasil

Una de las principales preocupaciones respecto al nuevo sistema de gestión del agua se refiere al potencial conflicto entre la dominialidad del agua, que se enfoca en el curso del río, y la unidad de gestión adoptada, la cuenca hidrográfica. La doctrina jurídica discute este punto y sugiere la adopción del principio de la prevalencia del interés, que permitiría un modelo más flexible y cooperativo. El federalismo cooperativo, al adoptar el concepto de aguas compartidas y la necesidad de negociación, sería una alternativa más eficaz para la gestión de las aguas, en lugar de incentivar la competencia, como ocurre actualmente (Canali, 2002).

Canali (2002) analiza el caso de la transposición del río São Francisco, donde varios estados entraron en conflicto durante la discusión del proyecto federal. El intento de la Unión de imponer una solución solo agravó el conflicto entre los estados, evidenciando cómo el fomento a la negociación podría haber conducido a una solución más armónica.

Casos como el de la transposición del São Francisco ponen de manifiesto el debate sobre el federalismo en Brasil, que aún conserva rasgos de un modelo centralizado. Este modelo histórico favorece a la Unión, que concentra buena parte de las responsabilidades gubernamentales, lo que puede explicar la falta de interés de otros entes federados por buscar mayor autonomía, incluso en la gestión de las aguas (Pompeu, 2006). Canali (2002) advierte que la PNRH enfrenta desafíos debido al legado de este centralismo político, si bien la ley también representa una gran innovación en la gestión pública.

Otras críticas al nuevo modelo de gestión también se han planteado. Uno de los puntos críticos es la limitada participación de la sociedad civil, muchas veces desmotivada por la desconfianza en las instituciones políticas (Jacobi, 2006a). Caubet (2006) señala varias fallas en el modelo adoptado, entre ellas:

a) la participación exige conocimiento técnico, y la forma de constitución de los Comités dificulta la participación popular; b) la representación de la sociedad civil, especialmente en el Consejo Nacional de Recursos Hídricos, a menudo carece de legitimidad, pues los representantes tienden a defender los intereses de sus entidades, más que los intereses colectivos; c) la separación de la gestión del agua de las demás políticas ambientales, lo que genera superposición de competencias; d) el énfasis económico que la PNRH confiere al agua; e) la no caracterización del agua como un bien difuso (bien público); f) la gestión por cuenca, que puede generar problemas cuando se extiende a múltiples territorios político-administrativos y no contempla el agua en forma de vapor.

Caubet (2006, p. 170) critica la PNRH por instituir la concesión (outorga) y el cobro por el uso del agua, transformándola en mercancía. Para él, esto no representa una innovación en la gestión ambiental, sino un retroceso socioambiental, institucionalizado por la nueva legislación. Incluso con la implementación del nuevo modelo de gestión, la degradación de los recursos hídricos sigue siendo un problema, con los gestores públicos permitiendo que continúe (Jacobi, 2006b).

No obstante, el proceso de implantación de la PNRH aún está en curso. Las cuestiones y controversias relacionadas con este modelo deben debatirse políticamente dentro del sistema. A pesar de las expectativas en cuanto al cambio de paradigma en el tratamiento de las aguas, es importante destacar que la Ley de la Política Nacional de Recursos Hídricos ofrece amplias posibilidades, incluyendo la discusión sobre el modelo federativo y la mejora de la democracia y la equidad social, al integrar el tema en las grandes cuestiones de la ciencia política (Canali, 2002).

3. OPCIÓN DE GOBERNANZA DEL AGUA EN BRASIL

La gobernanza del agua en Brasil reconoció que el Estado ya no está en condiciones de gestionar el recurso de forma aislada. La formulación e implementación de políticas públicas ahora requiere la participación de diversos sectores para garantizar la legitimidad de las decisiones tomadas. En este contexto, la buena gobernanza del agua debe basarse en la participación activa, el involucramiento y la negociación entre los interesados; en la descentralización de la gestión; en el enfoque integrado, considerando la cuenca hidrográfica como unidad de gestión; y en el establecimiento de mecanismos para la resolución pacífica, rápida y eficaz de los conflictos.

En respuesta a las nuevas exigencias de la gobernanza del agua, se desarrollaron diversos procesos y metodologías de interacción y deliberación para los actores involucrados. Sin embargo, surgieron interrogantes sobre cómo definir estos espacios/procesos. Algunos los consideraban meros espacios de

diálogo, otros los veían como procesos de negociación o de aprendizaje social. Las similitudes entre estos enfoques indican coherencia en el discurso teórico que justifica la necesidad de la participación activa de los ciudadanos en la formulación de políticas y en la gestión de los recursos hídricos. Superar las dificultades y limitaciones de esta participación se ha convertido en un desafío, especialmente en países como Brasil, que optaron por seguir este discurso de compromiso, creando los Comités de Cuenca Hidrográfica como parte de la estructura de gestión.

Aunque no siempre sea posible alcanzar la negociación o el diálogo, y comprobar el aprendizaje social sea complejo, cuando estos procesos son viables, los resultados sociales suelen ser superiores a las alternativas tradicionales: fortalecen las relaciones sociales, hacen que las decisiones sean más eficaces y eficientes, y aumentan la flexibilidad y la tolerancia ante las incertidumbres naturales.

No obstante, el discurso predominante no es homogéneo. Varios autores han expresado preocupaciones sobre la descentralización, el riesgo de empoderamiento de élites locales, la legitimidad de la participación en las plataformas multi-actor (¿quién participa y por qué?), la posibilidad real de negociación (especialmente en situaciones de conflictos intensamente antagónicos) y la diversidad de condiciones entre los actores y su realidad, lo que puede enmascarar las desigualdades. Estas preocupaciones deben ser consideradas constantemente, y el sistema debe reflexionar sobre ellas y adaptarse a cada nuevo caso concreto. Adoptar una postura reflexiva hace que el sistema sea más flexible y capaz de adecuarse a las situaciones más desafiantes.

En Brasil, el proceso de transición hacia una nueva gobernanza del agua comenzó en la década de 1970, con los primeros diálogos intergubernamentales, formalizados por primera vez por los CEEIBH. A partir de ese momento, diversos movimientos políticos y nuevos marcos legales, como las leyes estatales, la Constitución Federal de 1988 y la Ley 9.433/97, marcaron el camino hacia el modelo de gobernanza del agua. La Política Nacional de Recursos Hídricos optó por una gestión integrada y descentralizada, con espacios de toma de decisión participativa.

En los últimos diez años, la implementación del sistema enfrentó importantes desafíos, como la grave crisis hídrica que afectó a São Paulo y Brasilia, interrumpiendo el abastecimiento de agua para consumo humano. La crisis hídrica, una realidad desde hace tiempo en los estados nordestinos, exigió crear nuevas formas de distribución de este recurso esencial, como la asignación negociada. La necesidad de asignar el agua pasó a tratarse de forma negociada, incorporando los principios de la PNRH (Soares, 2022).

Aunque el sistema brasileño de gobernanza del agua no sea perfecto y quizá no cumpla todos los criterios establecidos por Rogers y Hall (2003) para con-

siderarlo "bueno", existe un gran esfuerzo para que sea coherente, integrado, transparente, inclusivo y participativo, promoviendo corresponsabilidades. Estos principios son defendidos por la Política Nacional de Recursos Hídricos, reflejando su proyecto y el camino que desea seguir en la gestión del agua. Aunque no sea el único modelo de gobernanza, sin duda es el modelo adoptado en Brasil.

4. CONFLICTOS AMBIENTALES

4.1. Sobre Conflictos

Al analizar los conflictos, se observa que el paradigma adoptado orienta la forma en que se comprende el conflicto. Desde una visión determinista y lineal, el conflicto se analiza dentro de la lógica causa-efecto, la previsibilidad y la evolución gradual, con soluciones sugeridas o impuestas que consideran solo algunas variables. En contraste, el paradigma de la complejidad entiende el conflicto como algo no lineal, no determinista, imprevisible y sin evolución continua. En este modelo, el conflicto se analiza atendiendo a su tendencia o patrón, con la intención de servir como herramienta para el interventor, sin reducir el fenómeno a una clasificación binaria, autoritaria o totalitaria. Afrontar la complejidad para entender el conflicto implica reconocer que cualquier visión será siempre parcial, abriendo camino a otras posibilidades de interpretación de la realidad y permitiendo la emergencia de innovaciones sociales y personales.

La manera en que el jurista concibe el tratamiento del conflicto también depende de la base filosófica que fundamenta la concepción del Derecho. El positivismo jurídico, al considerar el Derecho como una ciencia con racionalidad intrínseca y desvinculada de influencias morales, éticas, sociales o políticas, fue muy adecuado a su tiempo. Esto ocurrió cuando la razón instrumental se consolidó en la sociedad y la ciencia asumió la primacía sobre otros saberes, reemplazando a la religión como fuente de legitimación del poder. Esta visión aún influye en muchos procesos judiciales, que continúan operando dentro de una lógica binaria y determinista (Soares, 2022).

Sin embargo, los cambios sociales indican que el Derecho debe adaptarse. Las dos guerras mundiales y sus consecuencias devastadoras resaltaron la importancia de valores éticos y del compromiso con la vida. La globalización, la informática y los problemas ambientales globales evidencian la fragilidad de las fronteras del Estado-nación y el poder de sus soberanos. Como se discutió en el primer capítulo, la forma de gobernar del Estado moderno (autoritario, jerárquico y centralizado) está siendo cuestionada y modificada, y el Derecho debe acompañar estas transformaciones, adecuándose a las nuevas formas de gobernar la sociedad (Soares, 2022).

El positivismo jurídico, a su vez, ha sido criticado por no ofrecer los elementos necesarios para que el Derecho responda a las demandas de la sociedad contemporánea. El Poder Judicial no logra gestionar de manera eficaz la creciente complejidad y volumen de los conflictos con la celeridad y satisfacción requeridas. Esto dio lugar, en las décadas de 1970 y 1980, al surgimiento de nuevas alternativas de resolución de disputas, coincidiendo con los debates sobre la gobernanza política. Estas alternativas cuestionaban el monopolio del Estado sobre la aplicación de la Justicia, que, a través del Poder Judicial y sus procedimientos formales y autoritarios, imponía decisiones sin conocer los intereses subyacentes de las partes involucradas. Este movimiento también refleja la desconfianza de la sociedad en la capacidad del Estado para resolver los conflictos de manera satisfactoria (Soares, 2022).

La ampliación de las formas de resolución de conflictos, más allá de la tradicional vía judicial, puede alterar el escenario de crisis y, posiblemente, actuar como un medio de transformación social. La posibilidad de elegir entre diversas opciones, desde la negación hasta la violencia, permite a la sociedad optar por la forma más apropiada para cada disputa, según sus características. En este contexto, el Derecho puede ser un agente de transformación social, al abrir la posibilidad y responsabilidad de la sociedad de resolver parte de sus propias disputas, sin tener que delegarlas necesariamente al Estado. Los métodos adecuados de resolución de conflictos forman parte de este proceso de flexibilización del Derecho, promoviendo el respeto a las diferencias y el foco en los casos concretos, alineándose con el Derecho contemporáneo, que busca eficacia y efectividad (Soares, 2022).

4.2. Conflictos Ambientales

Los conflictos ambientales, que involucran bienes ambientales tanto en su aspecto material como simbólico, pueden entenderse como una tensión constante entre la naturaleza y la economía, configurando el gran conflicto social que la sociedad ha experimentado en tiempos recientes. La forma en que los involucrados y el posible interventor se posicionen frente a esta tensión influirá en su comprensión y actitud, lo que implica la necesidad de aclarar el paradigma que sostiene dicho análisis.

Las tipologías o clasificaciones de los conflictos ambientales son útiles solo cuando se aplican a un conflicto específico, siendo necesario escoger el enfoque más adecuado para entenderlo, como en el caso de conflictos sobre acceso a recursos, conocimientos o impactos (Little, 2001), o sobre diferentes modos de producción (Acselrad, 2004; Zhouri et al., 2005), entre otros tipos, como los conflictos de relación, sobre datos o valores (Moore, 1998; Redorta, 2004). Estas tipologías son herramientas importantes para la reflexión del interventor (Soares, 2022).

Tras analizar diversos ejemplos de conflictos ambientales, se concluye que el paradigma de la complejidad es el más adecuado para su comprensión. En los conflictos observados, los procesos no son lineales ni deterministas, y no se basan únicamente en la relación causa-efecto. Estos conflictos no pueden considerarse exclusivamente negativos, ya que han generado innovaciones y mejoras en la calidad de vida. Por ejemplo, el conflicto en Cubatão (São Paulo, Brasil) resultó en la transformación del estigma social y en la mejora de las condiciones ambientales; el conflicto en São Sebastião (São Paulo, Brasil) propició un cambio significativo en la comprensión sobre la preservación ambiental; y los conflictos asociados a la construcción de centrales hidroeléctricas dieron origen al Movimiento de los Afectados por Represas (MAB) (Soares, 2022).

En situaciones donde no existe una única verdad que se dispute, la lógica binaria del paradigma determinista (quién tiene razón y quién no) no logra responder adecuadamente a la realidad. Bajo esta lógica, uno de los actores sería excluido de las negociaciones. Sin embargo, lo que sucedió fue que ambas partes trabajaron juntas, reconocieron sus diferencias, aprendieron a respetarse mutuamente y comprendieron que cada lado poseía una parte de la "verdad" (Soares, 2022).

Además, dentro del paradigma determinista en el derecho (positivismo), se observa que este se relaciona con la pérdida de sentido, al no considerar el análisis de los hechos o valores. La razón instrumental utilizada en el Derecho, basada en este pensamiento filosófico, permite la construcción de razonamientos lógicos, como en el debate procesal sobre si las plantas y los animales tienen legitimidad para iniciar acciones judiciales en su defensa. Para evitar tales absurdos y preservar el sentido del Derecho, es esencial adoptar otra base filosófica que incorpore la dimensión de los valores y de los hechos, restableciendo la dialéctica entre el ser (la relación con la naturaleza) y el deber ser (las normas).

Por lo tanto, el paradigma de la complejidad, previamente delineado, comparte una visión similar sobre los conflictos en general, y, según los ejemplos estudiados, parece más adecuado para el análisis de los conflictos ambientales que el pensamiento determinista. Las consecuencias prácticas, tanto jurídicas como sociales, derivadas del pensamiento determinista no son compatibles con la complejidad de la vida contemporánea.

La conclusión más importante es que el conflicto no debe considerarse, a priori, como algo negativo que deba eliminarse o enmascararse en la sociedad. El conflicto simplemente existe y forma parte de la condición humana. Esto significa que la tensión entre economía y naturaleza no se resolverá de manera definitiva. Ninguno de los polos de esta relación puede ser eliminado; ambos son interdependientes y se influyen mutuamente. No es posible entrar en este debate esperando preservar la naturaleza sin la intervención humana, ni degradarla sin considerar las necesidades humanas. Debe entenderse la tensión

entre economía y naturaleza de forma dialéctica. Así, el conflicto ambiental debe abordarse preferentemente dentro de una lógica no binaria y no positivista, que sea capaz de enfrentar las diferencias sin eliminar o fusionar las partes, permitiendo restablecer el vínculo entre el sujeto y el mundo, entre la sociedad y la naturaleza (Ost, 1995; Soares, 2022).

5. MEDIACIÓN AMBIENTAL

5.1. Sobre Mediación de Conflictos

La mediación, además de aliviar la sobrecarga de los tribunales, reducir costos y tiempo, tiene la ventaja de evitar la creación de ganadores y perdedores. Fomenta la creatividad en las soluciones, fortalece el protagonismo de las partes y amplía su responsabilidad. Cuando se alcanzan acuerdos, tienden a perdurar en el tiempo y generan lo que Six (2001), Suares (2005) y Azevedo (2006) llaman "deuteroaprendizaje", es decir, la capacidad de afrontar conflictos futuros desarrollando habilidades y técnicas adquiridas durante la mediación.

El enfoque transformador de la mediación propone un nuevo contexto para la resolución de conflictos, donde las diferencias se tratan de manera no binaria, tendiendo un puente entre las partes sin eliminar ni fusionar sus perspectivas. Este modelo invita a las partes a reconocerse mutuamente y a valorar la contribución de cada una en la búsqueda de soluciones al problema compartido.

Los seres humanos organizan sus percepciones y dan sentido al mundo a través de estructuras formadas por un conjunto de creencias. El mediador, al igual que los mediados, se ve influenciado por sus propias creencias al elegir un tipo de mediación, lo que lo lleva a adoptar un enfoque que armonice con su visión del mundo. Si el mediador cree en el individualismo, puede optar por enfoques más orientados a la resolución de problemas o a la negociación. Por otro lado, si cree en la interrelación y en la capacidad de transformación de las relaciones, puede adoptar enfoques transformadores (Bush & Folger, 1996) o circulares-narrativos. Independientemente del enfoque elegido, el mediador puede innovar y crear su propio método, inspirándose en las diversas escuelas de mediación.

La mediación siempre puede aplicarse dentro de los límites legales, éticos y principios preestablecidos. En general, cuando la negociación es viable, la mediación también lo es, y esto ya no genera cuestionamientos. Sin embargo, incluso cuando no es posible llegar a acuerdos, ya sea por razones legales, la mediación aún puede utilizarse para abordar el conflicto en sí, sin limitarse únicamente a la resolución de la disputa. Puede aplicarse de forma más amplia, buscando gestionar las tensiones inherentes al conflicto, como se dis-

cutió previamente. Mediante la creatividad y dentro de los límites éticos, el mediador incluso puede crear procedimientos alternativos que se ajusten mejor a la situación concreta. Un ejemplo de ello es el uso de la mediación en el ámbito penal o en casos de acoso moral en el derecho laboral, donde se busca restablecer el vínculo entre las partes, sin excluir la responsabilidad por el acto cometido.

En cuanto a las controversias que surgen en la práctica de la mediación, dos cuestiones han generado mayor debate: la imparcialidad del mediador y la necesidad de equilibrar el poder entre las partes para viabilizar la negociación. La imparcialidad se entiende generalmente como la necesidad de evitar cualquier alianza o tendencia a favor de una de las partes. En cuanto al equilibrio de poder, la mediación no debe enmascarar o ignorar las diferencias sociales entre las partes. Estas deben ser reconocidas y abordadas de manera honesta (Soares, 2022).

Aunque se intente equilibrar el poder entre las partes, existe el riesgo de perpetuar las desigualdades sociales, afianzándolas aún más. No obstante, las desigualdades de poder pueden generar comportamientos de manipulación o cooptación. Éticamente, el mediador debe garantizar que el proceso no se desvíe de sus principios fundamentales, como establecer un vínculo respetuoso entre las partes, sin eliminación ni fusión, promoviendo el protagonismo y el reconocimiento del coprotagonismo. Si no es posible seguir esta línea, el mediador debe dar por terminado el proceso, permitiendo que las partes lleven su disputa a un contexto más adecuado, es decir, el modelo adversarial, que opera según la lógica binaria.

5.2. Mediación Ambiental en Brasil

Las experiencias observadas (Soares, 2022) muestran una combinación de prácticas, enfoques y procedimientos utilizados para gestionar disputas ambientales. Muchas de estas prácticas confirman los presupuestos teóricos, que defienden el uso del diálogo como herramienta para abordar conflictos ambientales, promoviendo la cooperación, el respeto, la solidaridad, la asunción de responsabilidades y el deseo constante de mejorar la calidad del entorno. La mediación, en este contexto, fortalece las relaciones entre las partes, permitiendo que, en momentos de crisis, puedan contar unas con otras para resolver los problemas. Además, puede servir como instrumento de aprendizaje y contribuir a construir una nueva relación entre el ser humano y la naturaleza, respetando las diferencias sin borrarlas.

No obstante, la mediación no es la solución para todos los problemas ambientales. Los resultados sociales y ambientales positivos solo se alcanzan cuando las partes realmente desean el cambio, cuando hay una interacción no adversarial y cuando las autoridades respaldan el proceso. La cultura del litigio sigue

siendo fuerte, creando barreras para la mediación, entre ellas la desconfianza y el miedo, llevando a muchos a preferir los procesos judiciales.

Las disputas ambientales generalmente comienzan a nivel local, y en esta etapa, cuando el foco está en el problema que enfrenta la comunidad, la mediación ha mostrado ser eficaz para la construcción de vínculos y la mejora de la calidad ambiental. Sin embargo, en disputas en las que los valores morales son centrales o cuando se busca alterar la política nacional, la mediación se ha utilizado menos y probablemente no sería la más indicada, dado que es difícil lograr una convergencia mínima o cultivar un espíritu colaborativo. Además, la mediación no debe aplicarse en situaciones de riesgo inminente de daño ambiental, donde se requieren medidas urgentes de mando y control.

En los conflictos ambientales, la relación entre las partes suele ser continua, y existen intereses subyacentes que necesitan ser abordados. Así, no basta con adoptar una postura pragmática o creativa para encontrar soluciones; es necesario crear un espacio para que los intereses subyacentes y el historial entre los involucrados salgan a la luz, permitiendo trabajar los vínculos sociales (Stone-Moloy, 2001).

Si bien asuntos como el desequilibrio de poder y la confidencialidad merecen atención, es importante señalar que estas preocupaciones están fuertemente influidas por el paradigma determinista/lineal, siendo más relevantes para mediadores tradicionales que buscan resolver el problema y lograr un acuerdo, en lugar de preocuparse por la relación entre las partes. El mediador, al decidir sobre el caso concreto y con base en sus propias convicciones (incluyendo la línea de mediación que sigue, su formación y experiencia profesional), tendrá un enfoque distinto en cuanto a la responsabilidad por el resultado, el desequilibrio de poder y la confidencialidad. Por eso, la elección del mediador es una de las etapas más importantes, pues refleja las expectativas de las partes respecto de la mediación y su comprensión del proceso.

Por ejemplo, O'Leary (1995) sostiene que la mediación aplicada a cuestiones ambientales implica bajos costos de transacción y un enfoque en la solución de problemas, ofreciendo soluciones más acordes con las necesidades de las partes involucradas. Esta es la visión de la Escuela de Mediación de Harvard, aún sustentada por un paradigma lineal. Sin embargo, es difícil afirmar que la mediación sea efectiva para las cuestiones ambientales, dada la falta de evidencias y suficientes investigaciones empíricas que lo demuestren. Para la autora, se necesitan más estudios para evaluar el impacto de la mediación en el ambiente (O'Leary, 1995).

La búsqueda incesante de un acuerdo a cualquier costo y la preocupación por predecir los efectos de la mediación impiden que las diferencias específicas de cada caso generen soluciones creativas y adaptadas a las realidades de quienes enfrentan el problema ambiental. En los problemas ambientales locales, donde las personas

están directamente involucradas, lo más importante no es un acuerdo puntual, sino la construcción de una relación de confianza, que permita abordar problemas futuros relacionados con la tensión entre el ser humano y la naturaleza.

En Brasil, la mediación no estaba expresamente prevista en la legislación, lo que generaba dudas sobre su uso y sus límites. Incluso con la creación del marco legal de la mediación, persisten obstáculos. El Derecho Ambiental en el país ofrece algunas posibilidades de negociación, y cuando esta es viable, la mediación también se convierte en una opción. El compromiso de ajuste de conducta es un ejemplo de ello. Su aplicación ha demostrado la eficacia de la negociación y los acuerdos en la protección ambiental, permitiendo al Ministerio Público y a los órganos ambientales alcanzar objetivos de preservación sin recurrir a lo judicial, ahorrando tiempo, recursos públicos y evitando el desgaste emocional.

Como cualquier práctica nueva y aún poco conocida, la mediación suscita preguntas, dudas y temores. Aunque existan pocos relatos y la experiencia sea limitada, algunas vivencias indican que vale la pena considerar la mediación como un recurso social para abordar disputas ambientales. Además, fomentar el uso de la mediación ambiental se alinea con el desarrollo de una cultura del diálogo y con una nueva forma de gestión ambiental, donde los diversos intereses –todos legítimos– participan de forma no adversarial, superando dicotomías y encontrando soluciones creativas para el desarrollo de la sociedad.

La mediación puede verse como una alternativa al reduccionismo positivista del Derecho, abriendo espacio a la complejidad y a la dinamización de los ecosistemas, y permitiendo abordar diferentes perspectivas legítimas. Según Leis (1997), esta es la dirección que debe seguir la ciencia, incluida la ciencia jurídica. Los operadores del derecho necesitan ampliar sus horizontes, recordando siempre que las leyes existen para efectivizar derechos, como el derecho a un medio ambiente ecológicamente equilibrado.

Por lo tanto, es fundamental incentivar y promover la mediación ambiental en Brasil, enfrentando el desconocimiento, los miedos y las dificultades, y reflexionando constantemente sobre la práctica. Solo así, al actuar en casos concretos, será posible cuestionar el éxito de la mediación, entendida como la contribución a una nueva forma de comprender y actuar ante la tensión hombre-naturaleza, sin violencia, sin eliminación y sin fusión.

6. LA MEDIACIÓN AMBIENTAL EN LA GOBERNANZA DEL AGUA EN BRASIL

El discurso predominante sobre la gobernanza del agua sugiere que la mejor forma de resolver disputas es evitar los tribunales, buscando soluciones

rápidas, pacíficas y no adversariales. La Política Nacional de Recursos Hídricos (PNRH) adopta este paradigma al implementar la descentralización, la participación de los usuarios, la negociación y la gestión integrada, basada en la cuenca hidrográfica. De este modo, la PNRH atribuye competencia legal para resolver disputas dentro del Sistema de Gestión de Recursos Hídricos (SIGRH), evitando los procesos judiciales.

La creación de un procedimiento alternativo al judicial, preferentemente no adversarial, busca mantener los vínculos sociales de confianza mutua y facilitar acciones colectivas relacionadas con la gestión de uno de los recursos más esenciales para la humanidad. Este enfoque es coherente con la sociedad actual, que enfrenta dilemas complejos y necesita soluciones jurídicas eficaces, rápidas y con repercusión social práctica. El Derecho, así, deja de ser un mero instrumento formal y se convierte en un agente de transformación social.

El redescubrimiento de la mediación en las décadas de 1960 y 1970 refleja este nuevo contexto de búsqueda por restaurar vínculos sociales, respetar al otro y convivir con las diferencias sin violencia. En el ámbito de las políticas públicas, la sociedad muestra una creciente desconfianza hacia el gobierno, ya no confía ciegamente en sus decisiones y exige ser escuchada. La mediación aplicada a las disputas públicas favorece la responsabilidad, el ejercicio democrático y la autodeterminación de los involucrados, permitiendo la transición de la lógica binaria a la convivencia de múltiples verdades e intereses legítimos.

El conflicto ambiental, que se configura como tensión entre economía y naturaleza, es un reflejo de este contexto. En las disputas ambientales, donde están en juego recursos o bienes ambientales, la complejidad de los casos evidencia que el tratamiento dentro del paradigma lineal y determinista no es el más adecuado. No se trata de buscar culpabilidad, sino de entender la responsabilidad colectiva sobre el medio ambiente, respetando la dinámica y las particularidades de cada situación.

Este escenario supone un desafío para el Derecho, que durante muchos años se basó en la lógica binaria y el formalismo de las normas generales y abstractas. Ahora es necesario que las leyes se adecuen a los casos concretos, acompañando la rápida evolución de las disputas y sus circunstancias. El Derecho debe flexibilizarse, manejar las incertidumbres y priorizar la eficacia por encima del formalismo.

Estas condiciones impulsan el camino hacia un derecho negociado, con la posibilidad de acuerdos que favorezcan la preservación ambiental. La mediación, cuando se aplica a cuestiones ambientales, ofrece no solo ventajas como la celeridad, el bajo costo y procesos cooperativos, sino que también enfrenta límites legales y éticos. El agua, un bien ambiental esencial, cuenta con respaldo legal para el uso de métodos alternativos, como la mediación, por parte de los Comités de Cuenca Hidrográfica (CBHs) y los Consejos de Recursos Hídricos.

Además de ser coherente con el carácter negociador de la PNRH, la mediación de disputas entre usuarios y, en algunos casos, entre los propios CBHs, cuenta con sustento legal. Sin embargo, es fundamental recordar que los acuerdos no pueden contradecir otras normas ni resultar en degradación ambiental. Las discusiones sobre el uso de métodos alternativos de resolución de conflictos pueden ser útiles para el mediador, quien debe evaluar cómo actuar para que los acuerdos resultantes de la mediación no sean perjudiciales para el ambiente, es decir, que no sean ilegales, inviables o ineficaces.

Las preocupaciones éticas son esenciales. Cualquier mediación ambiental, incluso dentro de los CBHs o Consejos, debe garantizar la posibilidad de diálogo, la voluntad de negociar y la ausencia de disputas sobre valores. Sin estas condiciones, la mediación se torna inviable, siendo necesario recurrir a otros mecanismos dentro del paradigma adversarial. Si existe riesgo inminente de daño, deben adoptarse medidas urgentes de comando y control.

Por otro lado, las disputas institucionales dentro de los CBHs, generalmente con un número reducido de personas y cuestiones locales, hacen que la mediación sea más factible, como lo demuestra el historial de uso de la mediación ambiental. Aunque no se logre un acuerdo, la mediación puede contribuir a disipar malentendidos, mejorar la comunicación y fortalecer la convivencia entre los usuarios, lo cual es crucial para el buen funcionamiento del Sistema de Gestión de Recursos Hídricos (SIGRH).

Algunas críticas al discurso de la gobernanza son similares a las dirigidas a la mediación ambiental, como la necesidad de equilibrar el poder entre los involucrados y la posibilidad de alcanzar un acuerdo. Crear un contexto institucional de igualdad de poder puede enmascarar la realidad, eliminando las diferencias. La posibilidad de dialogar sobre estas diferencias permite a los participantes transformar la sociedad y elegir actuar de otra manera.

En cuanto al acuerdo, no todas las corrientes de mediación tienen como objetivo exclusivo la obtención de un pacto. Hay enfoques que apuntan a la mejora de las relaciones o a la transformación del vínculo, haciendo que la imposibilidad de llegar a un acuerdo sea solo un obstáculo menor. La interacción entre los usuarios en el CBH puede traer a la superficie diferentes visiones legítimas sobre la gestión del agua, siendo una oportunidad para establecer colaboración y acción colectiva. El respeto a las diferencias y la convivencia armónica, sin fusión ni eliminación, son esenciales para el fortalecimiento de los vínculos.

Una preocupación común a la participación en el CBH es la manipulación o cooptación. Estas prácticas buscan eliminar o fusionar a quienes piensan de manera diferente. Utilizar la mediación para mejorar la relación entre los usuarios implica respetar las diferencias y evitar estas prácticas. Un mediador capacitado

posee las habilidades necesarias para conducir una negociación transparente y ética, garantizando un proceso serio y profesional.

El uso más amplio de las herramientas de mediación de conflictos en los procesos administrativos de la Administración Pública puede aumentar la eficacia de la PNRH. La mediación no debe limitarse a los procedimientos dentro de los CBHs. Al adoptarla, muchos usuarios pueden convertirse en agentes de transformación, replicando esta nueva forma de lidiar con los conflictos en la sociedad y promoviendo cambios en las relaciones entre las personas y la naturaleza (Soares, 2022).

En conclusión, la mediación ambiental resulta coherente con el enfoque de gobernanza adoptado por Brasil en su política de recursos hídricos. Aunque existan límites legales y éticos y cierta resistencia al procedimiento, el análisis de la disputa en cuestión y la reflexión sobre los límites aplicables resultan esenciales. Además, es necesario combatir el miedo y el desconocimiento sobre la mediación, alentando su uso en los CBHs y reflexionando continuamente sobre la práctica. Las innovaciones en la gestión de la PNRH exigen nuevos instrumentos que promuevan una relación más saludable entre el ser humano y la naturaleza, superando el paradigma binario, competitivo y controlador, y avanzando hacia el diálogo, la colaboración y la convivencia. La mediación puede ser ese instrumento, y su aplicación por parte de los CBHs y las entidades públicas contribuirá a transformar el discurso de gobernanza previsto en la política nacional en una práctica de acción evaluable.

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TRANSFORMING ENVIRONMENTAL CRIMINAL LAW ENFORCEMENT IN BRAZIL: PROPORTIONAL SOLUTIONS THROUGH NEGOTIATED AND RESTORATIVE JUSTICE APPROACHES

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1. INTRODUCTION

In this study, we reflect on the innovative potential of restorative justice to transform discursive structures, thereby enhancing the implementation of negotiated solutions for environmental crimes. Our analysis encompasses the extrajudicial realm and the institutions within the justice system. The text is organized into sections that explore this perspective, emphasizing environmental protection as a crucial mechanism for protecting human rights and reshaping decision-making and resolution processes aligned with restorative justice. The chapter outlines the normative and argumentative frameworks designed to achieve non-punitive and dialogical outcomes, characterized by proportional sanctions, by thoroughly examining the legal standards supporting such initiatives.

Following the introduction, the second section examines the significance of the matter within the Brazilian legal framework, emphasizing how the Federal Constitution (Brazil, 1988), in alignment with international norms, recognizes an ecologically balanced environment as a fundamental human right. Practical examples, including precedents from the Supreme Federal Court and the interplay between international and domestic standards, offer a comprehensive overview of the normative foundations that support a political dimension of collaborative efforts between public institutions and civil society.

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Subsequently, an analysis of the procedures and regulations underpinning restorative justice is conducted, emphasising their role in facilitating an alternative but legal framework for resolving environmental conflicts. The approach extends to the interplay between judicial and extrajudicial mechanisms and the obstacles to institutionalising restorative practices, provided that the core values of restorative justice remain intact.

The chapter examines Brazil's legal and administrative frameworks for criminalizing environmentally harmful conduct. It systematically explores the interplay between national legislation and consensual models, underscoring the significance of penal alternatives and the adoption of non-punitive measures that emphasize damage reparations and the effective accountability of offenders.

Subsequently, the following section delves into the formal procedures facilitating the evolution of the conventional criminal justice system. It highlights the role of agreements and negotiations aimed at reparative justice and the inclusion of stakeholders in the decision-making process related to environmental damages. The evaluation extends to applying restorative justice as a viable alternative to incarceration, thereby offering more expedient and effective responses to environmental crimes.

This chapter presents an in-depth analysis of integrating restorative justice principles into criminal justice decision-making. It focuses on proportionality as a foundational element for legal solutions that strive for more effective and sustainable restorative outcomes. Thus, restorative justice may be a valid alternative to traditional punishment, especially in environmental offences. This approach, rooted in solid principles and inclusive practices, has the potential to transform and strengthen Environmental Criminal law enforcement. Consequently, the Brazilian perspective introduced here seeks to enhance the discussion surrounding innovative applications of restorative methodologies in environmental protection.

2. THE CONSTITUTIONAL DIMENSION AND THE DUTY OF ALL TO PROTECT, CONSERVE AND RESTORE THE ENVIRONMENT

This section highlights the legal and political relevance of promoting joint action between state institutions and civil society to preserve the environment, guided by the sustainable development concept.[2]. In this regard, the Brazilian constitutional framework is a pertinent case study that encapsulates the

[2] Sustainable development was defined, in 1987, by the UN (w.d.) under an intergenerational perspective, as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

opportunities and challenges of realising the fundamental right to a balanced environment. This context illustrates the complexities involved in enshrining environmental rights within a legal system and the potential pathways for their effective implementation.

To give concreteness to the argument and connect the discussion proposed here to current judicial practices in Brazil, it is worth noting that, on September 16, 2024, Justice Luís Roberto Barroso, then President of the Supreme Federal Court, during the opening of the 2nd Meeting of the Observatory of the Environment and Climate Change of the National Council of Justice (CNJ, 2024), advocated a stricter stance by judges in punishing environmental crimes. At the time, he emphasized that the lack of a collective perception of the seriousness of these crimes, as violations of fundamental human rights, compromises their visibility. Barroso reinforced that the Brazilian Judiciary must hold perpetrators accountable, especially for significant impacts or irreversible environmental and societal damage. He emphasized that environmental issues need to occupy a prominent place on the Judiciary's agenda, ranging from "promoting a culture of sustainability to developing effective mechanisms for mediating socio-environmental conflicts" and the repression of practices that are harmful to the environment. Finally, he stressed the need for a more proactive, efficient and rigorous judiciary that assumes a central role in the preservation of natural resources and in tackling environmental damage.

The argument that judges must impose harsher punishments is unsurprising, as it reflects a common perspective in Western society (Garcia, 2020; Pires, 2004; 2020). Supporters of this viewpoint believe that tougher sanctions and swift and effective enforcement are the appropriate societal reactions to crime and impunity.

This chapter focuses on Justice Barroso's perspective on recognizing environmental crimes as violations of human rights and his stance for a systemic transformation in addressing these issues through dialogic practices. His viewpoint is a crucial reminder of the complex challenges we encounter today. Given the constitutional importance placed on environmental preservation as a fundamental right, it is argued—aligning with Barroso's perspective—that the resolution of environmental crimes should also be pursued through dialogic procedures, whether judicial or extrajudicial. This method would go beyond the traditional trial framework, where prosecutors, lawyers, and judges predominantly exert dominance.

Dialogical practices are enshrined by legislation and endorsed by Brazil's highest judicial authority. Therefore, rather than legislative changes, a shift in attitude among those involved in updating institutional frameworks is required. This transformation should focus on consensual and participatory resolution strategies that address contemporary socio-environmental demands

more thoroughly. By embracing collaborative and inclusive practices, these approaches provide more suitable, effective, and nuanced responses that align with the complexities of current challenges.

From this perspective, we refer to Niklas Luhmann's Social Systems Theory (2004), which states that constitutions enable structural coupling between legal and political systems. This implies that the Constitution provides political solutions to legal issues and legal solutions to political issues (Luhmann, 2004). In this sense, the constitutional recognition of the relevance of the environmental question legitimizes not only the actions of organizations and entities in society but also the formulation of alternative judicial approaches to the traditional retributive system, guaranteeing the fundamental right to a healthy and balanced environment.

The 1988 Brazilian Constitution recognizes the right to an ecologically balanced environment as a collective right shared by all. Consequently, the preservation, protection, and, when necessary, the restoration of the environment are responsibilities that lie with society and public institutions. In this regard, the Brazilian Supreme Court (STF, 2023) has articulated that by granting the community the right and duty to protect and preserve the environment, the Constitution mandates public participation in managing this essential and shared resource. This interpretation is anchored in two normative principles: the first pertains to the objective dimension of the fundamental right to a healthy environment; the second relates to the concept of participatory democracy embedded within Brazilian environmental governance.

The constitutional provision prioritizing environmental protection links to the international debate that has gained momentum since the seventies regarding the connection between the overexploitation of natural resources and climate change. Safeguarding ecosystems is established in international treaties and national and constitutional legislation worldwide (Boyd, 2012), reflecting the understanding that environmental degradation adversely affects the present and threatens future generations.

With these justifications, promoting legal protection of the environment in political-constitutional terms, rather than confining it to strictly legalistic and juridical contours – as if it were an exclusive "property" of professionals in the justice system (Christie, 1977) – is in line with the sustainability guidelines of the UN Sustainable Development Goals (2015). This approach highlights that environmental protection requires comprehensive political will because, despite the strength of the institutions of the traditional criminal justice system, its limits make clear the need for collective efforts. We all have a role to play in restoring the ecosystem and restoring our relationship with nature, because environmental restorative justice (ERJ) will help connect the global initiative to local action and knowledge by giving us practices and values acutely suited

to the care work of restoration and reconnection (Tepper, 2022). For Aertsen (2022), if it truly aspires at 'doing justice', restorative justice has to be situated in a broader time and space context and must broadly address the relational, cultural, social, economic, and political dimensions of the problem.

This section highlighted that the Brazilian Constitution mandates that environmental preservation necessitates coordination between political and legal dimensions. Effective implementation of this mandate requires disseminating normative reasoning through integrated and public policies that align environmental protection principles with legal standards, thereby ensuring the practical realization of environmental rights. It promotes a sustainable development model that harmonizes environmental preservation, social justice, and legal certainty.

The subsequent section will explore the potential legal repercussions of alleged environmental law violations, including administrative and criminal penalties, which would facilitate the practical implementation of the provisions outlined in the Constitution.

3. ENSURING THE RESTORATIVE MODEL AS A "COMMON UNDERSTANDING" (EXTRAJUDICIAL AND JUDICIAL)

This section explores the implications of solutions grounded in the restorative justice approach, particularly concerning situations identified as environmental harms or crimes. This framework shifts away from subjectivism by prioritizing the description of idea systems established by the regulations that underpin the legal subsystem (Luhmann, 2004). The goal is to draw a distinction in the structure of rational-legal discourse to highlight a typical restorative justice approach and set it apart from other methods. We will not concentrate on the individual agency or the formal or institutional environments where the social practice of language occurs. Our vision is that restorative justice should be a shared understanding within institutions and informal settings, functioning as "an idiom practised to achieve restorative outcomes". We contend that a socio-legal documentary analysis outlining key characteristics of restorative justice and its distinctions from traditional (retributive) approaches should not be confined to superficial criteria that separate conflict resolution into extrajudicial and judicial spheres. While this bipartite division may serve educational purposes, we argue that it unduly narrows the analysis and proves inadequate, as it fails to capture the fundamental elements that define the identity and significance of the regulations governing restorative justice interventions.

For instance, when introducing restorative justice in training for facilitators or academics aimed at the technical and professional development of people

unfamiliar with its assumptions, principles, and objectives, it may be relevant to emphasize the typology contrasting retributive and restorative justice (Gade, 2022). However, Aertsen (2024) warns of the limits of the dichotomy between being "inside or outside the criminal justice system." The institutionalization of restorative justice should not be understood as a mere process of co-optation or subordination to existing judicial structures nor as an utterly autonomous practice detached from the formal justice system or other social institutions. In this sense, Aertsen (2024) proposes a semi-autonomous and intermediate approach in which distinct rationalities – originating from both formal and informal justice – coexist and interact constructively and complementary.

It is worth mentioning that the United Nations Office on Drugs and Crime (UNODC, 2020) reinforces this perspective by highlighting that what truly makes a particular response to crime a "restorative" one is not only a specific practice or process, but more importantly its adherence to a broad set of values that provide a common basis for the participation of parties in responding to a criminal incident and its consequences. These values include truth, fairness, physical and emotional safety of participants, inclusion, empowerment of participants, safeguarding of victims' and offenders' rights, reparation, solidarity, respect and dignity for all involved, voluntariness and transparency of process and outcomes.

The overall vision of Forsyth et al. (2021) for environmental restorative justice is that its practices can permeate the entire regulatory spectrum, going far beyond its conferences within enforcement proceedings. They frame it as a shared and inclusive vision that seeks to integrate, hybridise, and build broader ownership for environmental restorative justice throughout existing regulatory practices and institutions, rather than creating parallel structures or paradigms.

Consequently, it is essential to emphasize that our analysis is grounded in the stance previously mentioned. For a communicative socio-legal practice to resonate with restorative justice, whether in extrajudicial or judicial contexts, it is imperative to recognize the rational attributes that confer upon it a systemic identity. In this context, the resolution of problematic situations in environmental criminal law from the perspective of Brazil can and ought to be guided by a humanized, dialogic, respectful, urban, and collaborative perspective to achieve the objectives outlined in the law. A restorative approach promotes harmonious relationships through restitution, reparation and reconciliation involving offenders, victims and the community (White et al., 2017).

After contextualizing the topic of our reflections, we will refer to specific regulations originating from the United Nations (UN), the European Union, and the National Council of Justice (CNJ) in Brazil. It is worth highlighting Resolution 2002/2012 of the Economic and Social Council of the United Nations, which, in

item 20, calls on Member States to promote a "culture favourable to restorative justice", both among "law enforcement and the judicial system and among program administrators and local communities". It also reinforces the need for regular consultation between criminal justice authorities and restorative programs to build a "common understanding" and maximize the effectiveness of processes and results. (ECOSOC, 2012).

As is well known, Sustainable Development Goal 16 (SDG 16) of the United Nations 2030 Agenda for Sustainable Development emphasizes Peace, Justice, and Strong Institutions. It aims to promote peaceful and inclusive societies, ensure access to justice for all, and build effective, accountable, and inclusive institutions at all levels. Specifically, subitem 16.7 highlights the need to provide responsive, inclusive, participatory, and representative decision-making processes at all levels. In this context, decision-making processes—both extrajudicial and those within the justice system—must focus seriously on producing restorative outcomes. These processes should be open to dialogue, represent social diversity, and effectively meet the demands and needs of individuals and communities. It becomes evident that restorative justice aligns closely with the objectives of the 2030 Agenda.

Facilitators, practitioners, mediators, members of civil society, government officials, and justice system professionals can all help overcome the rigid formalism characteristic of traditional retributive justice. They can promote participatory, inclusive, responsive, and representative interventions. It is essential to note that the regulations mentioned do not limit restorative practices to extrajudicial contexts. In Brazil, there is no prohibition on implementing restorative approaches within formal institutional structures without compromising their essence or effectiveness. Legal procedures can generally be seen as tools for conflict management. However, this does not imply that the criminal justice system must solely adopt a retributive and punitive approach. In a constitutional democracy, the Judiciary can impose significant social reprimands and severe penalties, including imprisonment. Nonetheless, it is equally clear that judicial institutions have the normative authorization to apply alternative sanctions of lesser severity.

The logic mentioned above does not apply to facilitators, mediators, or conciliators whose roles are confined to developing consensual and non-coercive resolutions. Within this framework, criminal alternatives—due to their inherent nature of imposing fewer restrictions on the rights and freedoms of the accused—can and frequently are employed as components of solutions formalized in judicially endorsed agreements grounded in voluntary expressions of will (consensual). In this regard, restorative practices exhibit transformative potential, which, over time, could become entrenched as customs and practices recognized within the legal framework, exerting a significant influence on justice

systems. Such a transformation would enhance legal communicative processes by reconfiguring the outcomes achieved and the discursive structures that underpin traditional legal institutions.

About the European Union standard, we have chosen to refer specifically to item 10 of the Council of Europe's Venice Declaration (2021), which deals with the role of restorative justice in criminal matters. This provision recommends that restorative justice be considered not only as a complementary tool within the traditional criminal justice approach but as a "broader culture that should permeate the criminal justice system". This culture is based on the voluntary participation of the victim and offender, as well as other affected parties and the community at large, to address and repair the harm caused by crime.

In Brazil, there is no impediment to legal decisions aligning with the principles of negotiated and restorative criminal justice, which will be explored in greater detail in the following sections. Indeed, the underlying logic of an agreement that delivers legal effects equals the meaning of Marshall's (1996) well-known definition of restorative justice as "a process whereby all the 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". So, what will make the difference is the ability of involved people and legal operators to achieve a fair solution to the case through dialogical practices.

It should be added that the National Council of Justice – CNJ (2021) establishes that the National Policy of the Judiciary for the environment consists of a strategic action by the bodies of the Justice system to protect intergenerational rights to the environment. In the environmental theme, it was also decided to establish measures to implement the National Judiciary Policy for the adequate treatment of conflicts (CNJ, 2010). This policy aims to use consensual methods of conflict resolution – mainly conciliation and mediation, but also restorative justice – in the Judiciary and under its supervision, and, ultimately, "change the mindset of legal practitioners and the community itself in relation to these methods", to achieve social pacification, the broad scope of jurisdiction, and making qualified access to justice effective ("access to a fair legal order").

To conclude this section, we argue that introducing the principles and values of restorative justice into the discursive structures of decision-making processes may contribute to the humanization of a system for obtaining solutions while expanding the possibilities for effective reparation, inclusion and constructive accountability in situations of environmental damage and crimes. Thus, by recognizing restorative justice as a valid and transformative alternative to traditional retributive approaches, including within the criminal justice system, it is essential to highlight the potential of institutional spaces for dialogue and inclusion anchored in the values mentioned above. These spaces transcend the

limitations imposed by the formal and retributive structures of the conventional system, paving the way for a reconfiguration of the decision-making processes that occur in practices that produce restorative results. In the next section of this chapter, we will examine the constitutional foundations and human rights principles that legitimize the joint action of institutional actors and civil society organizations to protect the environment.

4. THE CONSTITUTIONAL WARRANT TO CRIMINALISE ENVIRONMENTAL CRIMES AND ITS ENFORCEMENT

Brazil experienced significant challenges in the second half of the 20th century, particularly under authoritarian governments that dictated the country's direction. However, during the re-democratisation process and the transition away from the dictatorial regimes that dominated South America in the 1970s and 1980s, the 1988 Constitution emerged as a landmark document. It not only enshrined the human right to a healthy and balanced environment but also established corresponding responsibilities for the government and society regarding environmental preservation and restoration. This includes obligations in instances of environmental damage and crimes.[3].

It should be added that the Brazilian Supreme Court (STF, 2012) highlighted that the 1988 Constitution reflects the broad protection granted to the environment, evidencing its relevance and magnitude in the Brazilian legal system. For the STF (2012), Criminal Law, as the ultima ratio, ensures that specific constitutional values are not compromised by omissions or insufficient interventions to protect human rights. Thus, for the Constitution to acquire true normative force, it must be present in the consciousness of those primarily responsible for validating the legal order. This "will for the Constitution" (Hesse, 1991) represents recognising its authority and the commitment to its effective implementation.

Ramos (2006) examined the relationship between criminal law and international human rights law, focusing on the development of explicit and implicit criminalization warrants as tools designed to prevent and punish human rights violations by criminalizing the relevant conduct. The author emphasized how criminal law has transformed into an essential mechanism for protecting fundamental rights and combating impunity, establishing new paradigms that

[3] Article 225. All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations. (...) Paragraph 3. Procedures and activities considered as harmful to the environment shall subject the offenders, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused.

recognize the objective dimension of human rights and the state's responsibility to ensure their full implementation. In this context, criminal law not only responds to violations but also serves as a preventive mechanism, with its deterrent effects communicated through the criminalization of such conduct.

Additionally, Ramos (2006) points out that within international human rights law, constitutional criminalization warrants have been identified through interpretations of treaties by two key regional courts: the Inter-American Court of Human Rights and the European Court of Human Rights. Both institutions, when interpreting the American Convention on Human Rights and the European Convention on Human Rights, acknowledged the necessity of imposing criminal penalties on those who commit human rights violations. This approach reinforces the role of criminal law as a vital instrument for protecting basic rights and preventing severe violations, aligning with international commitments to uphold human rights.

Perini (2022) explains that when a community chooses (with its own laws) to sanction a fact through a penal norm, it becomes the object of an absolute prohibition (*prohibiting*): that is, the community expects that the rule of conduct established by the penal norm will not be violated under any circumstances. Likewise, an element in support of this is the fact that the threat of sanctions against goods of primary value for the offender (personal freedom, first of all) averts criminal rule violation with a well-known 'deterrence' effect.

The 1988 Constitution mandates the implementation of criminal laws for environmental protection, underscoring the potential of using the strong language of criminal law to safeguard the environment effectively as a human right. Upon officially recognizing the paramount importance of environmental protection, the Brazilian National Congress enacted Law No. 9.605 of February 12, 1998 (Brazil, 1998), which regulates the criminal and administrative sanctions applicable to conduct and activities harmful to the environment. This legislation provides not only for the individual liability of those involved in environmental crimes but also for the liability of legal entities in cases where the offence is committed by the decision of their legal representative, contractual representative or collegiate body in the interest or benefit of the entity. Furthermore, the law determines the need for prior reparation of environmental damages resulting from crimes as a condition for applying criminal sanctions. One relevant aspect is that, in the current Brazilian legal system, at least in principle, all environmental crimes allow for some form of concerted solution, such as a transaction, conditional suspension of the proceedings or a non-prosecution agreement. This demonstrates that the primary objective of the legislation is to restore environmental damage (Freitas, 2022) rather than to apply custodial sentences, which is the self-image of the retributive system.

The legislative technique of the Environmental Crimes Law reflects a trend observed in the Brazilian legal framework in recent decades, aimed at mitigating the need for traditional punishments and reducing the strict application of the principle of mandatory criminal action. In this scenario, the model ceases to be guided exclusively by the logic of classic retributive punishment – historically centred on incarceration – to adopt broader and more contextual approaches. The Brazilian Supreme Court (STF, 2022) recognized that the Brazilian legal system has incorporated elements of the Consensual Criminal Justice model since 1995. Unlike traditional criminal proceedings, which focus on punishing the perpetrator after due process, the negotiated system seeks, whenever possible, to repair the damages caused to the victim and to apply alternative measures to custodial sentences.

Provisions in Brazilian regulations function as normative overtures to refresh legal reasoning. They create legal alternatives for developing solutions through non-custodial measures such as civil settlements, criminal transactions, and conditional suspension of proceedings. These instruments embody the principle of subsidiarity in criminal law by avoiding custodial punishment of offenders as the only pattern and promoting reparation and reconciliation for damage. Thus, it is possible to identify a more sophisticated and alternative model for addressing environmental crimes in Brazil, aligning with Restorative Justice principles. This model prioritizes the reparation of damages and focuses on the needs of victims, thereby fostering a more effective and humane approach to environmental protection and conflict resolution arising from infractions.

To update the dialogical approach, the Brazilian National Congress enacted Law No. 13,964/19 (Brazil, 2019). This statute introduces a more refined decriminalizing strategy within criminal procedural law, aiming to resolve conflicts through consensual jurisdiction. The non-prosecution agreement applies to cases in which the ministerial body verifies the presence of the necessary requirements for filing a criminal action. Still, given the absence of violence or serious threat, a minimum punishment inferior to four years, and a formal confession by the person under investigation, prosecutors, relying on criminal policy reasoning, may consider the imposition of restrictive and pecuniary penalties appropriate for redressing the injustice. This rule mitigates the principle of mandatory criminal action, as the legislator understood that the public interest would be better served by prioritizing the victims' redress and applying restrictive rights measures of an educational nature, which also contribute to social well-being (Perez Filho, 2020).

Restorative justice is and ought to be identified with non-punitive, but effective, social measures that orient towards changing behaviour, including towards good environmental outcomes. Where restorative justice measures are located within larger criminal justice systems has implications, both for their

potential effectiveness (i.e., changing behaviour in a positive way) and how or if it presents as an alternative to punitive sanctions (rather than reinforcing the importance of the latter). (White, 2022)

The Superior Court of Justice (STJ), which occupies the second position in the hierarchy of the Brazilian Judiciary and is responsible for interpreting infra-constitutional laws, recently issued a decision on the non-prosecution agreement. In the judgment of REsp No. 2038947 (STJ, 2024), the court highlighted that consensual mechanisms offer a faster criminal response to criminal behaviour while reducing judicial demands in the criminal sphere. Under the principle of minimum intervention, criminal action is treated as subsidiary, and punishment, in the words of Claus Roxin, should be the "ultima ratio of social policy". In this context, the opening of a criminal process should not occur before the possibilities of softer consensual solutions duly provided by law have been exhausted (STJ, 2024). The STJ (2024) clarified that while mechanisms such as criminal transactions, conditional suspension of the process, and non-prosecution agreements are not technically classified as penalties, they serve as "functional equivalents of a penalty." Therefore, it is reasonable that these measures adhere to established guidelines for determining the state's response. This ensures that the protected legal asset receives appropriate protection even in cases of significant concrete gravity.

Then, it is essential to highlight that the 1988 Constitution marked a significant advancement by recognizing the human right to a balanced environment. It assigns the government and society responsibilities to ensure preservation and restoration. This commitment was further enhanced by the 1998 Environmental Crimes Law, which outlines the criminal and administrative penalties for environmental offenses. Additionally, the introduction of negotiated and restorative justice models emphasizes the repair of damages, encourages conciliation, and aims to reduce the solely retributive focus of the Brazilian legal system. In the next section, we will explore in greater detail how the methodology of negotiated criminal justice, by empowering parties to discuss the specific content of solutions in each case, can support a substantial approach to restorative justice that protects the environment.

5. NEGOTIATED CRIMINAL JUSTICE THAT MAKES VIABLE USING PENAL ALTERNATIVES

This section outlines procedural forms to enable the identity-based evolution of environmental criminal justice solutions, as Pires (2004) discussed. It emphasizes transforming the retributive model for addressing conflicts. To achieve this, the proposal advocates for the adoption of penal alternatives that minimize the

use of coercive sanctions. In Brazil, these non-imprisonment sanctions can be implemented through procedures focusing on consensus and dialogue.

The initial premise is that conventional decision-making processes typical of Criminal Law and Criminal Procedure have shown signs of difficulty in delivering solutions to complex issues related to environmental criminal justice within a reasonable time frame. They have also failed to adequately hold perpetrators accountable, particularly when faced with corporate violence against the natural environment (Acosta, 1988). Thus, restorative justice emerges, at least partially, as a response to dissatisfaction with the traditional criminal justice system, which is marked by coercive practices and distant from everyday reality (Walgrave, 2023).

For Vilas Bôas Filho (2009), a hypothesis to describe the Brazilian legal subsystem may be that, instead of a lack of autonomy that taints it as a whole, perhaps the courts, which are the instances that make up its centre, are overwhelmed with irritation due to deficient filtering by its periphery. This inability of the periphery of the legal subsystem to function as a kind of "filter", "cushion", or "buffer" that protects the centre of the subsystem from an overload of variety, which can create a short circuit in its operational web, aggravating problems related to the response capacity of this subsystem.

Brazil's traditional retributive criminal law system generally exhibits characteristics analogous to those found within legal frameworks in the Americas and Western Europe (Pires, 2004; Garcia, 2020). This system is predicated on subjective judgments, allowing for many arguments and diverse interpretations of identical factual circumstances. This inherent flexibility results in the absence of rigid time parameters, often culminating in protracted deliberations that lack defined temporal constraints, consequently contributing to delays in judicial outcomes.

In discussing the penal system, Jaccoud (2007) highlighted the characteristics that lead to stigmatization, social exclusion, and suffering for individuals deemed guilty. She suggested that restorative justice, an innovative approach, could partially transform these aspects of the criminal system by changing its goals (punishment), processes (adversarial), consequences (stigmatization), and foundational beliefs (particularly the divide between criminals and law-abiding citizens and the idea of crime being a violation of societal moral standards). Walgrave (2023) also emphasized the importance of respectful and inclusive dialogue among all parties involved, stressing the need to separate restorative justice from punitive and coercive methods. This distinction reinforces the perception of restorative justice as a process focused on human connections and inclusion.

No legal provision in Brazilian law (Suxberger, 2017) requires the public prosecutor to pursue a mandatory criminal trial or file a public criminal action. This is much more of a criminal procedural culture than an unequivocal, compulsory, and unavoidable normative mandate of the legislation.

Our position is that the judiciary can actively institutionalize negotiated practices within the criminal justice system, ensuring that effectiveness and speed are tangible tools for environmental protection. In Brazil, the Public Prosecutor's Office and the judiciary may be responsible for ensuring that agreements made outside the judicial sphere comply with environmental legislation and support the implementation of human rights, thereby safeguarding public assets of legal significance. To this end, we need to value institutional or judicial bodies specialized in dialogic justice, composed of professionals trained to deal with the complexities of environmental issues. Cohesive agreements rather than coercive judgments in legal disputes can support the alignment of interests, which is essential for applying specific Criminal Law programs. However, it is crucial to highlight that, in a democratic state of Law, only the Judiciary can impose non-consensual solutions.

From a socio-legal perspective, adopting respectful, dialogic, and urban procedures to address issues related to Environmental Criminal Law—be they administrative, judicial, or extrajudicial—would enable a nuanced approach to resolving conflicts. This process would also aid in systematically collecting these practices in institutional repositories, which could serve as a reference for negotiating future disputes. This model illustrates that traditional judicial conflict resolution is not the sole method for achieving the desired outcomes envisioned by the law. Since legal language is not subject to exclusive ownership and can be freely engaged with by the community, all parties can employ legal techniques and relevant principles to formulate agreements that comply with regulations concerning environmental damage and crimes. This collaborative approach can ultimately yield solutions that align with the restorative justice paradigm.

After completing the necessary formal procedures and ensuring public transparency—especially on the electronic official platforms used for administrative and judicial processes in Brazil—the agreements mentioned above must be submitted for review by the relevant government agencies or analyzed by the Public Prosecutor's Office. The Public Prosecutor or any interested party represented by their lawyer may initiate legal action if the intended objectives are not fully met. It is important to note that any agreement reached must comply with applicable statutes, case law, and the customs and practices of the jurisdiction where it was formalized, ensuring its legitimacy and effectiveness.

A great example of comparative law is a recent contribution by Forsyth and Tepper (2024), in which they explore environmental enforceable undertakings (EEUs) as innovative regulatory tools to mitigate and prevent environmental

harm. After identifying the central regulatory objectives of EEUs: strategic response, deterrence, prevention and, most importantly, their restorative function, the authors argue that EEUs promote legal compliance and repair of harm and involve affected communities in the regulatory process, contributing to environmental restorative justice. Drawing on case studies, especially in Australia and the United Kingdom, the authors highlight the inclusion of the community and indigenous populations in the design of solutions, fostering sustainable relationships and the reconstruction of ecosystems. The premises include the inadequacy of traditional punitive approaches, the need for adaptive alternatives and the effectiveness of EEUs in reducing future harm. The scholarly work frames EEUs as instruments that transcend legal compliance by adopting principles of restorative justice, promoting dialogue and collective reparation.

According to Zilli (2022), different approaches to achieving justice can be seen as potential pathways for resolving criminal conflicts within Brazilian society. This analysis identifies two modes that appear to be in opposition: the disputed mode and the consensual mode. The disputed mode focuses on uncovering the procedural truth regarding the details of an accusation. In contrast, the consensual mode aims to establish points of agreement that may either help avoid the disputed process or at least reduce some stages of its procedural implementation.

The procedures for achieving a valid agreement must adhere to the legal standards inherent in its substantive content, which are critical to ensuring its validity. These standards encompass objectives oriented towards restorative outcomes and necessitate the voluntary expression of will by the involved parties. This principle of voluntariness is frequently highlighted in regulations about restorative justice frameworks.

When analyzing possible solutions for Environmental Criminal Law, such as criminal trials or agreements, we observe elements of what is known as negotiated law or negotiated procedures. This concept represents a plural model rather than a single approach and is more accurately described as a mixed model. To support the idea of negotiated justice, it is typically contrasted with its opposite: imposed or disputed justice. However, neither of these two models fully captures the complexities we encounter in everyday situations. Between the extremes of disputed justice and negotiated justice exists a spectrum that includes various forms of participatory or consensual justice (Tulkens and Van de Kerchove, 1996). Consequently, legal professionals must navigate these nuances and apply their skills to tailor the most effective way to address their conflicts.

However, it is unacceptable to treat the agreement as a contract of adhesion or an absolute form of compliance or submission. According to Tulkens and Van de Kerchove (1996), specific alternative procedures to a criminal trial, such as a plea bargain, the imposition of specific alternative measures or punishments,

such as community service, or even certain decisions regarding the terms of the sentence, such as suspension of execution, suspension of sentence, parole or probation, are generally subject to the consent of the offender, in a sort of adhesion to what was proposed by the prosecuting authority. Therefore, a final model of negotiated criminal justice is not content to recognize that individuals have the power to accept or reject proposals whose content is entirely beyond their control. This model, which can be described as negotiated justice, grants these same individuals a "power of discussion", the exercise of which is likely, through reciprocal concessions, to affect, at least partially, the content of these proposals and thus lead to an indeed negotiated agreement. Suppose this model is already illustrated in certain forms of transaction that cannot be reduced to simple "adhesion contracts". In that case, it is materialized even more clearly in the institution of mediation procedures and the case of plea bargaining. In this case, as in the previous case, we can speak of contractual justice or, more precisely, of a particular form of contractualization of criminal justice, understanding, however, that the degree of autonomy of will granted to individuals obviously differs in both cases, as it differs in adhesion contracts and contracts by mutual agreement.

In our opinion, negotiated criminal justice instruments can help alleviate the overwhelming number of cases sent to Brazilian courts and tribunals. Currently, these courts are not the only avenue for resolution and are struggling to manage all the cases. As Nils Christie (1977) pointed out, it is essential to organize social systems in a way that allows conflicts to be nurtured and become visible, ensuring that professionals do not monopolize handling these cases. Only time will tell if this negotiated approach will qualify environmental criminal law enforcement and reduce impunity by providing tailored and more effective alternatives to the traditional criminal process, which is often slow, costly, and inefficient.

6. THE PRINCIPLE OF PROPORTIONALITY OF PUNISHMENT AND SOLUTIONS FOSTERING RESTORATIVE OUTCOMES

This section begins by suggesting that a negotiated perspective is better suited for implementing penal alternatives than a traditional retributive approach. It further posits that a restorative framework for addressing issues in Environmental Criminal Law should be based on objective criteria. One of the primary criticisms of custodial sentences underscores this argument—the cornerstone of the retributive system—namely, the inflexibility with which punishment amounts are prescribed by law in Brazil and many other legal systems. In some instances, this rigidity even results in imposing mandatory minimum punishment.

In this context, a prison sentence primarily means social exclusion, pain, and suffering, becoming a key element in the identity self-portrait of the penal system (Garcia, 2013). For this reason, a custodial sentence does not effectively address the core issues associated with a fundamentally restorative approach, as outlined in the regulations discussed in the previous sections. We argue that a solution based on an agreement within the framework of Environmental Criminal Law, established through a specifically dialogical procedure, should minimize abstract content as much as possible. Additionally, it is crucial for the solution to clearly define the objectives sought in the agreement between the parties involved.

The literature surrounding traditional theories of punishment—now regarded as institutionalized discourses within Criminal Law—is extensive. This situation starkly contrasts the lack of attention given to developing alternative penal approaches, particularly in the Brazilian context. Much of the academic and practical focus is on understanding the classic retributive model. A notable example of this gap is that it was only recently, in 2020, that the National Penitentiary Department, the National Council of Justice, and the United Nations Development Program released a manual addressing the management of penal alternatives.

In this scenario, Pires (2020) highlights the existence of a "deficit of institutionalized ideas" that could serve as a basis for reformers and innovators, helping them to align punishments with the principles of Human Rights. However, the weaknesses of the proposed updates have proven insufficient to legitimize the intended changes effectively. As a result, the foundations of traditional theories of punishment – retribution, deterrence and rehabilitation in prison – remain predominant, limiting the scope of innovative proposals. For Pires, restorative justice can partly fill this legitimacy deficit. However, he warns that restorative justice also runs the risk of being enveloped by a large number of restrictive ideas and norms, which can compromise the effectiveness of its fundamental principles. For example, Gade (2022a) suggests that by insisting that restorative justice is radically distinct from punishment, its advocates may – contrary to their intentions – favour those who wish to preserve the status quo rather than promote the evolution of criminal justice systems in the direction of restorative justice.

Such pertinent warnings support our position that explaining what Brazilian legal literature and jurisprudence consider a penalty proportional to the crime, including that applicable to environmental crimes, is essential.

Peruchin (2015) explains that the German Constitutional Court case law, which several other countries have also adopted, plays a significant role in developing the principle of proportionality. The author notes that in a judgment from the early 1970s, the Court established that a sanction is considered proportional when the measures provided by the legislator in response to the conduct are both adequate and enforceable in achieving the intended objective. The means are re-

garded as adequate if they can effectively promote the desired outcome, and they are deemed enforceable if they represent the least harmful option possible or if they minimally restrict the fundamental rights of the offenders.

Furthermore, Peruchin (2015) highlights that the principle of proportionality comprises three sub-principles or methodological stages: adequacy, necesity and proportionality in the strict sense. Initially, the interpreter must assess whether the intervention measures are suitable for achieving the intended objectives. The second assumption is necessity, which requires the absence of less onerous or intrusive means. Among the possible options, the one that causes the least interference in the interests of the accused citizen must be chosen. Proportionality, in the strict sense, translates into fair measure, resulting from a rigorous weighing between the impact of the intervention on the affected party and the objectives it seeks to achieve.

The Brazilian Supreme Court ruled (2012) that even in cases involving constitutional criminalization warrants, such as environmental crimes, the judiciary must observe the principle of proportionality. This principle prohibits excessive interference in the rights of the accused and insufficient protection of the rights of the collectivity. Therefore, the judiciary must always recognize that the Constitution grants law makers considerable discretion in selecting the legal interests protected by criminal law and evaluating the appropriate and necessary measures to ensure their adequate protection.

In the realm of environmental restorative justice, the discursive structure of negotiated criminal law solutions concerning environmental damages and crimes in Brazil must adhere to the principle of proportionality. This involves the following criteria: 1. decisions should comprehensively address the consequences of the crimes, highlighting the importance of integral reparation for victims (human and more-than-human) from a geocentric perspective[4] and focusing on future implications; 2. the actions of the Public Prosecutor's Office should be guided by the involvement of both the community and the perpetrator in resolving the issue; 3. the punitive measures imposed by the State should be reduced; and 4. there should be a strong emphasis on penal alternatives whenever analysis of specific circumstances allows, prioritizing restorative outcomes.

[4] In Minas Gerais, Brazil, there is the Institutional Center for Technology and Innovation in Environmental Modeling, which can measure and develop a plan to repair environmental damage caused to the natural territory. This research environment promotes innovation that aggregates intellectual capital and infrastructure in technological areas of the Federal University of Minas Gerais (UFMG), a public institution. Its mission is to carry out research, development, and technological and innovative extension activities to transfer its technologies and science to society, notably through environmental modelling applied to planning, management, and territory monitoring. See at https://csr.ufmg.br/ct_modelagem/

Moreover, we believe that the agreement should not be based solely on financial considerations. Instead, it should prioritize complying the conditions outlined in the agreement, which serve as a functional equivalent of a penalty (STJ, 2024). Therefore, there is no prohibition against these agreements incorporating restorative intervention principles, concepts, and objectives. According to Altman (2023), restorative justice approach is a mechanism of criminal justice because it achieves the aims of criminal justice.

As highlighted in case law and scholarly literature, the principle of proportionality can guide dispute resolution. In developing legal arguments for addressing conflicts in environmental criminal law, this principle provides a clear framework for applying and interpreting the law. The decision-making process should stress the importance of protecting fundamental rights and outline the necessary steps to restore these rights concretely. Additionally, it establishes acceptable limits for retributive punishment and ensures legal certainty for all parties involved. Once focused on negotiated and participatory solutions tailored to specific circumstances, this approach is significantly more effective in achieving restorative goals than simply resorting to an abstract incarceration punishment.

It is possible to state that a justice system (including an extrajudicial system) that values reparation for the damage caused to the victim, encouraging the offender to contribute directly to this reparation instead of applying a traditional penalty, is characterized as restorative and no longer retributive. This restorative nature remains even in situations where the constraint imposed on the offender is high or when the offender subjectively perceives the imposition of a reparative sanction as a form of punishment (Jaccoud, 2005). From this perspective, it is intuitive that the standardized reasoning of Restorative Justice has the potential to profoundly transform the retributive model that is dominant in Brazil, integrating itself into the state justice system. Thus, while maintaining its coercive nature (albeit partially), the legal system replaces the punitive purpose of sanctions with a restorative objective, which favours measures such as, for example, reparation of damages (Jaccoud, 2005).

7. CONCLUSION

This chapter sought to contribute to the debate on how the ideas mobilized within the social subsystem of Law (Luhmann, 2004) can transform the meaning of systemic operations aimed at resolving problematic situations classified as environmental crimes. It has been noted that no legislative changes are required in the Brazilian legal framework; instead, a shift in the attitude of professionals is necessary to initially pursue negotiated solutions and implement them in

accordance with the regulations described in this work. Thus, the schematization of ideas in an institutional environment aimed at achieving environmental restoration would undoubtedly contribute to realizing the fundamental human right to protect and restore damage resulting from ecological crimes.

The ongoing and unanimous evidence of a climate crisis underscores the necessity of strengthening constitutional protection of the environment as a fundamental human right. This implies that governmental institutions and the criminal justice system must remain vigilant and proactive, with policies and legal-political projects designed to implement penal alternatives that are more expeditious, efficient, and effective. Such measures aim to achieve sustainable development by addressing environmental crimes more successfully.

From a criminological perspective, systemic violations of the environment call for transformations within justice system institutions and in extrajudicial treatment of conflicts classified as environmental crimes. For the philosophy underlying restorative justice to produce impact, we must frame it as a "common understanding," applicable both extrajudicially and judicially. This transformation requires a paradigm shift from retributive to restorative models.

Through a multidimensional approach that integrates international norms, national jurisprudence, and constitutional principles, this chapter emphasizes that proportional solutions in restorative agreements provide a viable path toward achieving restorative outcomes. Such agreements must prioritize integral damage restoration while respecting the principle of proportionality, as recognized by Brazil's Supreme Federal Court and the National Council of Justice guidelines.

Adhering to objective and rationally grounded criteria in legal literature and jurisprudence lends legitimacy to consensus-building solutions. This approach avoids excessive retributive intervention in offenders' rights while ensuring adequate protection of the environment as a fundamental human right. Consequently, incorporating restorative justice as a foundational principle in agreements related to environmental damages and crimes can promote a culture of shared responsibility.

According to Aertsen (2022), the field of environmental damage offers broad opportunities for restorative justice to develop new understandings and practices in the pursuit of justice. Pilot projects and test cases play a crucial role in building ad hoc expertise, which must undergo rigorous evaluation to facilitate the subsequent creation of training programs tailored for facilitators and other stakeholders.

A project at the Court of Justice of the State of Minas Gerais is underway to design a restorative justice approach to environmental crimes through negotiated criminal justice strategies. The Tribunal's innovation management

team is evaluating the feasibility of this transformative shift. This initiative can enhance Brazil's institutional commitment to sustainability and the promotion of human rights. Additionally, it highlights opportunities to improve law enforcement's effectiveness in restoring degraded environments.

If effectively validated and implemented, this innovative concept can explore the feasibility of enhancing the constitutional mandate for environmental protection through penal alternatives. Additionally, it promises to modernise the functions of institutions responsible for enforcing environmental crime legislation in line with the UN 2030 Agenda. In this chapter, we have presented a socio-legal approach to ground the practicality of this innovation, concluding that such an initiative can align decision-making processes with the principles of negotiated criminal justice. Ultimately, this aims to yield restorative outcomes and strengthen environmental protection efforts.

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RESTORATIVE JUSTICE AND ENVIRONMENTAL INJUSTICE: EXPLORING GREEN VICTIMOLOGY IN THE INDIAN CONTEXT

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1. INTRODUCTION

The concept of restorative justice is gradually emerging in the Indian Criminal Justice system as an attempt at least to reduce the domination of conventional criminal justice model and supplementing crime with an attempt to restore the harm done to the victim and society. This approach that aims at correcting the loss promoted by criminal activities is most appropriate in the area of environmental crimes and injustice. There has been air pollution, water problem, and problems of environmental injustice where vulnerable groups of the society have been affected most, in India. Such problems arise from conditions of social and power wrongs, giving rise to what is referred to as environmental racism. It can be strongly said that the concept of restorative justice will work well in fighting environmental crimes in India. This approach highlights that any harm incurred on the individual and the society needs a response, and all stakeholders should be included in the process of making amends.

According to Bartuska and Westphal (2007), considering that any process that degrades natural system impacts human well-being, responses of ecological justice contribute to the larger biotic ecosystem. Restorative justice frameworks can also enhance fairer and sustainable approaches to the management of other environmental problems by providing due consideration to the victims, offenders and the broader community. Promoting the use of Indigenous wisdom and ways also fits perfectly into the equation in restorative solutions to environmental injustice. As Robyn contends (2002), exclusion of traditional knowledge in environmental policy is harmful in intself and that harm extends to other

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Indigenous people. Environmental justice is a criminological issue because concepts of justice and equality in access to environment are expanded, and the distribution of environmental risks depending on class, color, and ethnicity, are explored (Lynch et al., 2015). Addressing these disparities through restorative approaches can help to create a more just and equitable system for all.

2. EXPLORING RESTORATIVE JUSTICE APPROACHES IN THE INDIAN CONTEXT

Altogether, the introduction of restorative justice to environmental crimes and environmental injustice in Indian is a great opportunity for the development of the concept. People need to be involved in restoration and this process with the help of traditional knowledge and practices can help to solve the problem, rooted in restorative justice, of environmental injustice and find more efficient solutions for the future. Now let us discuss an example of environmental injustice that takes place in India the problem of e-waste. Electronic waste refers to discarded electronic appliances that have become a menace in India since most of them are either buried in the poor indigenous communities or publicly incinerated, polluting the air close to residents' homes. This is more so the case among the poor and vulnerable groups of society owing to lack of resources and proper infrastructure that would enable them manage e-waste from a proper disposal and recycle point of view (Robyn, 2002). To overcome this problem restorative justice could be useful. Through involving e-waste recyclers, the community members and the government authorities, the restorative justice will make efforts to compensate the losses resulting from illicit e-waste disposal and to punish those damaging the environment, and to build up sustainable e-waste solution.

A further example of environmental injustice in India is the increased sufferings of the environmental losses for the downside and poorer sections of people of hilly regions. These concern areas are located in the tropical regions involving indigenous or tribal based communities and influence their livelihood source, access and availability to forest resources as well as with climate change issues including deforestation, mining and climate change (Kuehn, 2000). Some restorative justice practices in this regard could comprise of engaging these communities to rehabilitate marred ecosystems, find ways of rational utilization of resource conservatively as well as being afforded an opportunity to contribute to policy making on issues touching on their environment. Thus, in the future, applying traditional ecological knowledge (TEK) along with human and community values of justice in the hilly areas of India, restorative justice could effectively respond to environmental injustice. It has found to have been used in many settings in India but its use in environmental crimes and environmental injustice is still emerging. Some of the promising examples

are the use of recognized analysis mode of resolving disputes like village council or panchayats in matters concerning the use of resources and harm on environment. There is also increased appreciation, globally and in India, on the use of traditional ecological knowledge and practices for policy formulation and rehabilitation works. Rather than basing solutions on loss of the environment, restorative justice presumably taking a communal approach through an understanding of the Indigenous societies' history and appreciation of the environment might develop better and sustainable ways of reparation.

Nevertheless, there is also research evidence of grassroots activism in India that is beginning to rely on restorative justice and TEK to address environmental injustice. For instance, separately in several states of India institutional structures of community have been established with an aim of managing the ecological structures like wetlands or forests, apart from trying to help the locals to demands greater ownership of these resources (Mitchell, 2011). Sometimes these initiatives include traditional models leading towards community-based natural resource management and modern models including environmental rehabilitation and community mobilization. It also shows through the localization of initiatives that restorative justice offers a pathway to handle the core issues of environmental injustice in India. Hypotheses derived from these experiments, alongside the expanding work in restorative justice and environmental justice, indicate towards a need for a more coherent, bottom up strategy to the challenges faced in the Indian context of environmental inequity (Mitchell, 2011; Long et al., 2020; Robyn, 2002; Bartuska & Westphal, 2007).

3. POLICY, COMMUNITY, AND LEGAL FRAMEWORKS FOR RESTORATIVE JUSTICE

As with most restorative justice approaches, their implementation has been asserted in a number of settings in India, however the application of these principles in environmental policy and law remains somewhat nascent. As a caveat, there are some positive trends that have emerged recently, including a rising awareness of Traditional Ecological Knowledge application in regards to the environment and the shift in conservation and restoration emphasis toward the community level. For instance, the Biological Diversity Act of 2002 in India pays attention to community interests in biological resources and established legal means that admit community engagement in benefit sharing. Also, the High Court of Uttarakhand has make recent judgments giving legal personality to river Ganga, Yamuna, and all the tributaries that flows through Uttarakhand necessary to understand and uphold natural resources and therefore value the rights of ecology, suggesting that environmental perspectives need to be oriented towards an ecocentric framework of analysis and action.

The development of these practices has still left many more powerful and coherent frameworks which used legal and policy tools for the implementation of restorative justice that would reflect the needs of the population that is especially vulnerable and in need of help for restoration of the harmed ecosystems. Due to the multifaceted nature of the issues of environmental injustice in India, there needs to be an approach that integrates restorative justice, TEK and Community Based approach. A relatively unexplored way of dealing with issues of environmental injustice in India is through restorative justice incorporating approaches to environmental rejuvenation and preservation efforts at the communal level. They include in decision-making both the local population and the use of resources involving traditional ecological knowledge and demands for improved practicable and impartial stewardship of the natural environment. According to the literature (Bawa et al., 2011; Alley, 2019). For example, in the state of Uttarakhand, local communities have been actively involved in the restoration of degraded forests and watersheds, drawing on traditional practices of community-based natural resource management (Alley, 2019). These efforts have not only helped to restore ecosystem health, but have also empowered local communities to have a greater say in the management of their natural resources and to seek redress for environmental harms (Alley, 2019).

4. EMPOWERING VICTIMS OF ENVIRONMENTAL HARM

For instance, self-governance by reference to the principle of accountability can be used to name and shame corporate organizations, as well as government departments, that cause harm to the environment and require them to institute remediation and rehabilitation measures among affected communities. The principle of healing can be used to help green victims regain their physiologically, emotionally and culturally healthier status, to also regain their ecological and cultures coherency. Solutions that involve a community engagement process, which allows local actors to make decisions about what should be done and require intervention to reverse the effects of adaptation, provide an inclusive process to including the needs of the affected people. Through the application of restorative justice into Green Victimology we can transform the current injustice in India that is accorded to the sufferer by enhance justice to take into consideration of victims of environmental injustice (Bartuska & Westphal, 2007; Mitchell, 2011).

5. RESTORATIVE JUSTICE PRINCIPLES IN GREEN VICTIMOLOGY

The principles of restorative justice, such as accountability, healing, and community-based approaches, can be applied to the field of green victimology to

address environmental injustice in the Indian context (Ferry & Fauzi, 2015; Daly, 2017) (Principles of Restorative Justice, 2014). For instance, self-governance by reference to the principle of accountability can be used to name and shame corporate organizations, as well as government departments, that cause harm to the environment and require them to institute remediation and rehabilitation measures among affected communities. The principle of healing can be used to help green victims regain their physiologically, emotionally and culturally healthier status, to also regain their ecological and cultures coherency. Solutions that involve a community engagement process, which allows local actors to make decisions about what should be done and require intervention to reverse the effects of adaptation, provide an inclusive process to including the needs of the affected people. Through the application of restorative justice into green victimology we can transform the current injustice in India that is accorded to the sufferer by enhance justice to take into consideration of victims of environmental injustice (Daly, 2017; Bartuska & Westphal, 2007; Mitchell, 2011).

6. EVALUATING THE EFFECTIVENESS OF GREEN VICTIMOLOGY

Taking into consideration the provisions of green victimology and restorative justice in relation to the environmental injustice in India, it is necessary to highlight various outcomes in terms of quantitative as well as qualitative indicators. The level of involvement of affected communities in management of restoration and conservation of the environment. The extent of justice done in addressing wrongs done to the environment, specifically the degree of environmental restitution accomplished. To what extent does the green victimology concept documented the level of physical, emotional and cultural healing together with ecological and community integrity. The potential and longevity of community-based environmentalism with restorative justice as an approach it is important to consider both quantitative and qualitative measures of impact.

Some key metrics to consider may include:

- The extent to which affected communities have been empowered and engaged in decision-making processes related to environmental restoration and conservation.
- The level of accountability and reparations achieved for environmental harms, including the implementation of restorative measures.
- The degree of physical, emotional, and cultural healing experienced by green victims, and the restoration of ecological and community integrity.
- The sustainability and long-term impact of community-based environmental initiatives that integrate restorative justice principles.

7. INTEGRATING RESTORATIVE JUSTICE INTO ENVIRONMENTAL PROTECTION

The emerging area of green victimology offers a prospect of attempting to incorporate the principles of restorative justice in environmental conservation and remediation in India (Richardson, 2016; Mitchell, 2011; Bartuska & Westphal, 2007). By following the devastating experiences of those who have been affected many they understand environmental injustice and degradation, solutions that can fit the problem appropriately would be provided. These various aspects of restorative justice and green victimology can manifest themselves in the inclusion of victims and affect communities in the decision making processes, the creation of programs that are designed to hold polluters accountable and seek justice for victims, as well as supporting the efforts of those who wish to restore the ecology and culture of given area. In this way, by adopting such a comprehensive and optics that prioritizes the victim in the complex process of world arrangement, it is possible to strive for the creation of a better and long-term perspective for all interested parties: recognizing the value of the natural environment in all its aspects and acknowledging the importance of its use by communities.

8. CHALLENGES OF ENVIRONMENTAL INJUSTICE

However, there are also, certain shortcomings or limitations regarding Restorative Justice approaches to reach environmental injustice in India. This obeys to the fact that a number of environmental injustices are rooted in power relations and structural vulnerability, with the worst of impacts tending to be tendered towards the most vulnerable groups. One of them is the issue of multiple scales of environmental problem in which conflicts are multiple, jurisdictional approaches are multiple and the stakeholders are multiple. Solving these problems presents a set of challenges which are best solved not individually and which might be challenging to implement in practice. Some of this research provides useful information regarding the applicability of restorative justice and environmental justice and traditional ecological knowledge in Indian context. More research has to be developed for better understanding of restorative justice in environmental crimes and environmental injustice in India.

9. ADDRESSING POWER IMBALANCES IN GREEN VICTIMOLOGY

However, integration of restorative justice principles as a working model for green victimology presents the researcher with some difficulty

since the majority of victims' cases involve massive corrupt organizations and governments endowed with large powers than the victims. These power dynamics categorize the exclusion of indigenous and low-income communities, corporate entrenchment of environmental policies and lack of recourse to legal/political means. In case restorative justice is to be fully incorporated into green victimology then it is crucially important to address these power relations and foster the agency of affected locals so that they can be recognised as equals with a right to listen and participate in the process for the restoration of the environment as well as the animals that inhabit it. It may include for example, enhanced programs for sightings and reporting from the communities, creation of forum for participatory decision making and legal, political frameworks for the green victims and their persecutors. By addressing these power imbalances and centring the voices and experiences of green victims, we can develop a more equitable and sustainable approach to environmental protection that is rooted in the principles of restorative justice.

10. THE ROLE OF STAKEHOLDERS IN GREEN VICTIMOLOGY

An important component of an analysis of environmental injustice and the integration of restorative justice principles into green victimology necessitates the participation of victims, environmental organizations at large, policy makers, corporations and other stakeholders in society. People and communities affected are the most significant victims of green crimes, and their understanding of what matters to them, what they went through, and what they want should be the focus of restorative justice. Green victims' stakeholders or social allies can involve the environmental organizations and advocacy groups because their task is to amplify these voices as well as to facilitate the community engagement and boil for policy/ legal changes in support of the restorative justice solutions.

In contrast, policymakers are in a unique position to pass laws and rules that would integrate restorative justice in environmental as well as conservation endeavors. Last, but not least, corporations are main offenders of environmental sins and as such must take an active part in reconciliatory processes as well as in supporting the communities that it harmed. Thus, encouraging the cooperation between these different stakeholders, we can build a more efficient and comprehensive response that will correspond to the principles of restorative justice and green victimology in India.

11. TOWARD A HOLISTIC APPROACH TO GREEN VICTIMOLOGY

The combined problem of restorative justice and environmental inequity in the Indian context provides a daunting set of overarching issues that need to be addressed using an integrative approach that brings together elements of multiple disciplines (Mitchell, 2011; Bartuska & Westphal, 2007). This is because the environmental problems are considered not simply a problem of ecology, but are existent in social and economical structures that promote environmental injustice and degradation on chunks of societies that are socially powerless. In response to this emergent challenge, it becomes necessary to move beyond top-down governance-based and punitive conceptions and practice of green victimology, to community-based, restorative, and engaged understandings and practices of green victimology.

This holistic approach involves several key elements:

1. Empowering affected communities: To build more efficient and sustainable solutions, the experiences, knowledge, and concerns of people affected the most by environmental injustice have to be at the center.
2. Addressing power imbalances: A restorative justice model recognizes that power relationships are usually at the root of the environmental injustice, and endeavors to overturn them in an endeavor to come up with a fair and democratic mechanism of decision-making.
3. Environmental reparations and accountability: This paper highlights that in order for victims to be able to move forward, the wrongdoers must offer a formal apology, offer compensation in both material and non-material ways – such as land restoration – and recognize that the harm was caused.

Thus by adopting this unique paradigm, it is possible to strive for better environment and justice for all who live on this planet. It is possible to recognize that social and environmental justice is not two distinct things but different units of the same whole. In the end, it is possible to strengthen civil society and induce people to active participation in the struggle against environmental injustice.

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MEGAINCENDIOS EN CHILE: DAÑOS, COMUNIDADES Y RESPUESTAS ESTATALES DESDE UNA PERSPECTIVA RESTAURATIVA

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1. INTRODUCCIÓN

Cada verano comienza, inevitablemente, la preocupación. En Chile, un total de 3.268.558 hectáreas se han quemado desde el año 1985 hasta la fecha. En ese mismo rango de tiempo, la cantidad anual de hectáreas afectadas ha ido en aumento: mientras en el año 1985 se quemaron un total de 27.479 hectáreas, en el verano de 2023 se quemaron 429.103 (CONAF, 2024). Según las estadísticas disponibles, el verano del año 2023 sería el segundo año con más hectáreas quemadas en lo que se lleva registrado, después del año 2017, con 570.197 hectáreas consumidas por el fuego.

Una de las zonas de mayor afectación de megaincendios ha sido la V región de Chile, donde se encuentran, entre otras, las ciudades de Valparaíso y Viña del Mar. De acuerdo con la investigación de Sapiain et al. (2020), la región de Valparaíso se posiciona entre las tres más afectadas por incendios forestales, concentrando el 15,7% del total de eventos en el país. En la ciudad de Valparaíso, gran parte de estos incendios se registran en áreas de interfaz urbano-forestal, donde coexisten zonas residenciales con terrenos destinados a la silvicultura y la agricultura. Como señalan Stein et al. (2013), en estas áreas, la presencia de

vegetación sin manejo adecuado y su uso como vertederos ilegales incrementan significativamente el riesgo de incendios. Según estimaciones municipales, Valparaíso enfrenta más de 100 incendios anuales.

En este capítulo hablaremos, en particular, de dos incendios ocurridos en la V Región: abril 2014 y febrero 2024. En el primero, se quemaron 1.042 hectáreas, murieron 15 personas y 2.910 hogares se vieron afectados (Vergara, 2024). En el segundo, un megaincendio afectó las ciudades de Viña del Mar, Quilpué, Limache, y Villa Alemana. Este incendio, considerado uno de los más destructivos en la historia reciente del país, quemó más de 9.000 hectáreas y destruyó alrededor de 10.000 edificaciones. Las áreas urbanas y rurales fueron severamente impactadas, con grandes extensiones de bosque y zonas residenciales consumidas por el fuego. Lamentablemente, 150 personas perdieron la vida, y miles quedaron desplazadas (CIGIDEN, 2024; Nasa ciencia, 2024). En esta tragedia, el evento fue exacerbado por una combinación de factores climáticos, incluyendo una sequía prolongada, una ola de calor y fuertes vientos, lo que creó una "tormenta perfecta" para la propagación rápida del fuego. Los incendios, que comenzaron el 2 de febrero, se expandieron a áreas residenciales, obligando a la evacuación masiva de la población (Nasa ciencia, 2024; CIGIDEN, 2024).

En este capítulo nos hemos propuesto como objetivo reflexionar sobre las realidades de los megaincendios desde una perspectiva restaurativa. Ante ello, nos hemos hecho la pregunta ¿Cuáles son los daños que se producen? ¿Cómo se puede pensar la reparación de dichos daños? ¿Cuáles son los niveles de responsabilización involucrados? Para ello, abordaremos la temática de las catástrofes socionaturales en general para luego derivar en una descripción de los megaincendios en particular. Posteriormente, desarrollamos una discusión sobre la experiencia de los incendios en la V Región de Chile. Agradecemos las contribuciones de Pablo Ferrer y Hans Klener, ambos profesionales que trabajaron directamente en la emergencia, y quienes aportaron desde su experiencia y reflexiones, a través de una entrevista con los autores de este capítulo, contenidos que fueron altamente valiosos e importantes para esta sección. Terminamos el capítulo desarrollando algunas reflexiones finales sobre las potencialidades y limitaciones que puede tener el enfoque de justicia restaurativa para abordar catástrofes socionaturales de esta naturaleza.

2. EL MEGAINCENDIO COMO UNA CATÁSTROFE SOCIONATURAL

El concepto de desastre socionatural busca enfatizar que los efectos de las catástrofes naturales son el resultado de la interacción entre aspectos sociales y ambientales, afectando a personas y grupos de forma desigual (Bradley, 2017). Al riesgo diferenciado que tienen grupos humanos específicos según aspectos

sociales, económicos y geográficos se le ha llamado vulnerabilidad social (Sandoval-Díaz & Cuadra-Martínez, 2020).

La vinculación de variables sociodemográficas y geográficas ha sido estudiada largamente en diferentes tipos de catástrofes, los que además tienen relevancia en dos sentidos: por un lado, en términos de la vulnerabilidad de su población a experimentar el riesgo (ver por ej. el estudio de Hakraborty, Collins, & Grineski, 2019, sobre el Huracán Harvey en Huston), y, por otro, términos de la vulnerabilidad frente a su impacto.

En el caso de Chile se han identificado como variables de vulnerabilidad social el estatus socioeconómico, el nivel educacional, la ocupación, variables demográficas como edad y género, discapacidad, migración, calidad de la vivienda y acceso a servicios básicos. De ellas, el estatus socioeconómico parece ser la más relevante (Bronfman et al., 2021), ya que se asocia a "otras variables que determinan la capacidad de los individuos y las comunidades para enfrentar y recuperar de desastres" (Bronfman et al., 2021, p. 1779).

En el caso de los megaincendios, los estudios reflejan una clara asociación entre vulnerabilidad social y exposición al riesgo (Modaresi et al., 2023). Un megaincendio se define por su extensión y la magnitud de los impactos generados, los que causan daños profundos y multidimensionales que abarcan los aspectos materiales, ambientales, sociales y psicológicos (González et al., 2020). En el caso de la V Región de Chile, los incendios han sido facilitados por la falta de planificación en las periferias urbanas, en donde es posible encontrar con mayor frecuencia campamentos y falta de infraestructura pública, además de dificultades de acceso a agua, lo que agrava y dificulta el trabajo de bomberos y las medidas de evacuación (Vergara, 2024).

En Chile, Acevedo y Cárdenas-Jirón (2018) examinaron el proceso de reconstrucción de viviendas tras el incendio de gran magnitud ocurrido en Valparaíso en 2014. Su estudio revela que, a pesar de estar ubicadas en zonas de alto riesgo y de difícil acceso para los servicios de emergencia, como bomberos, muchos habitantes optan por reconstruir sus hogares en el mismo lugar que ocupaban antes del siniestro. Esta decisión se ve agravada por la falta de planificación urbana en la ciudad, lo que incrementa los riesgos existentes. Hallazgos similares fueron reportados por Bailey y Zenteno (2015), quienes señalaron que la alta vulnerabilidad social es un factor clave en la resistencia de las personas a trasladarse a otras áreas después de que un incendio destruye sus viviendas. Esto se debe, en gran medida, a la carencia de recursos para adquirir nuevos terrenos y al hecho de que los lugares donde residían previamente eran gratuitos o de bajo costo. Además, el riesgo de incendios persiste debido a las condiciones precarias de las viviendas, tanto antiguas como nuevas, las cuales frecuentemente carecen de servicios básicos y se encuentran en entornos socialmente adversos

(delincuencia, problemas relacionados con las drogas) o en ecosistemas propensos a los incendios.

3. LAS DIMENSIONES DEL DAÑO EN LOS MEGAINCENDIOS

Los megaincendios afectan los territorios de una manera dramática y a largo plazo. Además de la evidente afectación de sus ecosistemas, los megaincendios pueden significar un número importante de pérdidas de vidas humanas, como fue el caso de los incendios de la V Región de los que hablamos en este capítulo. Como ya indicamos al inicio de este documento, el incendio del año 2024 fue identificado como uno de los más mortales registrados en la historia del país, con más de 100 fallecidos. En los siguientes párrafos, nos dedicaremos a describir otros daños directos e indirectos, identificados tanto en la literatura como en la experiencia chilena.

Daños materiales y ambientales

Los daños materiales en megaincendios incluyen la destrucción de viviendas, infraestructura crítica, carreteras, y servicios públicos. En megaincendios recientes como los de Australia (2019-2020), California (2020), y Chile (2024), se han destruido miles de viviendas y áreas urbanas. Estos incendios afectan sectores como la agricultura y el turismo, generando pérdidas económicas multimillonarias. La destrucción de ecosistemas resulta en la pérdida de biodiversidad, con especies nativas en peligro de extinción y la degradación del suelo, lo que afecta la capacidad de regeneración del entorno natural (González et al., 2020). Desde una perspectiva medioambiental, los incendios forestales a gran escala emiten grandes cantidades de CO2 y otros contaminantes al ambiente, contribuyendo al cambio climático. Además, la devastación de grandes áreas verdes impacta negativamente en los ciclos del agua y la calidad del aire, afectando la salud de la población cercana a las zonas afectadas (González et al.; 2020).

En el caso concreto del megaincendio en Chile de 2024, se afectaron aproximadamente 10.000 edificaciones, entre ellas 1.100 viviendas en las ciudades de Viña del Mar y Quilpué, fueron destruidas o severamente dañadas (CIGIDEN, 2024). Además, calles, redes eléctricas y alcantarillado sufrieron graves afectaciones, especialmente en las zonas urbanas. Esto implicó que varias comunidades quedaron sin acceso a servicios básicos (Nasa Ciencia, 2024). Se estima que más de 9.000 hectáreas de bosques, matorrales y áreas verdes fueron consumidas por el fuego (Nasa Ciencia, 2024). El incendio afectó gravemente los ecosistemas locales, destruyendo hábitats y provocando la muerte de numerosas especies de flora y fauna nativa que podría tomar décadas en recuperarse (Nasa Ciencia, 2024). En

particular, la Reserva Nacional Lago Peñuelas se vio severamente afectada, lo que agravó el impacto en la biodiversidad (Emol, 2024). Finalmente, las emisiones de gases y partículas contaminantes a la atmósfera aumentaron significativamente, afectando la calidad del aire no solo en la región afectada, sino también en áreas cercanas (Nasa ciencia, 2024; De la Barrera, 2018). Este incendio dejó una huella ecológica significativa y alteró el paisaje urbano y rural de la región, requiriendo un largo proceso de recuperación tanto para las personas como para el medioambiente. Estudios en el país también han identificado que los megaincendios tienen impacto a gran escala y largo plazo, dejando poblaciones expuestas a movimientos de tierra e inundaciones en períodos de lluvia (De la Barrera, 2018).

Daños en la salud

Rodney et al. (2021) investigaron los efectos del humo de incendios forestales en la población australiana, específicamente durante la temporada 2019-2020, una de las más devastadoras registradas en el sureste de Australia. Durante este periodo, la contaminación del aire causada por el humo alcanzó niveles peligrosos en las principales áreas metropolitanas, y se mantuvo elevada durante un tiempo prolongado. El humo impactó directamente la salud humana, afectando la función respiratoria y cardíaca, y de manera indirecta deterioró el bienestar general y la calidad de vida. El estudio reveló que casi el 97% de los participantes experimentaron al menos un síntoma físico atribuido al humo, principalmente irritación ocular, de garganta y tos (Rodney et al., 2021).

Se ha demostrado una fuerte asociación entre esta exposición y el agravamiento de condiciones como asma, enfermedad pulmonar obstructiva crónica, bronquitis y neumonía. Sin embargo, los datos epidemiológicos sobre la relación entre la exposición al humo y la mortalidad y morbilidad cardiovascular son mixtos e inconclusos, lo que señala la necesidad de más estudios para establecer de manera clara su impacto en la salud cardiovascular (Barría, 2019).

También investigaciones han identificado consecuencias de salud a largo plazo. Un estudio desarrollado en Estados Unidos identificó que mujeres embarazadas al momento de la exposición al humo del incendio, dieron luz a bebés con significativamente menos peso de lo normal y con una tendencia al nacimiento prematuro (Jones & McDermott, 2022).

Además de las afectaciones físicas, se encuentran las consecuencias en términos de salud mental. Ésta es una de las dimensiones de la salud más afectadas por los megaincendios y otros desastres naturales. Las personas expuestas a estas situaciones pueden desarrollar una serie de problemas psicológicos, como trastorno de estrés postraumático (TEPT), ansiedad, depresión, y trastornos de adaptación debido al duelo por la pérdida de seres queridos o la destrucción de sus hogares (Guerra et al., 2018). Las pérdidas

materiales y personales, junto con la incertidumbre sobre el futuro, generan altos niveles de estrés crónico. Según la literatura, entre el 30% y el 50% de la población general expuesta a un desastre natural experimentaría algún tipo de alteración psicológica en los meses posteriores al evento (Udomratn, 2008; Cova y Rincón, 2010). Los estudios post-incendios en Australia han identificado consecuencias a largo plazo (Zhang et al., 2022), los cuales han sido detectados hasta 3,5 años después del evento (Brown et al., 2021).

Sapiain et al. (2020) señalan que en Chile los incendios han generado impactos psicológicos y comunitarios que pueden ser más severos que los ocasionados por un gran terremoto y más duraderos que los daños materiales. Estos impactos están asociados a la pérdida de seres queridos o conocidos, la destrucción material, muchas veces total, la disolución temporal de las familias y redes comunitarias, la pérdida de empleos, el desplazamiento forzado, la destrucción de espacios comunes, así como la proliferación de conflictos sociales que surgen o se intensifican durante o después del incendio. Además, las respuestas de distintos sectores suelen ser desarticuladas e insuficientes frente a las características particulares de este tipo de desastres. Estos factores hacen que la experiencia de vivir un incendio de gran magnitud pueda constituir un trauma a nivel individual y familiar, provocando un impacto profundo y prolongado en la salud mental, afectando la vida diaria y manifestándose en crisis de angustia, altos niveles de estrés, incertidumbre, depresión y miedo constante. Asimismo, la destrucción del entorno natural puede generar un profundo duelo vinculado a la pérdida de identidad territorial y la transformación del hábitat cotidiano. La afectación puede llegar a diferentes grupos etarios.

Daños sociales

A nivel comunitario, los incendios generan desplazamiento masivo de personas, pérdida de redes de apoyo social, desarraigo, sentimientos colectivos de pérdida, y un deterioro de la cohesión comunitaria. Las desigualdades sociales suelen intensificarse en estos escenarios, donde las comunidades más vulnerables, como poblaciones rurales o de bajos ingresos, enfrentan mayores dificultades para recuperarse, profundizando desigualdades sociales ya existentes. Además, la reconstrucción de comunidades destruidas por incendios toma años, si no décadas, afectando el tejido social (Rivas et al., 2014). En un contexto más amplio de desastres naturales, las investigaciones muestran que las comunidades afectadas pueden enfrentar desafíos a largo plazo para acceder a vivienda, empleo y servicios públicos básicos, lo que exacerba las tensiones sociales y económicas (Rivas et al., 2014).

En ocasiones, las estrategias utilizadas para reparar el daño material pueden tener consecuencias sociales. En el año 2014, un grupo de familias damnifica-

das por el incendio de Valparaíso fueron relocalizadas en una ciudad cercana, Villa Alemana. Un grupo de investigadores documentaron las dificultades de estos vecinos para adaptarse a este nuevo entorno. Por un lado, su sentido de identidad comunitario, fuertemente ligado a la imagen de Valparaíso, se vio seriamente afectado. Sus lideres vecinales tenían dificultades para ejercer su liderazgo en un entorno social y político desconocido. Además, habían recibido manifestaciones de rechazo por parte de sus nuevos vecinos quienes pedían su expulsión y los llamaban "los quemados". Los autores reflexionan cómo el Estado, al centrar sus políticas a los efectos materiales inmediatos, deja a los vecinos de esta villa a un abandono subjetivo al no considerar integralmente sus necesidades (Gutiérrez et al., 2020).

A un nivel macrosocial, se ha visto que la exposición a desastres socionaturales puede causar daños en el tejido social. Se ha documentado disminución en la confianza social (Albrecht, 2018), y el aumento de indicadores de violencia física, emocional y sexual (Xu,, 2016). En Chile, estudios han dado resultados similares, especialmente en lo que respecta a violencia intrafamiliar (Silva, 2018).

Otros niveles del daño: Profesionales y voluntarios

Los efectos psicológicos no sólo afectan a los sobrevivientes directos de desastres, sino también a los equipos de respuesta y profesionales involucrados en la intervención, quienes frecuentemente desarrollan síntomas de traumatización secundaria (Espinoza et al., 2019). La revisión sistemática de Zhang et al. (2022) reveló que la prevalencia de problemas de salud mental a largo plazo entre los bomberos expuestos a incendios forestales es significativamente mayor que en la población general afectada por los mismos eventos. Este hallazgo es consistente con estudios previos que indican que los bomberos tienen un riesgo más elevado de desarrollar problemas psicológicos en comparación con la población general (Administración de Servicios de Salud Mental y Abuso de Sustancias, 2018; United Voice WA, 2018), así como con una revisión más amplia que evidenció un mayor riesgo de TEPT en los primeros respondedores frente a desastres, en relación con la población general (Galea, Nandi y Vlahov, 2005). La exposición repetida a situaciones traumáticas en estos profesionales representa un riesgo ocupacional que puede contribuir al incremento de la prevalencia de problemas psicológicos a lo largo del tiempo (Harvey et al., 2016). Un estudio en Estados Unidos (Jahnke, Poston, Haddock y Murphy, 2016) confirma que la exposición reiterada al trauma es más perjudicial para la salud mental de los bomberos que la exposición a un solo evento. Estos resultados son coherentes con la literatura sobre los impactos de la exposición recurrente a desastres (Leppold, Gibbs, Block, Reifels y Quinn, 2022).

En sintonía con estos hallazgos, Hernández-Wolf (2018) señala que los profesionales que brindan apoyo a víctimas directas de desastres, como los equipos de salud pública, pueden sufrir alteraciones psicológicas a corto y largo plazo como consecuencia de su labor en la intervención, contención y apoyo emocional. Estos profesionales también pueden verse doblemente traumatizados si se convierten en víctimas directas del desastre, enfrentando pérdidas personales significativas, como la muerte o lesión de compañeros y familiares, o incluso pérdidas materiales (Posada, 2010).

El rol esencial que desempeñan estos equipos en la respuesta inicial ante desastres y crisis los expone constantemente a escenas de destrucción y sufrimiento, lo que puede generar importantes repercusiones en su bienestar psicológico (Hodgkinson y Stewart, 1998). Las investigaciones señalan que profesiones de alto riesgo, como bomberos, paramédicos y fuerzas de paz, aumentan la vulnerabilidad a sufrir traumatización (APA, 2013; Dekel, Goldblatt, Keidar, Solomon & Polliack, 2005; Schaufeli & Greenglass, 2001). Esta exposición puede derivar en una condición conocida como traumatización secundaria o trauma vicario, en la cual los profesionales internalizan las experiencias traumáticas de los demás, desarrollando síntomas similares al trastorno de estrés postraumático (Chrestman, 1999; Figley, 1999).

Entre los principales síntomas de la traumatización secundaria se encuentran la ansiedad, el evitamiento de pensamientos y la disminución del interés en actividades cotidianas (Ortuño y Duarte, 2020). También pueden presentarse evitación de lugares asociados al trauma, hiperactividad (Bride et al., 2004; Campbell et al., 2017), dificultades para concentrarse y problemas de sueño (Ben Arzi et al., 2000; Bond et al., 2017; Koić et al., 2002). Estos síntomas, además, pueden derivar en trastornos mentales que afectan significativamente el funcionamiento diario de los profesionales (Ortuño y Duarte, 2020).

En Chile, la falta de recursos institucionales para brindar apoyo psicosocial a los equipos expuestos continuamente a desastres y material traumatogénico ha agravado la situación de salud mental de estos trabajadores, lo que se refleja en un aumento de licencias psiquiátricas en las organizaciones (Llanos y Arón, 2004). Según Ansoleaga (2015), cuando el esfuerzo invertido por los profesionales supera las recompensas recibidas, se produce un desbalance que, si se mantiene en el tiempo, genera emociones negativas y puede llevar al desarrollo de patologías físicas o mentales. Esta exposición a situaciones de riesgo no solo afecta la salud de los trabajadores, sino que también genera importantes consecuencias organizacionales, como el aumento del ausentismo, la rotación del personal, la disminución de la satisfacción laboral y un mayor riesgo de accidentes laborales, afectando así la calidad de la atención (Derycke et al., 2010). Ansoleaga (2024) también destaca los impactos emocionales de los incendios forestales, como los que ocurrieron en la provincia de Valparaíso en febrero de

2024. Estos eventos no sólo causaron sufrimiento en las víctimas, sino también en los equipos de respuesta, aumentando emociones como el miedo, la aflicción y la desesperanza. Los funcionarios de salud, como equipos de primera respuesta, fueron particularmente vulnerables al estrés, especialmente aquellos que también fueron damnificados por el desastre.

Los voluntarios, que suelen ayudar en momentos de desastres, también quedan expuestos a algún nivel de afectación. Espinoza et al. (2019) estudiaron los efectos psicoemocionales en voluntarios de primera respuesta ante desastres socionaturales, destacando la necesidad crítica de implementar y promover estrategias de contención emocional a estos equipos a lo largo de todas las fases del manejo de emergencias. Los resultados revelan que, durante la fase de respuesta inmediata, los voluntarios enfrentan altos niveles de estrés emocional y agotamiento físico debido a las demandas extremas y la necesidad de tomar decisiones rápidas. Además, los voluntarios reportaron una recepción positiva de la intervención de contención emocional inicial, percibiéndola como un espacio en el que se sintieron escuchados y valorados. Sin embargo, la ausencia de seguimiento posterior generó expectativas no cumplidas, lo que provocó una percepción de falta de apoyo. Estos hallazgos subrayan la necesidad de establecer mecanismos de apoyo continuo para mitigar el impacto emocional a largo plazo en los equipos de primera respuesta y asegurar su bienestar integral, evitando así el riesgo de traumatización secundaria o desgaste profesional (Espinoza et al., 2019).

No sólo daño, también crecimiento

Más allá del sufrimiento, tanto las personas expuestas directamente como quienes brindan apoyo a las víctimas pueden experimentar un proceso de crecimiento personal y colectivo como resultado de enfrentar y superar estas situaciones extremas (Hernández-Wolf, 2018).

El crecimiento postraumático (CPT) se refiere a la transformación positiva que experimentan algunas personas tras vivir experiencias traumáticas. Según Tedeschi y Calhoun (1996), el CPT implica un cambio significativo en la percepción de uno mismo, en las relaciones interpersonales y en la visión del mundo. Este fenómeno se ha observado en individuos que han sobrevivido a desastres naturales quienes, a pesar del impacto inicial del desastre, logran encontrar un nuevo sentido en la vida, desarrollan una mayor apreciación por sus vínculos personales y adquieren una capacidad renovada para enfrentar las adversidades (García et al., 2013). En el caso de los desastres naturales, la pérdida de hogares, la amenaza a la vida y la devastación del entorno pueden desencadenar tanto traumas profundos como oportunidades de reevaluar prioridades y fortalecer la resiliencia personal.

Por otro lado, el crecimiento postraumático vicario (CPTV) se refiere a las experiencias de transformación positiva que pueden experimentar los profesionales de ayuda que intervienen en situaciones traumáticas, como los bomberos, socorristas, psicólogos y otros equipos de emergencia que participan en la respuesta a desastres (Arnold, 2005; Espinoza, 2019; Hernández-Wolf, 2018). Aunque estos profesionales están expuestos a escenas de destrucción y sufrimiento que pueden llevarlos a desarrollar síntomas de traumatización secundaria o estrés postraumático vicario (Figley, 1995), también pueden experimentar un crecimiento personal como resultado de su labor. Arnold (2005) destaca que, al ayudar a los demás en situaciones extremas, los profesionales no solo pueden adquirir nuevas habilidades y fortalecer su capacidad de afrontamiento, sino que también pueden encontrar un sentido de propósito más profundo en su trabajo. Esta transformación ocurre cuando los equipos de intervención logran integrar las experiencias traumáticas de manera que les permitan reconocer el impacto positivo de su labor en la vida de las víctimas y en la recuperación de la comunidad.

En coherencia con lo planteado, Hugelius et al. (2017) abordó las emociones y experiencias tanto positivas como negativas de quienes, al ser parte de la organización de respuesta, actuaron como ayudantes mientras también eran víctimas, formando parte de una comunidad gravemente afectada. Los subtemas reflejan una amplia gama de sentimientos: fortaleza y confianza, ajuste y aceptación, satisfacción, impotencia y miedo, culpa y vergüenza, así como soledad. Ser un profesional de la salud durante un desastre natural resultó ser una experiencia compleja, poderosa y ambigua, al combinar el rol de responder al evento con el de ser sobreviviente de este. En este contexto, los valores personales, los motivos altruistas, los factores sociales y las estrategias de afrontamiento del estrés jugaron un papel fundamental en la búsqueda de un equilibrio entre la aceptación de la situación y el control sobre ella.

4. EL ABORDAJE DE MEGAINCENDIOS EN LA V REGIÓN DE CHILE

No existe un documento único que dé cuenta en detalle de las características, naturaleza y componentes que tuvo la respuesta del estado de Chile frente a los incendios de la V Región del año 2014 y 2024. En esta sección hemos realizado un esfuerzo por identificar algunos elementos de dicha respuesta, sin pretender ser exhaustivos[1]. Por ello, pedimos al lector leer esta sección como una aproximación general a lo que fue el abordaje de ambos desbastadores incendios.

[1] Hemos elaborado esta sección con material proveniente de los medios de comunicación, la entrevista a dos informantes claves (como se anunció en la introducción) y la revisión de material publicado en revistas académicas.

Frente al incendio del año 2014, no había preparación previa. Al día siguiente del inicio del incendio, los organismos del estado debieron rápidamente reunirse y coordinarse, para lo cual se creó una mesa intersectorial. Dicha mesa contó con la participación de agentes del mundo público y privado, incluyendo colegios de profesionales y universidades. Esta integración y vinculación fue especialmente relevante y necesaria, dada la multiplicidad de necesidades.

Se organizaron albergues en colegios y un estadio para las personas y familias que se quedaron sin hogar o que debieron evacuar ante el inminente riesgo. En la medida que el fuego se fue controlando, unos 15.000 voluntarios apoyaron en la emergencia y unas 5.000 personas se ofrecieron para apoyar la gestión y ofrecer asistencia en albergues y centros de acopio oficiales y de organismos no gubernamentales[2]. En este marco, fue importante el apoyo de la Organización Panamericana de la Salud, dado que incentivó que la ayuda fuese orientada principalmente hacia el retorno a la vida normal lo más rápido posible, evitando a toda costa que la permanencia de los damnificados en los albergues se extendiera más allá de la situación de emergencia. La ayuda articulada comenzó a desaparecer en tanto los albergues comenzaron a disolverse. Sin embargo, hubo necesidades de la población que no alcanzaron a abordarse en ese marco de tiempo.

Desde el ámbito de la salud mental hubo iniciativas como la creación de un centro de salud mental, y acompañamiento de salud mental en albergues, centrando gran parte de la respuesta en un formato de psicoterapia individual, sin desarrollo de intervenciones grupales o comunitarias. Para algunos, la respuesta a este incendio fue lenta y descoordinada, además de facilitar la construcción de viviendas de baja calidad por parte de empresas privadas, generando descontento en los miembros de la comunidad (Ojeda, Bacigalupe & Pino, 2019). Las intervenciones fueron en general acotadas en el tiempo. Una de las excepciones lo constituyó la creación de una ludoteca, diseñada como un espacio de acogida para niños, niñas y adolescentes en el Cerro Merced, que trascendió la emergencia y se constituye como un lugar de participación comunitaria hasta el día de hoy (Vergara, 2024).

En el año 2021, en respuesta al terremoto vivido en Chile en el año 2010 (uno de los más intensos registrados en la historia del planeta y en donde las víctimas fatales llegaron a 552, en gran parte debido a la falla del sistema de alerta ante el peligro de tsunami), se reforma, mediante la Ley 27.364, el sistema nacional de respuesta ante desastres, creando el Servicio Nacional de Prevención y Respuesta ante Desastres (SENAPRED). Esta entidad buscaba ser una instancia resolutiva y no sólo consultiva, como era su antecesor Oficina Nacional de Emergencia del Ministerio del Interior y Seguridad Pública (ONEMI). El SENAPRED tiene la misión de generar un sistema integrado de prevención, alerta

[2] Vid. en https://emergenciaydesastres.mineduc.cl/incendio-valparaiso/.

temprana, y respuesta ante catástrofes, liderando la implementación de la Política Nacional de Emergencia a través del trabajo intersectorial y local[3].

Cuando se produjo el incendio del año 2024, la nueva institucionalidad SENAPRED estuvo encargada de dirigir y coordinar la respuesta estatal, además de emitir las alertas de avance del fuego. Sin embargo, en algunos sectores, las alertas no fueron recibidas a tiempo, lo que provocó confusión durante las evacuaciones. La respuesta incluyó un despliegue de brigadas forestales, el uso de aeronaves para combatir las llamas, y la colaboración con organismos internacionales como la NASA para monitorear los incendios desde el espacio (Emol, 2024). La cobertura de la prensa fue amplia, destacando la gravedad del desastre. El Gobierno declaró estado de emergencia en las áreas afectadas, y se implementaron toques de queda para garantizar la seguridad pública.

A pesar de la nueva institucionalidad, hubo también evidencia de retrasos y descoordinaciones en la respuesta. Según medios de prensa, el despliegue masivo de funcionarios públicos se produjo recién a cuatro días de comenzado el incendio, al igual que las primeras ayudas (agua, pan y baños químicos). En parte, la lentitud se debería a descoordinaciones, contradicciones o desconexión entre las diferentes autoridades vinculadas, sin que estuviese claro cuál era el ente o la autoridad a cargo de coordinar (Ciper, 2024).

Según la percepción de nuestros informantes claves, en la respuesta del incendio del año 2024, hubo, por lo visto, más preponderancia de la respuesta estatal y menos colaboración con el ámbito privado que lo ocurrido 10 años antes. Además, no se observó que las buenas prácticas identificadas en el abordaje del año 2014 se mantuvieran o recordaran, lo que implicó, en cierta medida, un desaprovechamiento de la experiencia y aprendizajes previos. Un elemento que resalta de la respuesta del Estado es la falta de integración entre la respuesta material y el apoyo psicosocial, que tendían a ir por caminos paralelos. Respecto de lo último, una de las iniciativas que se llevaron a cabo fue el acompañamiento que se requirió, desde la municipalidad de Viña del Mar, a los profesionales de la salud, desde una perspectiva de salud mental. Estos profesionales requerían formación y entrenamiento en temáticas como duelo e intervención en crisis.

5. UNA LECTURA RESTAURATIVA DEL ABORDAJE DE LOS MEGAINCENDIOS

Hasta ahora hemos hecho un recorrido por los incendios de la V Región de Chile, enfatizando la vinculación de los megaincendios con determinantes sociales, reconociendo su impacto a nivel ecológico, de la salud física y mental de las per-

[3] Vid. en https://web.senapred.cl/.

sonas, y del tejido social. También hemos visto cómo el Estado ha tenido y debe tener un rol relevante en la respuesta a estos eventos, la cual, en la experiencia chilena, aún requiere ser mejorada en términos de integralidad de la acción, prevención, alertas, y recuperación a corto, mediano y largo plazo. En esta sección haremos el ejercicio de reflexionar respecto de las catástrofes socionaturales desde un enfoque de justicia restaurativa, poniendo el foco en aspectos como daño, responsabilidades, participación, narrativas colectivas, y reparación.

Daño y resiliencia

Además de los daños ecológicos evidentes, los megaincendios impactan profundamente a nivel individual, colectivo y comunitario. A nivel personal, las víctimas enfrentan pérdidas materiales, traumáticas y emocionales que alteran seriamente su bienestar. Colectivamente, afectan la cohesión social, exacerbando la vulnerabilidad y la inseguridad, y debilitando las redes de apoyo. En la comunidad, los megaincendios destruyen infraestructuras, alteran ecosistemas y generan desplazamientos masivos, lo que pone presión sobre los servicios de emergencia y la salud pública, además de producir condiciones de alto estrés que pueden exacerbar la desconfianza y promover conflictos a nivel intergrupal o intrafamiliar.

Por otro lado, hemos visto que los profesionales y voluntarios deben enfrentar muchas veces el doble rol de sobreviviente y profesional de ayuda, debiendo afrontar el sufrimiento, desesperación, dolor y frustración de una población altamente dañada, con recursos limitados y habitualmente insuficientes para resolver las demandas urgentes de la población -todo mientras lidian con su propia experiencia de traumatización. Uno de los informantes claves nos comentó cómo, en el incendio de 2014, las personas evacuadas manifestaban constantemente preguntas sobre la realidad que estaban afrontando que no eran fáciles de responder ("¿Qué pasará con mis cosas?" "¿Dónde está mi gato? ¿Cómo puedo recuperar mi casa?" "¿Dónde está mi familiar?"), mientras que los profesionales debían lidiar permanentemente con la dificultad material de poder resolver con éxito y a cabalidad las serias necesidades de las personas afectadas, recibiendo, a veces, la molestia y enojo de quienes atendían.

A pesar de estos diferentes niveles de daño, no podemos olvidar la capacidad de resiliencia de personas y comunidades. La resiliencia es un proceso dinámico en el que coexisten tres ideas fundamentales: funcionamiento adecuado en condiciones adversas, recuperación rápida, y retorno al funcionamiento normal después de la adversidad (Bonnano, 2004). Esta capacidad resiliente puede ser facilitada por varios factores claves (Brockhouse et al., 2011; Linley y Joseph, 2007; Shamai y Ron, 2009; Splevins et al., 2010; O'Sullivan y Whelan, 2011) donde al apoyo del colectivo es, quizás, lo más relevante. Es en la interacción entre la

persona y el colectivo donde se construyen lazos psicológicos de confianza, convivencia, generosidad y compasión (Salanova, 2023). La resiliencia es un proceso de construcción social en el que median variables personales y contextuales, por lo tanto, es un proceso que se construye en y desde lo social, lo relacional y los ecosistemas humanos (Madariaga et al., 2014). La resiliencia es una respuesta dinámica y creativa en la que adquiere gran importancia la capacidad de construir nuevas significaciones e interpretaciones de los contextos adversos y de las respuestas posibles que podemos encontrar ante ellos (Ayed, 2019).

Investigaciones realizadas en torno a la resiliencia comunitaria en países como Chile, Colombia y México, han constatado la existencia de la relación entre la cualidad de las interacciones e interrelaciones de los miembros del grupo y la posibilidad de un proceso resiliente. Poblaciones en estos países que enfrentaron crisis ambientales o sociopolíticas demostraron tener mayor posibilidad de sobreponerse y reconstruirse que otros grupos, cuando mantuvieron una participación organizada en torno a redes comunitarias y con las instituciones establecidas, así como con el medio natural y construido de interacción de la comunidad (López, 2017).

Estos aspectos hablan de la relevancia que tienen los vínculos sociales en el enfrentamiento de la adversidad, y de la importancia que puede tener promover sentimientos de comunidad e identidad social (en diferentes niveles, residentes entre sí y entre residentes, profesionales y voluntarios) para promover la resiliencia en los grupos sociales afectados por la catástrofe.

Responsabilidades y responsabilización y el rol del Estado

El concepto de desastre socionatural indica que los desastres naturales tienden a afectar a población que ya se encontraba antes del desastre en situación de desventaja social, económica y/o geográfica. Además, significa que las consecuencias de los desastres también serán diferenciadas, afectando especialmente a los grupos más desventajados. Esto da una labor relevante a los Estados en términos de estudiar, conocer y minimizar los riesgos para hacer gestión del riesgo apropiada. Al respecto, uno de nuestros entrevistados comentaba que en Chile existe la información y la tecnología para hacer una buena gestión del riesgo, sin embargo, ello no se veía reflejado en modelos de prevención certeros y efectivos.

Otro desafío es la capacidad de respuesta inmediata. A pesar del despliegue de brigadas y recursos aéreos, las condiciones climáticas y el terreno dificultaron el control del fuego en las primeras horas. Esto resalta la necesidad de mejorar la preparación frente a incendios de gran magnitud, especialmente en términos de capacitación y equipamiento (Emol, 2024). Un estudio indicó que los fallecimientos del año 2024 se produjeron, en parte, por elementos es-

tructurales que dificultaron la evacuación de las personas: trazados de calle irregular, colapso de redes críticas, crecimiento urbano sin planificación y falta de un diseño urbano adecuado (UC, 2024). Esto significa que el estado tiene la responsabilidad ineludible de mejorar la respuesta inmediata con mejores procedimientos y coordinación.

Por último, y en otro nivel, en Chile, el 99,7% de los incendios son causados por la acción humana, ya sea por descuidos o intencionalidad delictiva (Vergara, 2024). La investigación penal que se llevó a cabo con posterioridad al incendio del año 2024, con más de 130 fallecidos, dejó al descubierto una situación profundamente dolorosa: cuatro funcionarios vinculados a las instituciones encargadas de cuidar y prevenir incendios forestales fueron detenidos y formalizados por su responsabilidad en los hechos. La motivación: el incendio les permitiría trabajar horas extras y recibir honorarios adicionales. Entre los 2022 y 2023, se ingresaron 9.940 denuncias ingresadas a fiscalías por incendios provocados, de los cuales sólo 203 tuvieron condena definitiva (2%) (El País, 2024).

En los megaincendios existen, por lo tanto, diferentes niveles de responsabilización. Pueden haber responsabilidades individuales, cuando una persona causa o provoca el incendio, y responsabilidades institucionales, en materia de prevención y respuesta a la crisis. Es fundamental pensar en procedimientos en vistas al abordaje y reparación del daño que puedan abordar estos niveles, dado que cada uno de ellos tiene un rol en la ecuación relacionada con la complejidad y duración del impacto de los incendios forestales.

Participación de la comunidad

Algo que pudimos constatar tanto en la revisión bibliográfica realizada para este capítulo como en las entrevistas con nuestros informantes claves, es que, en nuestro país, la respuesta al desastre ha sido reactiva y *top-down*. Las decisiones son tomadas por técnicos, y autoridades, dejando poco o nada espacio para que las comunidades afectadas tengan algo que decir sobre cómo desean que pueda abordarse el camino hacia la reconstrucción. En nuestro país, la intervención psicosocial de emergencia se ha centrado, principalmente, en la intervención psicológica clínica tradicional, lo que puede implicar el predominio de un enfoque profesionalizante, individual y centrado en la carencia o el síntoma. Nuestra reflexión en este ámbito se orienta a pensar en la creación de procesos, instancias, mecanismos, en que la o las comunidades tengan voz y participación en la toma de decisiones, constituyéndose en un actor central en la forma que la respuesta a la emergencia es manejada. Una iniciativa que tiene un espíritu similar al descrito es la Red de Prevención Comunitaria, documentada por CIGIDEN (2024). Esta Red opera a través de una alianza colaborativa entre vecinos, municipios, empresas, entidades públicas y organizaciones sociales, con el objetivo

de reducir la ocurrencia de incendios. La Red de Prevención Comunitaria sigue un modelo flexible y dinámico, que se adapta a las particularidades de cada comunidad y territorio. Actualmente, ha sido implementada en más de 490 comités en siete regiones del país, y su base de datos permite evaluar de manera detallada las medidas preventivas adoptadas por los comités a lo largo del tiempo. Entre las acciones físicas destacan: la reducción de la exposición a incendios forestales, dirigiendo los nuevos asentamientos hacia ubicaciones más seguras y limitando el desarrollo en áreas de alto riesgo, prestando especial atención a infraestructuras sensibles. También incluye la limpieza de vegetación cercana a las estructuras, la creación de zonas de amortiguación para incendios y la implementación de otras estrategias de manejo de combustibles (CIGIDEN, 2024).

Narrativa colectiva

La investigación en trauma ha enseñado que uno de los aspectos centrales de la recuperación de personas que han vivido situaciones violentas, es la posibilidad de encontrar explicación a lo vivido (Janoff-Bulman, 1992). Para que nos permitan elaborar adecuadamente una situación violenta, estas explicaciones debieran ser adaptativas, es decir, benévolas, tanto en relación a la imagen que dicha explicación ofrece sobre uno/a mismo/a, como en relación a la imagen que desarrollamos del entorno social (Janoff-Bulman, 2005). Todas las personas tenemos significados básicos que se ven amenazados cuando vivimos violencia, rompiendo nuestras pre-concepciones sobre el entorno y generando desconfianza en los demás. Es parte de la recuperación construir significados que promuevan (y no eviten) los vínculos sociales. En un megaincendio, diferentes grupos, comunidades, familias y personas, desarrollarán sus propios significados asociados al evento, los cuales, si se han creado desde la afectación y el trauma, podrán devenir en un factor de aislamiento social, y daño a la cohesión social. Como mencionó uno de los informantes claves entrevistados en el marco de la elaboración de este capítulo, los megaincendios son eventos traumáticos masivos donde diferentes grupos tenderán a generar diferentes narrativas sobre lo sucedido. Entre sí, muchas de estas narrativas podrían estar en oposición, conflicto o distancia. Una respuesta desde el estado y la sociedad civil que favorezca la creación de narrativas colectivas, complejas y matizadas del evento vivido, a través de promover el encuentro entre miembros de diferentes grupos afectados (por ejemplo, entre vecinos de una comunidad, o entre profesionales de la salud y vecinos), podría ser de gran aporte al proceso de recuperación post incendio. Similares enfoques y prácticas se han utilizado para abordar la pandemia del COVID-19 y sus efectos en profesionales y comunidades (Yarboi et al., 2024; Marder & Rossner, 2021), por lo que una revisión de esta literatura podría iluminar alternativas de intervención.

Reparación del daño

En un megaincendio, donde los daños son tan profundos y duraderos, ¿cómo es posible repararlos? Una respuesta estatal que permita a las familias retomar la vida cotidiana lo más pronto posible es fundamental. La reparación del daño también implica que las personas puedan recuperarse de las afectaciones físicas, cuando las hay. En ese sentido, las condiciones materiales que puedan crearse y desarrollarse para superar, en términos concretos, la situación vivida, son muy importantes.

Pero también otras dimensiones de la recuperación podrían ser relevantes. Que las víctimas se sientan reconocidas como tales en su interacción con autoridades y organismos del Estado y la sociedad civil, es central. Que existan espacios para ser escuchadas y donde puedan dar su voz respecto de decisiones relevantes para sus vidas en lo inmediato y mediato, también. En otras palabras, satisfacer necesidades procedimentales (voz, participación, injerencia en la tomade decisiones) al momento de abordar la crisis y buscar soluciones es crucial, tanto a nivel individual y comunitario.

También podría ser reparatorio el que se implementen mecanismos para asegurar la no repetición; es decir, que el estado comprometa recursos, estrategias y mecanismos para evitar nuevos desastres de envergaduras similares, tal como nos enseñan los mecanismos de justicia transicional.

Cuando hay ofensor conocido (situación que ocurre muy excepcionalmente), la reparación podría tener que ver con los mecanismos de *"accountability"* que puedan implementarse, los cuales podrían estar más cercanos a las prácticas de justicia restaurativa tradicionales.

6. REFLEXIONES FINALES

Los megaincendios de 2014 y 2024 en Chile expusieron deficiencias críticas en la coordinación intersectorial y las limitaciones de las intervenciones centradas exclusivamente en el enfoque psicologicista. Estas respuestas, orientadas principalmente a la contención emocional individual, se revelaron insuficientes ante la magnitud de los daños sufridos, tanto en términos materiales como sociales. Dichos eventos dejaron en evidencia que la recuperación frente a desastres de esta envergadura no puede restringirse a intervenciones psicológicas individuales, sino que requiere un abordaje multidimensional que contemple las dimensiones sociales, económicas y comunitarias igualmente impactadas.

En este contexto, la vulnerabilidad social emerge como un factor determinante que exacerba los efectos de los desastres socionaturales. Las comunidades con mayores niveles de vulnerabilidad, caracterizadas por la falta de acceso a recursos básicos, infraestructuras deficitarias y redes de apoyo limitadas, enfrentaron mayores dificultades para recuperarse. Esto pone de relieve que los efectos de estos desastres no son homogéneos, afectando de manera desproporcionada a aquellos sectores que ya vivían en condiciones de precariedad. La vulnerabilidad preexistente intensifica tanto las pérdidas materiales como la incapacidad de las comunidades para reconstruir sus medios de vida, prolongando el trauma y las secuelas psicosociales a largo plazo.

En este sentido, es crucial que la gestión de desastres integre un análisis profundo de las condiciones sociales preexistentes que amplifican los impactos. Desde una perspectiva de justicia restaurativa, la respuesta a estos eventos debe ir más allá de la atención inmediata, incorporando una coordinación efectiva entre el Estado, el sector empresarial y la comunidad para abordar no sólo la recuperación física, sino también las inequidades estructurales que perpetúan la vulnerabilidad. Esto implica generar estrategias que fortalezcan las capacidades comunitarias y promuevan la equidad social, permitiendo una recuperación sostenible y resiliente a largo plazo. Por otro lado, implica relevar que los equipos de salud que operan en las zonas afectadas enfrentan una doble carga emocional y psicológica al sufrir tanto la traumatización directa como la traumatización secundaria. Estos profesionales no solo deben gestionar el impacto de atender a las víctimas y sobrevivientes de estos desastres, sino que muchos de ellos también viven en las mismas áreas afectadas, lo que agrava su exposición al trauma.

El enfoque de justicia restaurativa puede ser un aporte en este escenario. Sus prácticas inclusivas y flexibles pueden favorecer el encuentro entre grupos, comunidades; permitir el apoyo efectivo a profesionales, generando un espacio de vinculación, y otorgando la posibilidad de la co-construcción de narrativas comunes. Esto no puede, sin embargo, hacer a un lado la responsabilidad del Estado. Por el contrario, como parte del proceso de responsabilización, comunidades, profesionales y tomadores de decisión, tendrían la labor de trabajar conjuntamente para buscar soluciones efectivas y adecuadas para la comunidad afectada y prevenir nuevos desastres.

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LIDIANDO CON EMPRESAS (TRANSNACIOALES) / DEALING WITH (TRANSNATIONAL) CORPORATIONS

AN EXPLORATION OF THE ENVIRONMENTAL RESTORATIVE JUSTICE FRAMEWORK IN COBALT EXTRACTIVISM IN THE DEMOCRATIC REPUBLIC OF THE CONGO: ON THE NECESSITY OF HEIGHTENED SENSITIVITY TO AFRICAN POSTCOLONIAL SETTINGS

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1. INTRODUCTION

The Democratic Republic of the Congo (DRC) is a country known for its abundance of natural resources, but also for dreadful conflict arising from their extraction. One natural resource specifically has gained global prominence: Cobalt. The DRC holds around 50 % of the world's cobalt reserves and makes up for above 70% of global production (RAID and CAJJ, 2021, p. 10). The competition for mineral extraction has harmed the environment, induced violent conflicts and contributed to the general socio-political instability in the country (UNEP, 2022). This includes violations like habitat destruction, water- and air pollution, and child-and forced labor (Buxton, 2021). Due to the contemporary strive for alternatives to fossil fuel and 'green economies', these grave abuses of basic rights have become more prominent (Dorn, 2022, p. 138). Most approaches to reduce global emissions are technological, for instance, the use of electric cars (ibid.). Further, it has raised discussions about the continuous consolidation of global asymmetries between countries of the Global North and South. Extractivism in countries of the Global South deepens geographically asymmetrical relations between dominant economic actors and those populations impoverished by the domination of the former (Bruna, 2021, pp. 181, 185). This enables capital accumulation and green transitions to be

built upon uneven and exploitative exchange relations, which among scholars is labeled green extractivism (ibid.).

The existence of these rights' abuses raises the question of how such harm can and should be addressed. One possible answer is environmental restorative justice (ERJ), a sub-field of restorative justice, focusing on restoring relations between victim and perpetrator, and extending the idea of victimhood, to include other-than human members of communities and give intrinsic value to nature (Killean, 2022, p. 254). ERJ highlights the importance of contextualizing harms, paying attention to their historical background, making it interesting to observe whether this approach can work in a postcolonial setting. In such contexts violations of the environment happen on top of a base of unequal development, creating injustice within and among countries, because of the colonial era (Minguet, 2021, p. 67). Consequently, it is interesting to research the extent to which ERJ, as a relatively new framework, holds in the Congolese postcolonial context. The concept has been applied to postcolonial settings, but primarily in Latin American contexts (see i.e. Bolívar et al., 2022; Rodriguez, 2022). Thus, the exploration of ERJ outside this context widens the literature and supports a more complete picture of the applicability of the framework. Additionally, it takes the concept of green extractivism out of the Latin American context and answers calls for the exploration of the multiplicity of stakeholders in the global energy transition (Dorn, 2022). Lastly, it complements literature focused on mining in the DRC, by providing a holistic, and more global perspective. Therefore, this chapter aims to investigate the potential and limits of ERJ in addressing harms caused by cobalt extractivism in the Democratic Republic of the Congo. Exploring ERJ in a setting with colonial history puts the population of former colonies into the focus of conversations around conflict and raises awareness for present day influences of colonial times and connected disadvantages.

This chapter proceeds by firstly providing an overview of the research and scholarly debate on cobalt mining in the DRC. Secondly, the ERJ framework and connected theories, which guide the analysis, are outlined. After this, the methodological framework and process of data-collection are explained. The analysis commences with a historical contextualization of cobalt extractivism in the DRC, followed by an identification of harms and injustices. Stemming from these two pillars, a stakeholder identification is conducted, including a differentiation between victims and perpetrators. Next, the limits and potential will be assessed by exploring the circumstances under which cobalt extraction happens in the DRC through the lens of the six principles of ERJ as laid out by Margaret Walker (2006) and elaborated on by Budó and Pali (2023). Finishing off the analysis, the importance of heightened sensibility towards African postcolonial contexts and differences in colonial history is outlined. We argue that in the case of the DRC the limits to ERJ far exceed its potential, stemming

from the country's reality which is heavily structurally influenced by its recent history of colonial oppression. ERJ scholars should therefore pay heightened attention to differences in colonial history when exploring the ERJ framework.

2. LITERATURE REVIEW

This section considers the state-of-the-art of the existing literature on cobalt extraction in the DRC, pointing out the gap in research this chapter aims to fill. This needs to be understood as taking place within a green colonialism framework. Green colonialism is generally understood as the notion that the global energy transition is based in commodifying nature, geographically externalizing environmental costs and risks, and specific thought- and action patterns (Dorn, 2022, pp. 137, 139). These patterns have their roots in the hegemonic structures determined by our modernity, centered on Europe and North America (idem, p. 137). Present dependency structures between Africa and Europe are reproduced, while new demands are being made towards African states, which are supposed to support European ecological transformation plans (Claar 2022: 262). The use of these structural relationships to fight against climate change constitutes an integral element of green colonialism (idem, p. 264). Extractivism is embedded within green colonialism, as it is a response mode by Global South countries, in which they perform an extraction of their resources, responding to global demands and interests connected to climate change and its impacts (Bruna, 2021, p. 181). It is generally understood as 'the appropriation of natural resources to export them [...] with a high intensity of resource extraction, a high concentration of value chains, the exportation in unprocessed form or with minimal processing, the accompanying environmental degradation, and the deterioration of working conditions' (Dorn, 2022, p. 139). Crucial to remember is that even if resource exploitation occurs locally, globalization is constantly involved, due to the connection between the global supply of the extracted resources and the international governance's setting of pricing and demand (Gudnyas, 2015, p. 63). Further, the increase of extractivist export by Southern countries was and continues to be needed by them for self-sustainment. Because of this, Southern countries are in competition for who gets to dominate the export of a natural resource, which provides them with foreign investment, thus creating competition between resource rich countries. As a result, the structure of rules, institutions of global governance and international relations are determined by foreign investors and not the Southern countries (idem: 71). Exporting countries are supposed to accept and follow global rules, established by Northern countries, with little ability to organize supply management, prices of commodities or to use them in their own industrial processes (Gudnyas, 2015, p. 71).

The scholarly debate around cobalt mining in DRC mainly revolves around exploring and confirming the human rights issues, which arise out of the industry (see i.e., Sovacool, 2020; Sovacool, 2021; Banza Luzaba Nkulu et al., 2018). Scholars have inspected the mining policy framework and explored which aspects are insufficient and need to be transformed to lead to an improvement of circumstances in mining (Sovacool, 2020; Sovacool, 2021; Rubbers, 2020). These scholars, particularly Sovacool (2020), talk about the global supply chain connected to cobalt extraction, from an economical approach, proposing improvements in the chain itself to increase sustainability, efficiency, and effectiveness. Additionally, the debate has a domestic focus, exploring existing rights violations from local perspectives. While the global dimension of the cobalt supply chain is mentioned continuously (Sovacool, 2020; Mora et al., 2024), the aspect of global and historical responsibility is barely touched upon. Consequently, this presents a gap within the literature and provides an avenue to explore this angle further.

Another cluster within the literature focuses on relations between mining companies, miners, and the government, largely paying attention to the organization of work relations in this triangle. Here an example is the exploration of the formalization of small-scale mining and its influences on workers' rights (de Haan and Geenen, 2016; Calvão et al., 2021). Calvão et al. (2021, p. 9) are concerned with the issue of responsibility, more precisely how the increasingly formalized relationship between small-scale miners and mining companies is used by the latter to avoid responsibilities towards these employees. The concept of Corporate Social Responsibility is a recurring theme (Calvão et al., 2021), as well as the concept of 'responsible sourcing' (Mancini et al., 2021; Deberdt, 2022; Calvão et al., 2021).

Barely any literature aims to explore historical roots of the ongoing conflicts in- and around cobalt extraction. When looking at literature regarding resource extractivism, Bolívar et al. (2022) present an exploration of restorative justice's potential in extractivism-related issues in Chile. Here, a clear line is drawn between dynamics of extractivist policy in the Global South and global power relations between the North and South. In line with Bolívar et al., Dorn (2022, p. 141) arrives at the conclusion that the energy transition is not only based on extractivism, but that there is an increase in environmental conflicts connected to the exploitation of raw materials. This can be seen as having its roots in an imperial mode of living of the Global North (Dorn, 2022, p. 141). This means that "everyday life in the capitalist centres is essentially made possible by shaping social relations and nature-society relations elsewhere, i.e. by means of (in principle) unlimited access to labour power, natural resources and sinks (...)" (Brand and Wissen, 2017, p. 43, as cited in Dorn, 2022, p. 141). He calls for a needed decolonial turn in thinking

and going about the energy transition (Dorn, 2022, p. 143). Additionally, it is stated that there is the need for research into the relations between, and of the multiple actors, policies and strategies involved in the green energy transition (idem, p. 144). Bolívar et al. (2022) call for restorative justice to take an international perspective, through creating international mechanisms that could help countries and governments to arrive at a more sustainable and equal lifestyle. Further they state that to get a complete understanding of environmental harm in Latin American countries, there needs to be an international perspective and contextualization of harms at hand and stress the complexity of state responsibility in environmental harms in the Global South (Bolívar et al., 2022, p. 580).

3. ENVIRONMENTAL RESTORATIVE JUSTICE (ERJ)

The theoretical framework that will be employed to analyze the situation in the DRC is an ERJ framework, as explored by Minguet (2021), Rodriguez (2022) and complemented by Budó and Pali's understanding of Walker's (2006) principles of ERJ. Its core idea is that environmental conflicts always have a collective dimension, distinguishing three groups: impacted communities, one or more private companies and usually a public actor, i.e., the administration of a country (Minguet, 2021, p. 66). Social and environmental injustices are explained as stemming from modernity and the continuous augmentation of European worldviews (Rodriguez, 2022, p. 534). Violations of the environment happen on top of a base of unequal development, creating injustice within and among countries, rooted in the colonial era (Minguet, 2021, p. 67). ERJ is a sub-field of restorative justice, which extends the notion of victimhood, from human-beings to including other-than human members of communities, acknowledging the intrinsic value of nature, and harm to the environment is acknowledged as an independent form of harm (Killean, 2022, p. 254). Harm is understood as a multi-layered concept, which includes social, as well as physical harm of individuals and communities and harm of nature (Forsyth et al., 2021, p. 20). Further, the historical context of- and their influence on conflicts are emphasized (Minguet, 2021).

In this chapter we follow ERJ as a perspective on how to approach harms in cobalt extraction led by six principles of ERJ as identified by Margaret Walker (2006). These principles are: 1. reparation of the harm / wrong; 2. a focus on the needs of those harmed and wronged in attempts at repairing; 3. recognizing and acknowledging responsibility by perpetrators; 4. processes of ownership, participation and dialogue; 5. reintegration of the perpetrators without stigma; 6. a transformation of structures, processes and values.

Walker's approach is deemed as useful, because of its focus on responsibility, relationality, and repair (Budó and Pali, 2023, p. 190). This conceptualization considers systemic factors, like colonialism, exploitation, and historical injustice, and how these generate relationships between actors distant from each other (ibid.). Walker contends that 'in cases of oppression, mass violence and historic injustice, there may not be a morally acceptable status quo ante' (Walker, 2006, p. 209). Here, restoration means moving relationships towards becoming morally adequate, no matter if they had been adequate prior (ibid.). This thought is especially relevant to the Congolese context as the country's history is coined by factors as described by Walker.

4. METHODOLOGY

As the context, within which cobalt mining and the resulting rights violations take place, is highly complex, our research makes use of a single-case study framework. Focusing the analysis on a single case, allows for exploration of the plausibility of a theory in a specific context and allows to consider the multiplicity of contextual factors (Ruffa, 2020, p. 1143). Further, it allows for exploration 'of a phenomenon in all its depth and complexity' (idem, p. 1134). A combination of qualitative methods was used, to get the most information out of the case study. The main method employed was document analysis and doing historical contextualization, which is pertinent to explain contemporary structures of society, their historical roots and development need investigation (Halperin and Heath, 2017, p. 239). Additionally, there was a review of media coverage, regarding the state of reparations and regret from Belgium towards the DRC. The data were analyzed by an iterative process of data analysis, which means developing a set of observable implications to understand what empirical referent is needed to find support or contest the theoretical framework (Ruffa, 2020, p. 1150). For this reason, the process of analysis was a going back and forth between the data and Walker's six principles of ERJ. The research developed a set of observable implications to understand what empirical indicators were needed to support or contest the theoretical framework. An understanding of what constitutes empirical indicators which support, or contest the framework is based on the researcher's reflexivity, whose subjectivity is considered a resource more than a problem (Morgan, 2022, p. 73).

As contended by Creswell (2007), 'the data collection in case study research is usually extensive, drawing on multiple sources of information' (p. 75). This data collection leads to a thorough description of the case, where an analysis of themes allows one to understand the complexity of the case and is not aimed at providing generalizations (Creswell, 2007, p. 75). Using multiple sources of data and methods allows for data triangulation, thus approaching a research

problem from different angles (Halperin and Heath, 2017, p. 161). Triangulation of evidence increases reliability of the data and enables the cross-checking of findings, minimizing the possibilities for biases (ibid.). Analyzing documents like books, journal articles, or video recordings is beneficial because of the stability of the data, as pre-existing text cannot be influenced by researchers' behavior (Morgan, 2022, p. 66). The consulted academic literature was in English and was collected by a search of significant literature through databases, namely the UvA Catalogue Plus and Google Scholar. The main search terms were 'environmental restorative justice; harms; injustice; legal/policy framework for extractivism; (cobalt) extraction; responsibility and corporate responsibility; global energy transition'. The data was qualitative and collected from diverse sources. There were analyzed reports by different kinds of organizations, namely Amnesty International (2016; 2017; 2023), the Öko Institut e.V. (2011), The Good Shepherd Sisters (2013), Rights and Accountability in Development and Le Centre d'Aide Juridico-Judiciaire (RAID and CAJJ) (2021), The Good Shepherd's International Foundation (2021) and the African Resources Watch (2022; 2017). In addition, eight letters by four major Mining companies in response to confrontation by Amnesty International regarding human rights violations on their mining sites were analyzed. Moreover, policy documents were reviewed, namely the revised Mining Code of the DRC (2018) (translation as provided by law associates by the ICLG), OECD guidelines on companies' due diligence, a legislative handbook by the Development Bank of Southern Africa (DBSA) (2020), and the guidelines within Environmental and Social Impact Assessment as established within the Mining Code. It is important to note that the analyzed documents were in English, whereas the official language of the DRC is French. Because of this access to further primary data was restricted and has to be taken into consideration when interpreting results. Other data were two, two-hour long recordings of panel discussion at the global Cobalt Conference of 2023. One session is titled 'Expert session on environmental and human rights due diligence', the other 'DRC: fostering a transparent, verifiable and responsible cobalt value chain'. Additionally, a two-hour recording of testimonies by involved actors at the Tom Lantos Human Rights Commission from 2022 regarding the state of human rights violations in DRC cobalt mining was reviewed. These recordings were made public and available for non-commercial use via each organization's website.

In the following sections, firstly, a historical contextualization of cobalt extractivism in the DRC is presented, followed by an analysis of harms, where a distinction is made between harms to the environment and harms to people. Subsequently relevant stakeholders, victims and perpetrators are outlined. Lastly, Walker's six principles of the ERJ framework are applied to the case, culminating in a reflection on the necessity of increased sensibility to differences in postcolonial context and colonial history.

5. HISTORICAL CONTEXTUALIZATION

The roots of cobalt extraction go deep into the country's colonial past. Resource extraction or rather exploitation, has historically taken place at the expense of many, benefitting only a few (Global Witness, 2004, p. 6). These patterns were established under rule of King Leopold II (1884-1907) of Belgium and Belgian colonial rule (1908-1960) (ibid.). During the Conference of Berlin (1884-1885), Leopold's claim on what the DRC is today was formally recognized, turning the territory into his personal possession, and calling it the 'Congo Free State' (Global Witness, 2004, p. 6). His aim to colonize was fueled by wanting to improve Belgium's position within the European dynamic, because Belgium had only recently gained independence from the Netherlands (Russell 2023). Leopold's rule was coined by forced labor, exploitation, pure brutality, and repressive land laws (Global Witness, 2004, p. 6). A core aspect, which is essential to the extractivist sector is that DRC was not organized as a state, but used as a business company, with the aim to enrich the colonial occupier (ibid.). Leopold established multiple mining companies for mineral exploitation. These included the Union Minière du Haut-Katanga (UMHK), and the Compagnie du Katanga, which after independence of the DRC remained a major part of the mining sector (idem: 8). Copper, from which cobalt is obtained, was first extracted in 1911 in southeastern Congo by the UMHK (idem, p. 23). Within 12 years the DRC transformed into the largest global copper producer (Russel, 2023, p. 23), remaining in the top five producers today (ibid.).

When Leopold sold the Congo Free State to Belgium in 1907, circumstances for extraction remained the same (Global Witness, 2004, p. 8). Several rebellions and demonstrations led to independence from Belgium in 1960. But the colonial occupier left the DRC fast and with no assistance to establish an independent and self-sufficient state. The country was overtaken by Mobutu Sese Seko (Mobutu as follows) by means of a military coup, which was backed by the United States- and Belgium to 'fight communism' in context of the Cold War (Global Witness, 2004, p. 8). While Mobutu renamed the country 'Zaire', its organization remained that of a personal business enterprise, solely benefitting him and his confidants (ibid.). His regime was characterized by brutality, corruption, and an access to natural resources based on personal connections (ibid.)[1]. Mobutu nationalized minerals, the state gaining ownership of all land and mineral rights. The UMHK was turned into a state-owned mining company and renamed 'Gécamines', operating in the DRC until today. Additionally, Mobutu ignited competition between entrepreneurs and military units, allowing each

[1] Notable is that there was close to no investment into public services for the whole duration of Mobutu's rule.

to guard their respective territories and to develop their own commercial opportunities, laying the base for a militarized control over natural resources (ibid.), visible today.

Mobutu's fall in 1997 was induced by the end of the Cold War in 1991 and the accompanying loss of US' support for the dictator. Combined with hyperinflation and increasing political opposition the country was left in economic and social chaos. Therefore, multiple foreign companies abandoned the country and its cobalt mines. Furthermore, there had been no maintenance or upgrading of machines on the mining sites (ibid.). Because the mines were the main income source for the Congolese, the economy declined vastly. Banking services collapsed, consequently it was not possible to conduct any business in the DRC anymore (ibid.).

This was combined with the influence the Rwandan genocide had on the region bordering with the DRC. One million Rwandan Hutu refugees entered the DRC, which heightened ethnic tensions in South and North-Kivu (idem: 10). Further, the Rwandan government stated that Mobutu harbored Hutu extremists who had fled across the border, providing them with a reason to intervene in the DRC and take part in bringing down Mobutu (CFR, 2023). Joseph Kabila, head of the then-opposition in the DRC, supported by the Rwandan and Ugandan army, took over Eastern parts of the DRC and named himself president of the, then renamed, Democratic Republic of the Congo, when Mobutu fled in 1997, marking the end of the First Congo War in 1997 (CFR, 2023; Global Witness, 2004, p. 10).

The DRC has never been politically or economically stable, but the expansion of mining operations in the 21st century has complicated peace efforts even more (CFR, 2023). The Congolese conflict has become globalized, because of the increasing global demand and reliance on minerals, including cobalt, giving domestic and external groups more incentive for involvement in conflicts in the East (ibid.). The First and Second Congo Wars saw never before seen war atrocities unlike any other African conflict, amounting to over three million deaths by 2004. Up until today ongoing conflicts in the Eastern regions of the DRC have caused circa six million deaths (CFR 2023). Not only international investors, but also Rwanda, Uganda and militias supported by these actors, have interests and risks in Congolese mines (ibid.). The aspect which is key for any inferences made about the potential and limits to addressing harms in the cobalt extraction by means of ERJ is that the mining sector as it is, stemming from its roots in exploitation and asymmetrical power dynamic between the ruling elite, whether that was the Belgian colonial power or Mobutu's government, was not designed with the good of the people in mind, but was solely oriented towards profit and personal gain.

6. HARMS AND INJUSTICES OF COBALT EXTRACTION

To test the applicability of ERJ approach to addressing harms caused by cobalt extraction these have to be outlined first. By reviewing NGO reports and academic literature on consequences of cobalt extraction, the following harms are identified. To provide a structured overview the identified harms are sorted into two groups. In line with ERJ's ecocentrist perspective, firstly those harms were identified, classified as harms to the environment itself. Secondly, a wide array of harms connected to the violation of the Congolese population's human rights can be seen.

The environment as the victim

Cobalt extraction causes grave harm to DRC's biodiversity. The harms which can be identified are, for instance, water and air pollution, loss of vegetation and a destruction of the general landscape. While the focus of those looking at negative consequences of cobalt extraction mention harm that is caused to the environment, this is mostly done in a complementary manner to outline the suffering that the Congolese people have to endure because of environmental degradation. In line with the theoretical approach of our chapter the environmental degradation itself is seen as a key harm, as nature and all other-than-human entities have a value, considered equal to human-beings. To illustrate this, the case of the pollution of the Kalemba River by a Chinese mining company called Sicomines is explored. In September of 2017 a basin containing acids used in cobalt mining processes spilled and polluted the river with large amounts of toxins (AFREWATCH, 2022). The pollution that the river suffered is seen as an important harm, stemming from the intrinsic value that it has as an other-than-human being. While it is harder to quantify this harm because the river cannot directly speak for itself, there are ways of perceiving its harm through appropriate mediators. These can be (local or indigenous) communities who have a longstanding connection with the waters around them, NGOs, or scientists / scholars averse with the entity at hand (Killean, 2022, pp. 256-257).

Harm to people

There is an array of harm caused to those directly working in the cobalt extraction industry but is not exclusive to this group of people. Physical violence takes place on a range, such as beatings by supervisors, or in form of sexual violence[2] (Amnesty International, 2016, 2023; Tsurukawa et al., 2011). Not only do the interpersonal working relations pose a harm to individuals

[2] Such as prostitution, rape, and other forms of sexual assault.

occupied in the mining sector, but the material working conditions do so as well. There is a lack of protective equipment, established working routines and infrastructure on mining sites, especially on those where small-scale mining dominates (Amnesty International, 2016, p. 5). For instance, there are many cases of premature death through the collapsing of hand dug tunnels. Further, there is physical harm in forms of negative health implications for the workers, including continuous exposure to dust containing cobalt particles, leading to lethal lung diseases[3] (Amnesty International, 2016, p. 5). Moreover, continuous skin contact with cobalt can lead to skin diseases and radioactive elements to cobalt cause infertility, illnesses of the digestive tract, and premature death[4] (AFREWATCH, 2022; Tsurukawa et al., 2011). Not only is the health of those working on the sites endangered, but also of those who live in the environment negatively impacted by extractivist activities.

The prior mentioned acid spill by Sicomines, polluting the Kilombo river had a profound influence on the river communities in two areas, Yenge and Kapanga. These communities experienced negative socio-economic and health impacts from the environmental degradation. Not only did the consumption of polluted water lead to serious health implications, like kidney diseases and dental issues. Additionally, the polluted water destroyed the soil from which communities grow crops, but crops and water are continued to be consumed because of lack of alternatives (AFREWATCH, 2022). Another harm that applies to the communities in Yenge and Kapanga and which is generalizable to similar circumstances in the DRC, is that communities lose the means to sustain themselves. Where communities are dependent on consuming and selling products, like crops and fish, the destruction of their environment causes serious social harm. Further, children whose education is financed by the income these assets provide experience a loss of access to education (ibid.). Children are not only harmed by losing access to education, but by child labor, with 70% of children being involved in labor processes in mines (Amnesty International, 2016, p. 6; GSIF, 2021, p. 2). In this environment they are objected to all harms caused by the working conditions and interpersonal relations as outlined before and have no power to protect themselves. Lastly, communities in the Southeastern region of the DRC are facing forced evictions. Cobalt mining sites in this region have been growing, but instead of benefitting from the growth, many people are forced out of their homes, making space for the expansion of large-scale mining projects (Amnesty International, 2023, pp. 6, 8). These evictions are conducted by mining operators with little regard for

[3] Workers experience respiratory limitations, such as asthma, shortness of breath and a decrease of their general lung function.

[4] This is only a number of examples but does not present the whole range of possible illnesses.

the communities' rights and national laws, and accompanied by physical assault of evictees, as well as violent destruction of their property (idem, pp. 6, 11, 12).

7. STAKEHOLDER IDENTIFICATION

The historical contextualization and identification of harms allows for a delineation of stakeholders. Stakeholders include different governments, namely the Congolese, Rwandan and Ugandan governments. Other stakeholders are local and international mining companies, as well as rebel organizations[5] who have stakes in cobalt resources. Further stakeholders are the tech companies who process cobalt, for instance, for electric vehicles. They make their products for another group of stakeholders: end users. Those who make use of, for example, electric vehicles also hold an interest in the activities of the mining sector. Other stakeholders are local and international organizations, like NGOs which focus on environmental- and social issues connected to cobalt extraction. A last stakeholder are international organizations, like the Organization for Economic Cooperation and Development (OECD)[6].

Because ERJ extends the notion of victimhood from humans to other-than human entities the harmed environment is considered one of the key victims of cobalt extractivism. Furthermore, stemming from the analysis of harms, the workers on mines constitute one major group of victims, where child workers have to be highlighted as the most vulnerable group. Other victims are local communities which are influenced by nearby mining sites. They either face evictions or the environment they reside in is made uninhabitable through environmental destruction, destroying their livelihoods, and causing lethal health impacts.

Following the identification of victims, the perpetrator identification needs to succeed. Stemming from the historical contextualization the first perpetrator identifiable is the Belgian (colonial) government. Had it not been for the misuse of the DRC as an economic enterprise by Leopolod II and the colonial government, the cobalt extractivism of today would not present as it does. The implemented structures of exploitation laid the base for its misuse by Mobutu, catalyzing the unstable and unjust extractivist sector of the 1990s, the Congo Wars and the fight over cobalt resources in the present day. Similarly, the

[5] Precedent by Mobutu establishing a militarized control over natural resources, there are militias and rebel groups which conduct illegal trade of cobalt and equal mineral, mostly in the Eastern regions of the DRC (Global Witness, 2004, p. 6).

[6] Organizations as such are interested, because the production circumstances in the DRC are connected to global supply chains and therefore subject to standards that are mandatory within these chains.

mining enterprises owning and operating the cobalt mining sites are dominant perpetrators. These companies, for example, state-owned companies like Gécamines and foreign-owned companies, like Chinese-owned Sicomines are to be held responsible for the harm caused to the environment and to the workers on their sites. This highlights two distinct spheres of perpetrator identity: the domestic and global level. The Congolese government has statutory control and responsibility over- and for the mining sector (Liedekerke, 2022). At the same time, the foreign companies have responsibility for how the cobalt they extract is sourced, not just because of domestic laws, but also because of international standards regarding working and sourcing conditions (Amnesty International, 2017, p. 25). Additionally, this highlights the point of connection with the international market and leads to the identification of the next (group of) perpetrators: international companies who purchase cobalt. These include producers or users of lithium-ion batteries, most notably used in electric vehicles and mobile phones[7] (Amnesty International, 2023, p. 6). While offenders on the higher levels of society are key perpetrators, it is important not to forget the responsibility that lies with end users. The demand determines the supply, for example, electric vehicles or smartphones are only produced because they are continuously bought.

8. APPLYING THE ERJ LENS TO COBALT EXTRACTIVISM

As illustrated until now, harms in cobalt extractivism are multi-layered, spanning social, political, historical, and environmental elements. In what follows, the applicability of Margaret Walker's six principles of ERJ to cobalt extractivism in the DRC will be analyzed, to arrive at a conclusion about its potential and limits in this case.

8.1. Attempts at repairing harms

The first of Walker's six principles of ERJ concerns the importance of recognizing harm and the need to repair it, as a base for all restorative processes (Budó and Pali, 2023, p. 190). As the importance of repairing harm is a key component and allows for inferences about the potential and limits of ERJ, this section outlines the already taken attempts and possibilities at repairing identified harms in cobalt extractivism. There have been different approaches to repairing harm. These can be grouped into the categories of legal / policy approaches, followed by attempts taken by companies and attempts made on a community level.

[7] Examples for such companies are Apple Inc., Microsoft, Tesla, and Dell (Kelly, 2019).

The general legal framework regulating cobalt mining is the Mining Code and Mining Regulations of the DRC, which were revised in 2018 (Liedekerke, 2022; Ngalula and Elohim, 2023). While these laws include environmental health and safety regulations, therefore tending to environmental harms caused by cobalt extractivism, the health and safety regulations for workers are mainly regulated by the Congolese Labor Code (Ngalula and Elohim, 2023). The 2018 Mining Code specifies that companies are required to get an environmental exploitation permit from the Congolese Environmental Agency (CEA). To qualify for a permit, the company applying needs to provide an Environmental and Social Impact Study (ESIS), an environmental management plan which describes the status quo of the ecosystem and how it plans to limit and solve harms to the environment (Ngalula and Elohim, 2023). Further, the code established compensational rights to those living in an area influenced by a mining permit, when their actions, like agriculture are affected by a mining project and the obligation to consult with local authorities (ibid.). The Mining Code holds anyone who has a permit liable for any damages caused to persons, property, and the environment as a result of mining activities, being required to repair any harm caused. This includes direct- and indirect pollution from mining activities which influence human health or the environment's biodiversity (ibid.). What is noticeable when analyzing these legal attempts is that these are merely procedural, and preventive in character. While the Congolese state reacts to concerns regarding environmental and human harm in trying to build a framework to tackle these issues within future projects, the legislation is not aimed at repairing harm which has already been caused. Additionally, while the revised code established these requirements it also fueled the development of the mining industry in the DRC, by making the sector more competitive through tax incentives. The state acts as both regulator and promoter of the sector (ibid.), while it remains open how those already harmed are getting justice. This is accompanied by a lack of general infrastructure and implementation capacity (Liedekerke, 2022; Walmsley and Hussleman, 2020, p. 3). Child labor is addressed by the DRC's Labor Code and National Action Plan (NAP) for eliminating child labor. Both legislations prohibit hazardous and forced forms of labor for children (Bigirimana and Ahmad, 2023, p. 40; Amnesty International, 2017, p. 21). The NAP was first developed in 2011, but never implemented and has been outlined as lacking. There are no clear timelines, assigned responsibilities and no implementation plan (Amnesty International, 2017, p. 22). Domestic attempts at addressing and repairing harms are paired with input by international initiatives, like guides by the OECD and the United Nations. These organizations set out the responsibility of companies to respect international human rights and conduct due diligence investigations[8] in their supply chains (idem: 5). This builds the connection for the next identified attempts at repairing harm: those by companies.

[8] Research on where and how cobalt used in their products is sourced, adapting company policy and sourcing sites accordingly

The attempts taken by companies virtually only concern their supply chain management. There have been several corporate initiatives created since 2016[9], which for instance, are The Responsible Cobalt Initiative, The Responsible Raw Materials Initiative (RRMI) and Cobalt4Development. Just like the attempts made by the Congolese government, this approach to remedying harm is marked by little solutions to actual harm experienced by members of the mining community. Their focus lies on implementing due diligence processes, and at times concern their obligation of investing into mining communities but emphasize due diligence as the key aspect.[10] Those corporate initiatives which do invest into local communities aim at improving alternative livelihoods, and diversifying incomes (Lawson, 2021). When analyzing those attempts made by others other than the state or the international sphere, the first significant element is that many of these approaches are not formalized. At times it is an individual attempting to get justice, other times it is a community as a whole and then there are those attempts by local organizations, which are the most formalized form. Attempts at resolving harm happen on a spectrum, such as the sending of letters and petitions, to mediation meetings between mining companies and residents. These mediation meetings, in the best-case, end in dispute settlement payment by companies, but only after residents exert continuous pressure (Amnesty International, 2023, p. 67). There are a number of Congolese nonprofit and nongovernmental organizations, which mostly tend to harm regarding child labor (educational access, vocational training and internships, psychological support), or implementing community development projects, trying to secure long-term development[11] (FCA, 2023). There are some, but overall, very few cooperatives of miners fighting for their mining rights bottom-up. What is important to note is that these community programs are virtually always supported by an international organization or company. This is either a mining enterprise, an international NGO or development projects. Local, community-based initiatives, for example, Maison Kwetu, Alternatives For Action, or the Mining Cooperative for Social Development are all backed by a number of international tech and mining companies. While this presents a point of connection between the victim communities and those causing harm, it also puts these initiatives at the merit of these companies. Combining this structure of relationships with the on-ground reality explored by NGOs including Amnesty International, the support of local initiatives has a performative character.

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[9] Which was the year that Amnesty International published a first report on the horrendous state of human rights in cobalt mining in the DRC and called for companies to improve their sourcing practices.

[10] See for instance: https://respect.international/responsible-cobalt-initiative-rci/ https://www.responsiblebusiness.org/media/docs/RRMI-Brochure.pdf

[11] Through workshops on financial capacity, entrepreneurship, and furthering research in mining sectors.

8.2. A focus on the needs of those harmed and wronged in attempts at repairing

Walker's second principle emphasizes the necessity of situating victims' needs at the center of repairing harm, pertaining to material, emotional and moral elements of need (Walker, 2006b, as cited in Budó and Pali, 2023, p. 191). Here, ERJ needs to reply to the needs of the harmed, as articulated by themselves (Budó and Pali, 2023, p. 191). Applying this to cobalt extraction in the DRC this translates into the question to what extent the needs of affected communities are put into the focus of repairing harms and whether these communities are involved in decision-making processes. In the DRC the needs of affected human communities are put into the focus insofar as any attempts at reducing or solving harm have been initiated by NGO reports about harms to communities, which were in direct contact with communities, through interviews. But there has been no involvement of these communities in the development and establishment of legislation. Additionally, legislation is guided by international standards, like the OECD guidelines on due diligence (Amnesty international, 2017, p. 5), approaching this from an internationalized perspective, with little impact from local communities. A factor which needs consideration connects back to the country's colonial history, more precisely how the state was handled as a business enterprise. The focus of the DRC today remains with natural resource extraction (Global Witness, 2004, p. 8; RAID and CAJJ, 2021, p. 17). While the Congolese state is creating a legal framework in support of affected communities, it simultaneously fuels growth of the cobalt mining sector, while aware of the implications this has for the communities. Therefore, it is questionable whether the legal attempts, which do not fix ongoing harm but only aim to prevent it, really are created with the needs of the population in mind. Other-than-human entities, so the environment itself, are not given a voice. While environmental harm is acknowledged at times[12], this is not done in a way where it would provide the harmed ecosystem with its own voice through appropriate mediators between nature and human systems. Community approaches do take the needs of affected communities as their core, but while these approaches try to restore and empower communities, this exclusively happens within the community[13], and not in attempts of restoring relations between perpetrators and victims.

[12] A member of the audience on a panel meeting of the Cobalt Conference 2023 (further explored in the next section), for instance, questioned whether the focus on social harms connected to environmental harms in cobalt mining does not make the conversation miss out on environmental harm itself (Expert session on Environmental and human rights due diligence May 9).

[13] For example, a focus on financial literacy and alternative livelihoods at the 'Alternatives for Actions' NPO/NGO listed earlier.

8.3. Genuine responsibility and accountability

For perpetrators[14] to be held accountable for creating and remedying harm is an essential element of ERJ (Budó and Pali, 2023, p. 192). They do not only have to be held accountable but must genuinely acknowledge their responsibility (ibid.). Being genuine in this context means a perpetrator being concerned with what the victim thinks of the circumstances and of the perpetrator themselves. The perpetrator is concerned with the (dis)approval of the victim, recognizes and expresses that the harm caused was unjust plus displays the need to redress the harm the victim suffered (Roche, 2003, p. 81). They take responsibility for their actions without the presence of denial and emotional distance towards the victim's reality (Walker et al. 2020, p. 256). This process of acknowledgement should in the best case happen directly between victim and perpetrator (Walker 2006b). The form of accountability striven for extends beyond caused harm that is legally recognized, includes the will of perpetrators to reflect on their decisions and for the harmed to have the power to take part in designing solutions to experienced harm (Forsyth et al., 2021). The dynamic between perpetrators and victims in cobalt extraction is coined by a continuous non-acknowledgment of responsibility, as well as upright denial. An analysis of response letters by four of the major mining enterprises operating in DRC[15] allows for negative inferences about their level of accountability. Response letters to confrontations regarding forced evictions and further human rights violations on their mining sites by Amnesty International (2023) are coined by either literal denial, or by stating that the situation is to be interpreted differently. In its response letter (May 9, 2023) company Chemaf, for instance, states that it 'remains concerned with AI's findings which contain false accusations against the Company' and Zijin Mining Group that it 'has conducted friendly communication and exchange with the Provincial Relocation', while the reality of interactions were reported very differently by local residents. What corporate responses further have in common is the rhetoric of 'clarifying' the context of findings. Here, clarifications either consist of referring to human-rights processes they have in place or contending that whichever action conducted by their company, while not acknowledging that they played any role in causing harm, was within the DRC's legal framework. As an illustration: COMMUS states that 'mine development was in compliance with laws and regulations [...] and in strict accordance with local laws and regulations [...]' (letter of 9 May, 2023).

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[14] In the case of the DRC, perpetrators are those outlined in our stakeholder identification. The only group of perpetrators which is difficult to confront directly, are end users, as this is an immense, diffused group. How to actively foster restorative processes between end users and victims located in the DRC remains an issue.

[15] La Compagnie Minière de Musonoie Global Société par Actions Simplifiée (COMMUS), Chemical of Africa SA (Chemaf), Eurasian Resources Group SARL (ERG) and Kamoa Copper S.A.

Taking a further look at the global sphere it is striking that while all identified harms are addressed, responsible actors manage to just skip past the question of and take responsibility. The Cobalt Conference[16] consists of several panel sessions, each session concerning a particular aspect of the cobalt sector. While there were sessions on environmental and human rights due diligence and specifically on fostering a 'transparent, verifiable and responsible cobalt value chain' in DRC, these sessions did not address the question of responsibility at all. The panels consisted of representatives of mining companies, such as Glencore[17], DRC government mining departments, international initiatives, like the Fair Cobalt Alliance[18], RRMI, as well as end-users, like Mercedes-Benz. While the conversation facilitator contended that they wanted the conversation to be 'reflective, but positive and forward looking' (Session 4 Cobalt Conference, 2023), the conversation was non-reflective, but all too positive. When addressing the international realm, it is important to outline in what ways Belgium acknowledges its responsibility. In character with prior findings, Belgium does not acknowledge responsibility nor takes accountability for its role in the state of the DRC's mining sector. Belgium has not paid any sort of reparations[19] to the DRC (Munshi, 2020). Traditionally, Belgian society has said little to nothing about colonial times and their influence on the DRC (Nyemba, 2022), which extends to the cobalt sector. The dominance of non-acknowledgement presents one major limit to the possibility of ERJ in the case of harms caused by cobalt extraction in the DRC.

8.4. Processes of ownership, participation and dialogue being created

The fourth of Walker's (2006) principles concerns the creation of processes of ownership, participation and dialogue between victims and perpetrators (Walker, 2006, p. 208). Reparation should extend beyond material compensation and reach for interpersonal gestures, such as apologies or expressions of sorrows (Walker, 2006, p. 211), which processes of dialogue can provide. The reality of dialogue-creation and genuine interpersonal interaction is very somber. Spaces and processes which hold the potential to offer a place for dialogue, participation, and ownership, like participatory processes within the ESSIAs, community information meetings, company internal social responsibility

[16] A yearly meeting of 'all parts of the cobalt value chain', in 2023 having taken place in May.

[17] A mining company found guilty of bribery and illicit trade, as well as workers' rights violations (Sasha Lezhnev, policy consultant, in testimony at the Tom Lantos Human Rights Commission, 2022).

[18] A multi-stakeholder initiative with the aim of establishing a fair and responsible cobalt and improving mining communities' situation.

[19] Neither symbolic, nor material.

policies, and platforms like the Cobalt Conference are usually closed off to impacted communities, insufficiently organized, or poorly implemented, hindering the possibility of meaningful interactions (Amnesty International, 2023, pp. 10, 14, 38). The organizational structure of these platforms reflects clear power structures. Claims of, for instance, 'bringing together the entire cobalt value chain, wider critical minerals industry, as well as the world's largest cobalt investors' at the Cobalt Conference (Cobalt Institute, 2024) to debate challenges and opportunities, does not include the victims of the cobalt sector. These power asymmetries are increased by little linkages between affected communities, effectively leaving them to fend for and by themselves. Consultation processes between companies and communities, supposed to offer genuine dialogue, either do not take place at all, or the communities are forced, for instance, under the threat of assault by military police to accept companies' offers (Amnesty International, 2023, p. 13).

8.5. Are the perpetrators offered the opportunity to reintegrate (into society) without stigma

The fifth of Walker's (2006) principles concerns that the offenders are offered the opportunity to reintegrate into society without stigma attached to them (Walker, 2006, p. 208). Here, processes of dialogue can and should also provide offenders with the opportunity to 'humanize' themselves and those they hurt, allowing for reintegration without stigma (idem, p. 211). As there are virtually no meaningful dialogues taking place between perpetrators and victims, non-acknowledgment and non-prosecution and accountability of and by perpetrators, the question of possibilities for perpetrators to reintegrate without stigma renders itself impossible.

8.6. A transformation of structures, processes and values?

By engaging actively in justice, those involved should become more conscious about their ability to fundamentally change structures of society and relationships. It is imperative to better the social conditions in which the harm caused has its roots (Budó and Pali, 2023, p. 195-196). Therefore, the last of the six principles of ERJ concerns that there is a transformation of structures, processes, and values visible.

In the case of harms in cobalt extractivism a genuine transformation of the socio-political system and connected values cannot be seen. While there is a transformation of structures when looking at the legal framework to remedying harm, like the revision of the Mining Code and the connected establishment of ESSIAs, social structures and on-ground reality of mining communities have

merely been influenced by such (RAID and CAJJ, 2021, p. 5). The lived reality of the victims of harm, showcases a failure of actual implementation of new forms of structures and processes. At the same time, looking at a transformation of values, it can be said that a switch of values towards more awareness of especially human rights violations can be observed. Human rights abuses are, above all, discussed in the international realm and a pattern of strict condemnation is visible. Nevertheless, two aspects need to be re-emphasized. Firstly, this condemnation mostly excludes acknowledging the environmental harm as a relevant violation on itself. Secondly, Belgium notwithstanding its historic ties with the DRC, remains with harsh non-acknowledgment of its colonial influence on the DRC's cobalt mining sector. More generally, in the matter of harms in cobalt extractivism the large absence of meaningful and active justice that has been outlined in this chapter, hinders the possibility of a genuine (systemic) transformation as imagined by ERJ. This element poses another limitation to addressing harms by means of ERJ approach in the Congolese context and leads to a critique of its applicability to post-colonial contexts, resembling the DRC's.

9. SENSITIVITY TOWARDS DIFFERING POSTCOLONIAL CONTEXTS

Our analysis makes clear that the limits to ERJ in, specifically the Congolese postcolonial setting far succeed its potential. The case clearly highlights what Bolívar et al. describe as environmental and social harm going hand in hand with economic growth in many countries in the Global South (2022, p. 564). The environmental harm in the DRC has a strong social justice dimension, which outweighs harm caused to the environment itself. This dimension has its roots in the, through Belgian colonialism, historically defined social dynamics and its connection to global power asymmetries. The framework for environmental- and social harm and the country's relationship to its natural resources are the structures implemented during Belgian colonial rule and the grave impact this era had on the succeeding governments. These circumstances do not allow for genuine reparation of harms, because they continuously feed into established power inequalities. ERJ's applicability to harms of cobalt extraction in the DRC is very limited, rooted in the country's organizational misconstruction and the high level of disconnection within- and between communities, between the government and the public and the exploitational global relationship. Additionally, this exposes a theoretical limitation of ERJ. The framework assumes that postcolonial societies normally have the capacity to consider and represent harm to the environment. But this is not the case for the DRC, where a focus lies on human harm, because of the conflict-riddled socio-political system. As outlined, the DRC's colonial heritage has not been addressed, which makes it questionable how achievable ERJ is in a post-colonial context with a state and civil society as unconsolidated

as in the DRC. ERJ's potential, evident in other postcolonial contexts, like Chile (Rodriguez, 2022) and Nigeria (Minguet, 2021) may manifest in the DRC, but only after the country and its international community have started to face the systemic inequalities Belgium's rule has imposed, which is the characteristic decidedly defining the cobalt mining sector and its environmental and social harms. Therefore, an increased sensibility to differences in colonial history, not solely between Latin American and African countries, but also between African countries is necessary when applying the ERJ framework.

10. CONCLUSION

This research aimed to draw conclusions about the potential and limits of ERJ in addressing harms caused by cobalt extractivism in the Democratic Republic of the Congo (DRC). The analysis of the case has shown that the limits far exceed its potential. The current state of attempts at fixing harm, non-acknowledgement of responsibility by perpetrators and lack of meaningful engagement of impacted communities pose serious limits to an applicability of the ERJ concept. This is rooted in the DRC's recent colonial history and the immense influence it has on power relations between local communities, mining companies, the Congolese government, and international actors. In this context, the applicability of the ERJ approach requires awareness of the details of environmental-and social conflicts, highlighting their collective and historical dimension (Minguet, 2021, p. 66; Budó and Pali, 2023, p. 190). These findings contribute to the existing literature on the topic, by exploring the ERJ framework in a postcolonial context outside of Latin America, which is the region where prior research regarding this topic has mainly been conducted (see i.e., Rodriguez, 2022; Bolívar et al., 2022; Killean, 2022). By doing so this research widens the literature on the applicability of ERJ and raises questions regarding the influence differing colonial history may have for this approach.

However, it is crucial to acknowledge limitations inherent to this study. While a case study allows for detailed and context-dependent knowledge, this poses a limitation regarding generalization of the findings, as the chosen case cannot be seen as a representation of all cases like it, thus lowering external validity. Further research in this area should investigate the potential and limits of ERJ in other African postcolonial contexts, to generate generalizable conclusions about the framework's applicability. This way research can investigate how differences in colonial history, for example the time frame of colonial occupation, comparing Latin America and Africa, influence the possibility of an ERJ approach.

The findings of this study highlight the limits that postcolonial settings outside of Latin America can pose to the possibility of ERJ and emphasizes the need

for further research to investigate environmental- and social justice processes aiming at empowering populations and finally delivering long-deserved justice.

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BEYOND CORPORATE SOCIAL RESPONSIBILITY: ENHANCING ACCOUNTABILITY AND MARKET (R) EVOLUTION IN MULTINATIONAL COMPANIES THROUGH MOLAR-MOLECULAR DEMOCRACY

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1. INTRODUCTION[1]

Big firms and multinational corporations face societal and public expectations that extend beyond profit-making and customer service delivery. Despite not being elected like governments, some of these entities wield significant influence over politics and society. As their impact broadens to include areas such as environmental issues, cultural dynamics, and technological advancements, they must adopt a heightened level of accountability to society (Leach et al., 2010). Given that these players are not chosen by citizens and consumer preferences alone cannot ensure accountability, mechanisms must evolve to hold both private firms accountable (Benish & Mattei, 2020; Smith, 2014). This shift calls for accountability frameworks that transcend customer-centric approaches and external market regulations, ultimately aiming to bolster the social legitimacy of firms in this century.

A broader, more inclusive perspective on market accountability necessitates moving beyond traditional concepts like customer satisfaction (Alcaniz et al., 2020) and the core principle-agent dynamic, which defines relationships between producers and consumers (Winter, 2006). In the context of the digital economy, even with the rise of the "prosumer" — individuals simultaneously generating and consuming data services — accountability must incorporate principles of inclusivity, active participation, and stronger ties between firms and civil society.

[1] To deep into the concept of accountability, see the recording of the author's seminar at the Basque Institute of Criminology, in 2024, at https://www.youtube.com/watch?v=dX11UIyHGa0.

Such an approach could pave the way for innovative economic models that are still under development. Yet, this firstly requires a redefinition of accountability studies, emphasizing substantive rather than procedural dimensions. Greater focus should be placed on bottom-up demands and diverse voices within private corporations. For example, as big companies grow their political and societal influence, they should also become more responsive to public demands and activism. In an era of multimodal technological governance and influence of "algocracy" (Fukuyama et al., 2021), it is vital to ensure that no authority, including market-driven ones, operates beyond the control of society (Tawney, 1964).

While debates persist regarding the extent of market players' power over society (Balzam & Yuran, 2022), it is essential to establish new societal objectives for big corporations. Faced with ecological crises and social inequalities, studies have pointed to implement Corporate Social Responsibility across different sectors and develop societal impacts at a macro level (molar), whereas other authors have claimed a transition from shareholder-centric models to participatory systems that engage citizens as stakeholders within each company at a meso and micro level (molecular) (Freeman, 2010; Manganelli & Nicita, 2022). This study analyzes how the molar and molecular proposals can converge to recalibrate traditional market organizations and to enhance their social legitimacy. To do so, an accountability operationalization based on four principles is proposed: responsibility, transparency, answerability, and participation. This accountability proposal then is applied in two mini-cases that traditionally remain reluctant or represent a challenge to molar and molecular initiatives. These mini-cases are from a multinational mining company and a global investment fund. The accountability proposal investigates potential mechanisms that can be mobilized in practical terms through reform, but also in hypothetical cases to imagine deeper structural reforms and futures. In the last scenarios, the study concludes that a deeper social role of firms would depend also on a transformation of economy itself and the conversion of assets to social value. That is, although the precise form of this new model remains open to discussion, greater legitimacy must be built upon the conversion of capitals' assets into distributed social assets (in the molar level), and upon grassroots participation in the core management of companies (in the molecular level), as these could serve as a guiding principle for accountability and market (r)evolution.

2. MOLAR SOLUTIONS: CORPORATE SOCIAL RESPONSIBILITY

Without the aim to exhaust this topic, Corporate Social Responsibility (CSR) represents a complex and evolving area of scholarly inquiry, encompassing diverse theoretical frameworks that emphasize the ethical, social, and environmental obligations of businesses alongside their economic goals, looking for alliances

across different sectors to develop societal impacts at a macro level (molar). Early conceptualizations, such as Friedman's (1970) assertion that a corporation's primary responsibility is to its external shareholders, laid the groundwork for debates around the limits of corporate accountability. This view was challenged by Drucker (1984) theory, which broadened corporate obligations to include various stakeholders—employees, communities, and customers—advocating for businesses to create shared value for all these groups.

Carroll's (1999) pyramid model further elaborated on CSR by categorizing corporate responsibilities into economic, legal, ethical, and philanthropic domains, emphasizing a holistic approach to responsible business practices. In parallel, legitimacy theory (Suchman, 1995; Deegan, 2019) highlighted the importance of aligning corporate behavior with societal norms to sustain organizational legitimacy, while institutional theory (DiMaggio & Powell, 1983) suggested that CSR practices often arise from external pressures such as regulatory requirements and cultural expectations.

The integration of environmental concerns into CSR gained prominence with Elkington's (2006) triple bottom line framework, which called for balancing economic, social, and environmental objectives to promote sustainability. Kramer and Porter (2006) shared value approach further linked business success to societal progress by advocating for strategies that address social challenges while fostering economic competitiveness. And Matten and Crane (2005) introduced the notion of corporate citizenship, framing businesses as actors with roles and responsibilities akin to those of individuals in governance processes, thereby expanding CSR to include global issues such as climate change, human rights, and social equity. At the same time, Garriga and Melé (2004) synthesized CSR theories into instrumental, political, integrative, and ethical domains, providing a comprehensive taxonomy for understanding corporate motivations and practices

In a governance perspective, scholars like Michael (2003) identify three distinct "schools of practice" on the role of CSR. The neo-liberal school emphasizes industry self-regulation, where businesses engage in CSR activities based on a cost-benefit analysis of risks and rewards. The state-led school highlights the importance of national and international regulations and collaborative efforts between governments and corporations. The third way school focuses on the partnership between for-profit and not-for-profit organizations, emphasizing their joint contributions to societal development.

However, these approaches face criticism when analyzed through broader developmental theories. The neo-liberal school is critiqued for its inability to resolve resource misallocations that often arise from CSR initiatives driven by market forces. The state-led school is challenged for overlooking the political dynamics and power structures influencing government-promoted

CSR practices. Similarly, the third way school is questioned for failing to fully address the self-serving motivations that may underlie collaborative CSR efforts, potentially undermining their altruistic intentions.

Considering those limitations, Dmytriyev et al. (2021) consider that CSR has focused on the external context and environment of companies, rather than in core internal solutions. In those analysis, a key aspect is the integration and participation of stakeholders in the company management, including the inclusion of civil society. Corporate mandates are not ruled by direct citizens elections like in public top bureaucracy, and civil society may not have definitive solutions for accountability. Yet, its active role is critical in addressing contemporary challenges such as corporate social legitimacy and to give a response to structural problems like climate change, social and gender inequalities, monopolistic markets, and economic inequality (Yauri-Miranda et al., 2024). In that sense, molecular solutions, like stakeholders theory, have been proposed to prioritizing people as central actors in organizational management fostering their active involvement, ensuring that public voices are integral to shaping more equitable and sustainable systems.

3. MOLECULAR SOLUTIONS: STAKEHOLDERS ECONOMY

A molecular approach to understanding economic responsibility, often referred to as molecular democracy, aligns closely with the principles of the stakeholder economy. This perspective moves away from traditional models of economic strategy and governance, emphasizing instead a hybrid and multi-actor framework based on democracy principles within each company or organization at a meso and micro level (molecular) (Jabour et al., 2020; Munaro & Tavares, 2023). Such an approach critiques the conventional notion of placing shareholders model at the center of analysis, advocating for a more distributed and interconnected understanding of responsibility in each organization. A critique of this model can be found in Owen and Kemp (2023), who underscore the need for broader, systemic accountability that emphasizes the interconnectedness of diverse actors—investors, supply change, workers, trade unions, consumers and individuals—each contributing to and sharing responsibility for societal outcomes.

Freeman and Dmytriyev (2017) expand CSR by combining it with stakeholder theory, serving as a foundational framework, advocating for businesses and other entities to address the needs and interests of all stakeholders rather than focusing narrowly on shareholders. This broader approach challenges traditional economic models by stressing mutual obligations and shared value creation across all sectors of society. In current firms, the value provided by

capital is increasingly reduced, and the risk, on many occasions, is shared by stakeholders. Thus, if the contribution of value and the assumption of risks are not exclusive to the shareholders, why should corporate governance rights be exclusive to them? In this kind of market authority, it is crucial to understand that even society can give more legitimacy to companies as long as people increase their role in the very functioning of firms (Yauri-Miranda et al., 2024).

Kramer and Porter's (2006) concept of "shared value" further highlights this tension within economic systems, aiming to align business success with societal progress. However, critiques argue that this framework often prioritizes corporate advantage, thus undermining the deeper ethical and communal principles of a stakeholder-driven economy. Such an instrumental approach can obscure the more profound goal of fostering an equitable distribution of resources and responsibilities among all economic participants.

In practice, the limitations are starkly visible in industries such as mining, where concepts like the "social license to operate" (SLTO) emerge. While SLTO is framed as a mechanism to ensure community consent for operations, critics argue that it often represents a superficial acknowledgment of stakeholder concerns, focusing more on transactional approval than on addressing systemic inequities or long-term impacts (Omotehinse et al., 2023). These critiques underscore the importance of moving beyond transactional models to embrace a relational and collaborative framework where all stakeholders have a voice inside the companies, rather than an external consultive role (Demajorovic et al., 2019).

This shift towards a stakeholder economy also challenges the traditional assumptions of centralized authority and unilateral decision-making. By positioning corporations and other large entities as one among many actors in an interconnected landscape, the stakeholder economy highlights the role of governments, civil society organizations, and local communities in shaping economic outcomes (Eikelenboom & Long, 2023). A molecular perspective reinforces the idea that responsibility and accountability must be distributed across the entire ecosystem of stakeholders. It challenges economic systems to engage with systemic issues such as inequality, environmental degradation, and governance, which require collaborative solutions that transcend the capacities of any single actor. By focusing on these broader dynamics, the stakeholder economy seeks to create a more equitable framework for addressing complex global challenges.

4. DEFICITS FROM INSIDE: MOLAR WITHOUT THE MOLECULAR

Considering a certain organization or company, Corporate Social Responsibility (CSR), when pursued without deep, internal changes within

a company, risks being superficial and ineffective in driving meaningful transformation of business models. While CSR initiatives often showcase a company's commitment to societal and environmental concerns, their true impact depends on whether they are embedded into the core operations, values, and strategic frameworks of the business. Without such integration, CSR efforts can devolve into mere public relations exercises, offering limited or even negligible value to the broader societal and environmental challenges they claim to address.

A prime example of the inefficiency of surface-level CSR can be found in industries such as fashion, where companies often tout initiatives like using recycled materials in product lines or supporting social causes through marketing campaigns. Take, for instance, fast fashion brands that launch "sustainable collections" while maintaining a business model built on overproduction, cheap labor, and resource-intensive supply chains. H&M's Conscious Collection, for example, has faced criticism for promoting sustainability on the surface while continuing practices that contribute to environmental degradation and exploitative labor conditions (Ellen Macarthur Fouondation, 2020). Without overhauling the fundamental model of mass production and overconsumption, such CSR initiatives struggle to create meaningful or lasting impact.

Similarly, the oil and gas industry frequently engages in CSR efforts, such as funding renewable energy projects or community development programs. BP, for example, heavily publicized its commitment to a "Beyond Petroleum" strategy and environmental initiatives. However, critics argue that these actions did not reflect a significant shift in its core business model, which continued to rely heavily on fossil fuel extraction and production (Frumhoff et al., 2015). The Deepwater Horizon disaster in 2010, which resulted in the largest spill of oil in the history of marine oil drilling operations in the Gulf of Mexico, starkly illustrated the gap between CSR rhetoric and operational reality, demonstrating how a lack of substantive changes can undermine a company's claims of responsibility and sustainability (Abbriano et al., 2011).

Tech giants like Facebook and Google also illustrate the limitations of CSR without structural change. While these companies promote initiatives such as digital literacy programs or environmental commitments to carbon neutrality, they face ongoing scrutiny over their core business models, which are built on pervasive data collection and advertising practices. These models have raised concerns about privacy violations, algorithmic bias, and their broader societal impacts, issues that cannot be addressed through peripheral CSR projects alone (Zuboff, 2019).

For CSR to transcend its limitations and drive real change, it must be embedded into the DNA of an organization. This means rethinking operational models, supply chains, and value creation processes to align with ethical, social,

and environmental goals. Unilever's commitment to its Sustainable Living Plan is an attempt of a more integrated approach, as it is committed to reducing its greenhouse gas emissions by 50% by 2030, and to achieve net-zero emissions from its products by 2039 (Unilever, 2024). The company has worked to reduce its environmental footprint across its supply chain and align its products with social impact goals. However, this company has faced challenges in fully integrating sustainability into all aspects of its global operations, illustrating that even leaders in CSR struggle with the scope and depth of change required (Lawrance et al., 2018).

Ultimately, CSR initiatives that are not grounded in systemic changes risk being dismissed as "greenwashing" or "social washing," where companies overstate their commitments to gain consumer trust without fundamentally altering harmful practices. The credibility and effectiveness of CSR depend on its integration into a company's strategy and operations, transforming it from a peripheral activity into a core driver of innovation and responsible business practices. Without this transformation, CSR will remain a vague and insufficient response to the pressing challenges facing modern business and society.

5. DEFICITS FROM OUTSIDE: MOLECULAR WITHOUT THE MOLAR

The stakeholder economy, while a promising framework for reimagining economic responsibility, risks vagueness and inefficiency if external systemic changes are not coupled with genuine internal transformations within companies. External shifts—such as supportive regulatory frameworks, market incentives for sustainable practices, and societal pressures—are critical for the stakeholder economy to thrive. However, these external changes must also be reflected internally through the incorporation of diverse stakeholder voices into corporate decision-making processes. A true democracy within organizations, where the interests of all stakeholders—employees, communities, customers, and even the environment—are meaningfully represented, is essential for aligning internal practices with the demands of an evolving external environment.

For instance, in the energy sector, companies like Shell and BP have pledged to transition to greener energy models and reduce carbon footprints (Euronews, 2023). While these commitments rely heavily on external changes, such as stricter emissions regulations and the elimination of fossil fuel subsidies, they also demand significant internal restructuring. Genuine inclusion of environmental advocates, community leaders, and even employees from renewable energy divisions into corporate governance structures could democratize decision-making. Such internal changes would enable these companies to better align

their operations with external sustainability goals, fostering deeper engagement with the transition to renewable energy (International Energy Agency, 2024).

In the technology industry, organizations like Microsoft have invested in stakeholder-oriented sustainability initiatives, such as carbon neutrality and digital inclusion programs (Microsoft, 2020). However, their reliance on extensive data collection and advertising-driven revenue models persists, highlighting the dissonance between external and internal dynamics. This tension could be addressed by integrating data privacy advocates, civil society representatives, and consumer groups into decision-making processes. Such internal democratization would not only ensure that external pressures for stronger data privacy regulations are reflected in corporate strategies but also promote long-term trust and accountability (Zuboff, 2019).

The fashion industry provides another example of this dual need for external and internal change. Brands like Patagonia and Stella McCartney have embraced sustainability and ethical labor practices, responding to growing consumer awareness and advocacy for environmental accountability (Zuno Carbon, 2024). However, to scale these practices across the industry, external changes such as government-imposed penalties on unsustainable practices or consumer behavior shifts are necessary. Internally, these companies can amplify their impact by including supply chain workers, sustainability experts, and community representatives in their governance structures. This internal democracy can better align corporate actions with the broader systemic shifts required to transform the industry (Ellen Macarthur Foundation, 2020).

Furthermore, in emerging markets, where external regulatory systems are often weak, corporations face additional challenges in aligning stakeholder-driven initiatives with systemic change. Companies engaging in sustainable agriculture or ethical manufacturing may struggle against policies that favor industrialized, extractive practices. Addressing this imbalance requires internal mechanisms that incorporate local community leaders and advocates for sustainable practices into strategic discussions. By democratizing internal processes, companies can become more resilient and adaptive to external challenges, while simultaneously promoting policies and practices that drive systemic reform.

Ultimately, the stakeholder economy's success hinges on the interplay between external systemic changes and internal organizational transformation. A genuine democracy within organizations—where decision-making is no longer the exclusive domain of shareholders or senior executives—is essential for bridging the gap between external pressures and internal responses, depends also in an external dimension of compliancy, regulations, and institutions that emulate internal changes. In other words, internal democracy in each company needs for a robust democracy in external societal and public institutions. Yet, this dual

approach requires companies to rethink their governance models, integrating diverse voices that reflect the interests of all stakeholders, while actively engaging in and advocating for systemic changes in their external environment.

Without this alignment, the stakeholder economy risks becoming a superficial framework, unable to drive the transformative changes necessary for a sustainable and inclusive future. By rethinking both the inside and the outside, organizations can lead the way in creating a stakeholder economy that not only responds to external demands but also embodies them within its core, fostering a truly integrated model of economic responsibility and accountability.

6. MOLAR AND MOLECULAR DIMENSIONS ALIGNMENT

Without the alignment between molar and molecular dimensions, companies will still be key producers of what is called, a "landscape of irresponsibilities" (Ferry, 1962), including conflicts of interest, blacklisting, false advertising, planned obsolescence, false narratives, political interference, concentration of power, war mongering, and driving inequality. To mitigate this landscape, new forms of accountability are required, integrating both molar and molecular dimensions of economic responsibility. The molar dimension refers to systemic, macro-level accountability structures such as regulations, market incentives, and global standards. The molecular dimension focuses on micro-level, relational accountability within organizations, emphasizing inclusive governance and participatory decision-making. Reconciling these dimensions is crucial for fostering an economy where accountability is not only enforced externally but also ingrained internally within corporate practices. The next part will explore these new forms of accountability, proposing a framework that bridges these molar and molecular dimensions. By doing so, it aims to chart a path toward a more responsible and equitable economic system, addressing the deficiencies of the current landscape while offering practical strategies for integrating accountability into the heart of business operations.

7. ACCOUNTABILITY PRINCIPLES

In the fields of accountability and business administration, there is significant diversity in approaches and concerns, distinguishing it from the predominant focus on private sector accountancy or accounting. While the latter is the process of measuring, processing, and sharing financial and other information about businesses and corporations (May, 2013), the former highlights trends like New Public Management and the rising role of "good governance" in corporations

(Furstenau et al., 2020; Zukin, 2020). Accountability in this approach is often tied to benchmarks that aim to foster competitiveness, but also ensure codes of conduct to respect human rights, and mitigate environmental and social harm (Ackerman, 2005; Holla et al., 2011).

In the study of accountability as a form of governance, two key epistemological frameworks for analyzing accountability are prevalent. The first, termed "Rational Agents & Social Contingency" (Bovens, 2014; Schillemans, 2013), focuses on providing a taxonomy of mechanisms, such as the principal-agent relationships described in Strøm (2000) and Mattli and Büthe (2005). These studies, rooted in agency theory, describe modern accountability as a form of democracy based on a chain of delegation. That is, a representative that manages the interests of the principals. In general, those principals are the shareholders of the company. However, this framework falls short in predicting behavioral outcomes or addressing power dynamics inherent in accountability relationships (Lægreid & Rykkia, 2022), and also in covering the principals' role beyond shareholders to other stakeholders in the corporate governance.

The second framework, "Stewardship Theory," offers a more inclusive perspective. Dissatisfied with the self-interest assumption of agency theory, stewardship theory examines conditions under which agents act in the interests of their principals (Whitaker et al., 2004; Schillemans & Bjurstrøm, 2020). It proposes participatory dimensions where the public actively engages in accountability processes. However, stewardship theory also faces challenges, particularly in scaling participatory democracy within hierarchical structures, and in reconciling the complexities of modern organizations with more democratic governance.

To address the limitations of these frameworks, we propose a synthesis that incorporates both fixed, deliberative mechanisms of agency theory and the fluid, critical perspective of stewardship theory. This approach emphasizes understanding accountability not just as a mechanistic process, but as a dynamic interaction shaped by power relations and the macro-context of organizational structures. Based on previous studies (Yauri-Miranda, 2024), the following principles could be regarded as the synthesis of those studies in order to enhance accountability and cover both molar and molecular dimensions:

- Responsibility: As duties and missions that one actor or organization should promote towards a certain audience and the public through formal and informal means. It allows checking the actors and content of the accountable action. The promotion of responsibility entails trust (Dowdle, 2006) and relates to Corporate Social Responsibility in the case of firms (Velte, 2021).

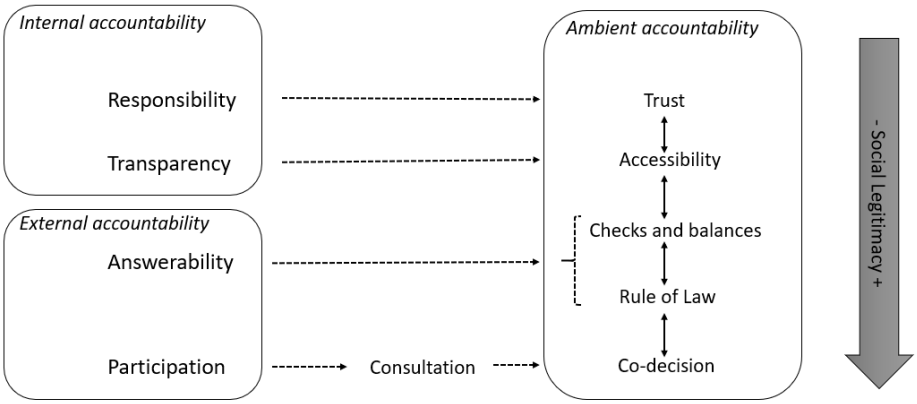
- Transparency: It is the scale of visibility that allows checking the range and impact of the accountable actions (i.e. actors, audiences, procedures, content, time, and outcomes). The result of transparency is accessibility (openness towards other actors) to oversee organizational orientation and concrete outcomes (Bushman et al., 2004).
- Answerability: It is the capacity to demand "answers" and formulate corrections to an accountable actor. Through soft means, it relates to pressure, scrutiny, and investigation. Through hard means, it relates to correcting other actors by enforcement and sanction. This principle is connected with mutual oversight and checks and balances. In judicial terms, this principle helps to create/preserve the Rule of Law and the protection of individual rights in the molar level.
- Participation: It is the capacity to integrate the people in the formulation and functioning of a certain organization. In simpler cases it entails consultation; the act of integrating other actors in a consequentialist perspective (a priori or before decision-making). In developed cases, participation promotes co-decision even with dissenting and clashing actors (during the decisions and actions). This principle helps to create/preserve the integration of different citizens and groups as co-constructors of corporate policies, enhancing to deepen stakeholders' economy in the molecular level.

These normative principles can be regarded as necessary to deepen democracy within firms and enhance their social legitimacy. Social legitimacy can be defined by the redefinition of the agency-principals relationships in companies, expanding the role of principals in order to include other stakeholders to produce social values and benefits in the communities where companies operate. Social legitimacy is the purpose and the normative orientation of accountability (Yauri-Miranda, 2024); and it requires concrete channels for stakeholder participation and the inclusion of diverse, even conflicting, preferences. Such accountability principles provide a foundation for reimagining corporate governance in alignment with democratic ideals and societal expectations.

The next figure shows the above accountability principles and their interdependence to increase the social legitimacy of public and private organizations. Responsibility and transparency can be demanded by external actors, but they appear as internal dimensions since they rely on the predisposition and self-initiative of the accountable actors that assume duties and adopt some degree of openness. Meanwhile, answerability and participation depend on external actors to be implemented. Only by external pressure, regulation, and continuous participation one can expect commitment to foster checks and balances, Rule of Law, consultation, and co-decision. The

external principles also relate to agonistic notions of democracy, that is, to continuous bargains, tensions, and challenging actions as salutary elements of governance and social effervescence. The right part of the figure shows that the accountability principles depend on each other to reach ambient accountability. Likewise in organic ecosystems, ambient accountability consists of a complex and wide combination of institutional and social actions that support each other to produce legal and cultural changes to increase the meta-objective of accountability: social legitimacy. In that sense, an organization is more accountable and socially legitimate if it promotes or is permeable to responsibility, transparency, answerability, and participation.

Figure 1. *Deepening accountability in public/private organizations*



Source: based on Yauri-Miranda, 2024.

The evolution of corporate accountability requires a robust framework that integrates core principles like responsibility, transparency, answerability, and participation while addressing the multifaceted challenges of global governance and the limitations of traditional economic models. To enhance accountability, corporations must move beyond superficial compliance and actively integrate democratic mechanisms into their operations, bridging the gap between macro (molar) and micro (molecular) dimensions.

Responsibility underscores the obligation of corporations to uphold duties not only toward shareholders but also toward a diverse set of stakeholders, including employees, communities, and the environment. This principle fosters trust and mutual reliance, allowing firms to establish credibility through their actions and commitments. For instance, incorporating small and medium-sized enterprises (SMEs) into supply chains transforms these entities from passive participants to active contributors, ensuring economic inclusivity

and shared responsibility in corporate policies. Such integration strengthens corporate accountability by broadening the range of actors involved in shaping organizational missions.

Transparency, as a cornerstone of accountability, extends beyond disclosing financial reports to encompass all aspects of corporate decision-making and impact. By increasing visibility into procedures, outcomes, and their broader effects, corporations enable stakeholders to assess their alignment with societal values. Transparency also promotes accessibility, allowing diverse voices to scrutinize corporate actions effectively. In this way, firms act not as opaque entities but as law-enforcement promoters, establishing standards that align with both regulatory frameworks and ethical imperatives. This shift from customer-facing narratives to active accountability mechanisms ensures that stakeholders are engaged as participants, not passive recipients of corporate actions.

Answerability enhances this dynamic by embedding mechanisms that allow stakeholders to demand explanations, challenge decisions, and enforce corrections. This principle strengthens the checks and balances necessary for sustainable governance, connecting corporate actions to broader societal and legal norms. For instance, creating representative commissions with balanced power alongside shareholders enables stakeholders to directly influence corporate policies, ensuring their concerns are addressed and their rights protected. By fostering mutual oversight, corporations become partners in accountability, contributing to systems that promote equity and the rule of law.

Participation, the most transformative principle, involves integrating stakeholders into the formulation and execution of corporate policies. Beyond mere consultation, meaningful participation allows for co-decision processes where dissenting voices and clashing perspectives are acknowledged and negotiated. This democratization of corporate governance can be achieved through innovative mechanisms like mini-publics, where diverse stakeholder groups engage directly in deliberations, or through equal power-sharing commissions that redefine traditional hierarchies. Such participation enriches accountability by ensuring that corporate decisions reflect the collective interests of all stakeholders.

Crucially, these principles must operate within an economic system that moves beyond conventional metrics of profit and growth. Accountability-driven metrics, such as social equity, environmental sustainability, and stakeholder satisfaction, redefine success in ways that align with broader societal needs. By focusing on these metrics, corporations can address the systemic inequalities perpetuated by shareholder-centric models, fostering a more equitable distribution of value and risk.

To achieve this integrated vision of accountability, corporations must adopt a dual focus. At the molar level, they should align with systemic goals, ensuring that policies and practices contribute to global equity and sustainability. At the molecular level, they must embed accountability into their organizational fabric, fostering direct democracy and co-decision processes that empower all stakeholders. By bridging these dimensions, corporations can lead the way in establishing a truly accountable economic system, at different scales and sectors. In the next section, the study explores how this accountability proposal can be mobilized to overcome crucial challenges that need attention in two economic mini cases.

8. THE CHALLENGES: TWO MINI CASES

8.1. Case One: A Multinational Mining Company

BHP, a global leader in natural resources headquartered in Melbourne, Australia, focuses on commodities like iron ore, copper, and metallurgical coal, operating in over 90 locations worldwide. The company emphasizes accountability through a combination of ethical conduct, corporate governance, sustainability initiatives, and community engagement. According to its website, BHP's Code of Conduct enforces integrity and fairness across employees, contractors, and partners, encouraging confidential reporting of concerns without fear of retaliation (BHP, 2024). In this Code, robust corporate governance practices aim to include a Board Governance Document and committees that define accountability and ensure regulatory compliance. Transparency is a cornerstone of its operations, according to this document, as BHP sets clear sustainability targets aligned with the Paris Agreement and the UN Sustainable Development Goals, publishing regular performance reports (BHP, 2024). Furthermore, the company actively engages with local communities to address environmental and social concerns, investing in regional development to ensure positive societal impacts. However, BHP has faced significant criticism for environmental harms and accountability failures, particularly regarding the 2015 Fundão dam collapse in Brazil, which caused widespread ecological damage and loss of life (Demajorovic et al., 2019). The company has been accused of negligence and delaying compensation for affected communities, while ongoing legal battles include a £36 billion lawsuit in the UK. BHP contested these claims, asserting it did not directly manage the dam and maintained a strong safety culture (Reuter, 2024). BHP has also faced criticism in Chile for contributing to water scarcity, despite its use of desalination plants (London Mining Network, 2021). These

issues underscore persistent concerns about the company's environmental impact and commitment to accountability.

Improving accountability in multinational commodity companies, such as BHP, one of the largest mining corporations in the world, requires the integration of key accountability principles—responsibility, transparency, answerability, and participation—into its governance and operational practices. These principles, applied holistically, can address systemic issues often associated with the extractive industry, such as environmental degradation, community displacement, and labor exploitation, while fostering trust and legitimacy among stakeholders.

Responsibility must become a foundational principle for BHP's operations, embedding duties that prioritize environmental stewardship, community well-being, and long-term sustainability. The company already reports commitments to reduce greenhouse gas emissions and manage water resources responsibly, but these initiatives need to evolve beyond compliance-driven goals to encompass proactive, mission-oriented responsibilities. For example, BHP could develop and enforce binding agreements with host communities that outline its environmental, social, and economic commitments. These agreements should include actionable and measurable objectives for biodiversity restoration and local economic development, ensuring that responsibility is not only declared but actively practiced and evaluated over time.

Transparency, a critical enabler of trust, must extend across the entire supply chain and operational footprint of BHP. While the company publishes annual sustainability reports, true transparency requires real-time accessibility to data and decision-making processes for all stakeholders (Wanner & Janiesch, 2019). This could involve creating an open-access platform where stakeholders can track environmental impact metrics, community investments, and compliance with safety standards in real time. Transparency should also be applied to contractual agreements with governments and subcontractors, reducing opportunities for corruption and ensuring that all deals align with both corporate values and public interests.

Answerability enhances the enforcement of responsible and transparent practices by enabling stakeholders to demand explanations and corrections for corporate actions. For BHP, this means establishing robust mechanisms for stakeholders to raise concerns and challenge decisions. This could involve creating an independent accountability commission with representation from local communities, environmental groups, labor unions, and shareholders. Such a commission would have the authority to scrutinize corporate policies, investigate grievances, and recommend enforceable corrections when BHP's practices fall short. For example, in response to incidents like the 2015 Samarco dam disaster—a joint venture involving BHP that led to widespread

environmental and human harm—such a commission could ensure timely reparations, prevent recurrence, and enhance oversight over risk management processes (Dowdle, 2006).

Participation must underpin BHP's engagement with stakeholders, fostering a sense of inclusion and co-decision in its operations. Beyond traditional consultation processes, BHP could establish participatory governance structures that integrate diverse voices into strategic decision-making. For instance, the company could create regional councils composed of representatives from indigenous communities, local governments, and civil society organizations, alongside corporate executives. These councils would have equal power to influence decisions on mine planning, environmental practices, and community investments. This participatory approach ensures that the people most affected by mining operations are not only heard but actively shape the outcomes of corporate policies.

Another form of addressing wrongdoing and mistakes of companies like this is restorative justice. This framework provides a transformative approach to corporate accountability by addressing community impacts, environmental harms, and irresponsibility through mechanisms of participation and answerability. Unlike traditional punitive measures, restorative justice centers on repair, reconciliation, and engagement with those affected by harm. By involving communities, indigenous groups, and other stakeholders in structured dialogues, corporations can collaboratively develop reparative measures that align with restorative justice principles (Zehr, 2015). This process not only ensures that grievances are acknowledged but also integrates community voices into decision-making, fostering trust and long-term accountability. For example, rather than relying solely on fines, companies could engage in actions like ecological restoration and community-led monitoring to repair and prevent harm (Van Ness & Strong, 2014).

Restorative justice goes beyond fines and sanctions by addressing the root causes of harm and creating processes that demonstrate genuine corporate commitment to affected stakeholders. It covers all four accountability principles—responsibility, transparency, answerability, and participation—by fostering inclusivity and forward-looking solutions. This approach mediates the gap between irresponsibility and true accountability, transforming corporate practices into active commitments to trust-building and sustainability (Johnstone & Van Ness, 2013). Such frameworks could have been applied in cases like the Samarco dam disaster, where restorative measures might have more effectively addressed social and environmental damages while integrating local voices into reparative efforts. These must be carefully constructed to avoid clashes with communities after disasters, and to avoid image washing after harms or wrongdoing, even from third parties that are connected to the company.

Integrating these four principles into companies' accountability framework addresses both internal and external dimensions of responsibility. Internally, it fosters a corporate culture that values inclusivity, ethics, and sustainability. Externally, it aligns the company's operations with broader societal expectations, enhancing its social legitimacy. By embedding responsibility, transparency, answerability, and participation into its practices, BHP can transition from being a company criticized for its environmental and social impact to a global leader in sustainable and equitable resource extraction.

Reaching new forms of economy? Bridging the divide between the local and the global

Reaching new economic models that prioritize social-centric values requires fundamentally transforming the governance and operations of multinational companies, particularly in the commodity sector. Balancing decision-making between local councils representing indigenous communities, local stakeholders, and regional actors, and headquarters dominated by executives and shareholders in wealthier nations, remains a critical challenge (Elkington, 2006). Achieving this balance demands equitable and scalable governance structures that integrate democratic principles into corporate strategies.

A viable approach involves interconnected councils at multiple levels with clear roles and decision-making powers. Local councils, including representatives from indigenous groups, labor organizations, and environmental advocates, would address site-specific issues like environmental impacts and community investments. These councils must hold binding authority over regional operations, ensuring their voices significantly shape governance (Freeman, 2010). Headquarters councils, traditionally controlled by executives and shareholders, should integrate representatives from local councils, shifting to shared authority. This requires replacing the top-down model with negotiated decision-making and conflict-resolution mechanisms that ensure local perspectives influence global strategies (Freeman & Dmytriyev, 2017).

Scalability presents another challenge in democratizing multinational governance. Operating across countries with diverse legal, cultural, and economic contexts necessitates robust frameworks to ensure meaningful participation at all levels. Digital platforms could facilitate real-time communication and information-sharing, allowing local councils access to global decision-making processes and giving headquarters insights into regional realities (Ackerman, 2005). Such integration maintains scalability while respecting the distinct needs of each region.

Shifting from business-as-usual to social-centric paradigms requires reevaluating corporate objectives. Instead of prioritizing short-term profits,

companies could adopt metrics measuring social equity, environmental sustainability, and stakeholder satisfaction (Holla et al., 2011). Embedding these values into the corporate mission and incentivizing leaders and employees to align actions accordingly is essential. Financial mechanisms should redistribute resources equitably, directing profits to local development funds, healthcare, and education. Focusing on social alongside financial returns redefines corporate purpose and drives societal impact.

Democratizing multinational commodity companies and transitioning to socially focused economic models involves rethinking power structures, bridging local and global governance divides, and embracing systemic change. Inclusive representation, scalable frameworks, social-centric metrics, and robust accountability mechanisms enable companies to fulfill immediate responsibilities while contributing to equitable and sustainable economies. This transformation is both an ethical obligation and a strategic necessity amid rising demands for corporate responsibility and resilience (Pullen & Rhodes, 2021).

Imagining futures: Degrowth modeling?

Transforming a multinational commodity company toward a degrowth-oriented model and creating economies rooted in sustainability and equity requires rethinking success metrics, value creation, and confronting entrenched opposition. This transformation demands alternative metrics aligned with ecological and social imperatives, alongside innovative economic structures prioritizing collective well-being over extractive growth. Implementing these changes also means addressing resistance from stakeholders benefiting from the status quo (Buckton et al., 2024).

New metrics are essential for degrowth. Traditional indicators like GDP contribution, revenue growth, or shareholder returns sustain the growth paradigm, ignoring broader societal and environmental impacts. Instead, companies should adopt metrics like reductions in carbon footprints, biodiversity restoration, and material circularity. For example, companies should assess resource reuse efficiency within supply chains. Social metrics such as community well-being indices, equity measures, and livelihoods generated through sustainable industries further redefine success beyond financial returns (Ellen MacArthur Foundation, 2020).

Economic value must also shift from financial dominance to include ecological regeneration, social resilience, and cultural preservation. Companies could adopt "value-sharing agreements" to redistribute profits to community development projects, renewable energy, and healthcare. For instance, mining operations in resource-rich regions could directly support local water access initiatives or education programs. Decentralized ownership models, like cooperatives, could

democratize economic benefits, strengthening the relationship between the company and host communities (Daly & Farley, 2011).

New governance frameworks are crucial for integrating these models. Participatory budgeting within local councils allows communities to influence resource allocation. A transnational stakeholder council with representatives from affected regions, indigenous groups, and environmental advocates could share decision-making power with boards of directors. Open source technologies can further enhance transparency, enabling stakeholders to monitor resource flows, emissions, and profit management in real time (Bauwens et al., 2020).

Degrowth also demands localized economic systems. Regionalized supply chains reduce carbon footprints and strengthen local markets, aligning with sufficiency and resilience. Instead of exporting raw materials, companies could collaborate with local industries to process and utilize resources regionally, reducing dependency on extractive exports and empowering local economies (Jackson, 2013).

Resistance to degrowth is significant. Investors, executives, and extractive industries often resist changes threatening growth trajectories, with financial markets penalizing deviations. Lobbying groups and governments reliant on commodity revenues also oppose shifts that may impact short-term economic stability. Addressing these challenges requires coalitions with civil society, environmental groups, and policymakers to create supportive frameworks like subsidies, carbon pricing, or tax incentives for sustainable practices (Raworth, 2018).

Internally, aligning employee and leadership incentives with degrowth principles can mitigate resistance. Tying bonuses to social and environmental outcomes or offering equity stakes in community-benefiting projects shifts priorities. Participatory decision-making and internal dialogues foster alignment and shared commitment to the transition (Kallis et al., 2024). Ultimately, transitioning to a degrowth model challenges the prevailing economic paradigm but offers transformative potential. By embedding sustainability, equity, and democracy into operations, multinational commodity companies can lead toward a more just, resilient economy where people and the planet are prioritized over perpetual growth (Jenkins et al., 2020).

8.2. Case Two: A Global Investment Fund

BlackRock, Inc., the world's largest asset manager with over $11.5 trillion in assets, is a multinational investment corporation headquartered in New York City and operating in over 30 countries. According to its website, the company emphasizes accountability through a robust corporate governance framework,

adherence to strict ethics and anti-corruption policies, and its Investment Stewardship program (BlackRock, 2024). According to the company, this program actively engages with companies to promote sustainable business practices and holds boards accountable for long-term value creation and sustainability progress. These measures would reflect BlackRock's commitment to ethical conduct and accountability to clients, shareholders, and the broader community. However, the firm has been accused of greenwashing, as many "sustainable" funds include fossil fuel investments, and criticized for its continued backing of companies with poor environmental records (BlackRock, 2024). Political and legal challenges have also arisen, with lawsuits alleging antitrust violations tied to its ESG policies. Additionally, BlackRock's reduced support for environmental shareholder proposals has raised doubts about its commitment to sustainability. These issues highlight contradictions between the firm's public ESG promises and its actual investment practices.

Improving accountability and participation for BlackRock, a global asset management leader, requires structural reforms guided by the principles of responsibility, transparency, answerability, and participation. While BlackRock has already introduced measures seeking for commitments to environmental, social, and governance (ESG) considerations and climate-related transparency initiatives, these can be expanded and deepened to create a more robust and participatory accountability framework.

Responsibility should be the foundation of BlackRock's operations, emphasizing its duty to assess and mitigate the social and environmental impacts of its investments. The company's existing focus on ESG issues, including its advocacy for corporate net-zero emissions by 2050, provides a starting point. However, BlackRock can strengthen this by integrating explicit criteria for social equity and human rights into its investment strategies. For example, ESG scoring could be expanded to prioritize entities that demonstrate measurable contributions to carbon reduction, labor rights, and ethical governance. Preferential terms, such as lower interest rates or faster approval processes, could incentivize these responsible practices, enhancing the impact of BlackRock's investments (Baines & Hager, 2023).

Transparency in BlackRock's operations is already advanced, with initiatives like its annual Task Force on Climate-related Financial Disclosures (TCFD) reporting. However, this could be improved by providing greater real-time accessibility to investment impacts. An open sourcepowered platform could enable stakeholders, including affected communities, to monitor the social and environmental outcomes of funded projects. Furthermore, BlackRock's current stewardship reports, which detail engagement with portfolio companies, could include more granular data about the progress of these companies on ESG goals. Introducing an independent certification system for borrowers based on

ESG and human rights performance—categorizing companies as Bronze, Silver, or Gold—would further enhance transparency, creating reputational incentives for higher performance (Blakey, 2020).

Answerability requires mechanisms to hold both BlackRock and its investees accountable for their actions. Currently, BlackRock uses its voting power to influence corporate governance, as seen in its push for climate and diversity resolutions. This can be strengthened by linking investment terms to concrete ESG and human rights milestones. Accountability-based loan structures could reward companies meeting defined targets, such as reducing emissions or improving labor practices, with reduced interest rates or extended repayment terms. Regular third-party impact audits could verify compliance, with penalties for non-compliance, such as exclusion from future funding opportunities. Internally, this kind of company could enhance executive accountability by tying compensation to progress on ESG and social impact metrics, ensuring leadership prioritizes sustainable practices (Eccles & Krzus, 2014).

Participation should democratize the firm's decision-making processes. While the company engages with stakeholders through annual letters and shareholder voting, deeper integration of diverse perspectives is needed. Establishing advisory councils with representatives from clients, NGOs, academics, and communities affected by its investments would provide critical oversight and ensure investment decisions align with broader social and environmental objectives. These councils could evaluate funding decisions, promote participatory governance, and enhance firm's credibility. Additionally, introducing "impact-first" funds that prioritize social and environmental outcomes over short-term financial returns would reinforce the company's commitment to participatory and ethical investment, attracting socially mindful investors (Bugg-Levine & Emerson, 2011).

This company advocates for industry-wide ESG reforms, such as its support for mandatory climate disclosures, positions it as a leader in responsible investing. However, it could expand this role by championing mandatory ESG and human rights standards across all institutional investments, collaborating with global regulators to create enforceable frameworks. Such measures would ensure that the firm's accountability principles influence not only its operations but also broader industry norms. For example, post-investment accountability mechanisms should include regular impact audits by third-party evaluators. Borrowers would submit periodic reports verified by these auditors, detailing progress on ESG and human rights goals. Non-compliance could result in financial penalties or exclusion from future funding opportunities. Internally, aligning executive compensation with ESG outcomes could encourage leadership to prioritize sustainability and equity,

reinforcing the corporation's long-term commitment to impactful investing (Eccles & Krzus, 2014).

Finally, the firm can amplify its efforts by advocating for industry-wide reforms. Collaborating with policymakers to establish mandatory ESG and human rights disclosures for all institutional funding recipients would set a standard for transparency and ethical behavior. By adopting these comprehensive measures, the company could enhance its accountability and participation mechanisms, ensuring its investments align with the values of sustainability, equity, and respect for human rights. This approach not only addresses existing gaps but also can place the company as a leader in responsible and impactful investing.

Reaching new forms of economy? Developing new metrics and overseeing supply chains

Transitioning to a new economy beyond the traditional "business as usual" model presents significant challenges for an organization like BlackRock. These obstacles arise from entrenched financial systems, societal reliance on unsustainable industries, and the difficulty of aligning long-term sustainability goals with immediate financial demands. A key issue is the tension between short-term profitability and long-term impact. The financial system prioritizes immediate returns, making it difficult to justify investments in sustainability initiatives that require years to yield results. BlackRock faces the challenge of balancing shareholder expectations with the imperative to support transformative projects, highlighting the difficulty of aligning financial objectives with sustainability (Khan & Vaheesan, 2017).

A significant barrier is the absence of standardized metrics for measuring social and environmental impacts. Although ESG criteria are widely discussed, the lack of a universal framework fosters inconsistencies and risks greenwashing, where sustainability efforts are exaggerated to attract investment (Bebbington et al., 2020). This undermines trust and complicates the identification of genuine opportunities for impactful investment. Resistance from stakeholders accustomed to traditional models adds complexity, as corporate clients and investors often fear that transitioning could harm competitiveness or compromise short-term returns (Gillan et al., 2021).

The global economy's reliance on unsustainable industries, such as fossil fuels and industrial agriculture, creates another obstacle. These sectors are deeply embedded in supply chains and GDP contributions, making transitions politically and economically contentious, particularly in regions reliant on such industries for employment. BlackRock's global influence necessitates overcoming this resistance while promoting alternative, sustainable economic activities (McKibbin et al., 2020).

Geographical and economic disparities further complicate efforts. Developing nations and marginalized communities often lack resources to adopt sustainable practices, risking exclusion from high-impact investment opportunities. Supporting these regions while maintaining accountability for ESG outcomes demands nuanced strategies and acceptance of higher investment risks (Amis et al., 2020). Regulatory misalignment across jurisdictions compounds this challenge, as inconsistent or outdated regulations, especially in emerging markets, hinder progressive investment strategies and global ESG compliance (Pucker & King, 2022).

At the same time, complex supply chains exacerbate these challenges. Even when companies meet ESG standards, suppliers may engage in exploitative labor or environmental degradation. Addressing these indirect impacts requires monitoring and transparency, which many organizations lack. Institutional and cultural resistance within companies and their stakeholders further delays the adoption of frameworks prioritizing social and environmental outcomes over traditional financial performance (Zhou et al., 2021). In that sense, the company could act as a catalyst for change by incentivizing sustainable practices among suppliers. This might include offering preferential contracts to suppliers that meet or exceed ESG benchmarks or providing financial assistance and capacity-building programs to help smaller suppliers transition to more sustainable operations. Also, transparent communication is essential to build trust and ensure all stakeholders are aligned. Regular impact reporting and open forums for feedback can keep suppliers, investors, and consumers informed and engaged. Accountability measures, such as third-party audits and public disclosures, could reinforce credibility.

Difficult trade-offs also arise, as projects generating local employment may have significant environmental footprints, forcing investors to prioritize competing objectives. Strict ESG standards risk excluding small and medium enterprises or developing economies lacking capacity to meet stringent requirements, even though these entities are crucial for local development. Political and geopolitical barriers, including lobbying and conflicting national priorities, further delay international standards and policies for a just transition (Meckling & Allan, 2020). But this could be mitigated developing regional hubs for sustainable production in collaboration with local governments and NGOs would strengthen localized supply chains. These hubs could focus on circular economy practices, renewable energy integration, and workforce development, creating economic resilience in regions heavily reliant on traditional industries (Bebbington et al., 2020).

Addressing these challenges requires bold leadership and systemic reform, both molecular core strategy change and new molecular corporate governance. This kind of companies must lead by example, advocating stronger regulatory

frameworks, investing in capacity-building for underserved regions, and fostering public-private collaboration. The organization must drive a cultural shift toward long-term thinking and broader accountability, redefining financial success to include contributions to a sustainable and equitable global economy. Though fraught with resistance, these efforts are essential for society and the planet, underscoring the urgency of overcoming entrenched barriers to new forms of economy (Raworth, 2018).

Imagining futures: Degrowth modeling?

Degrowth models, advocating for reduced economic output to achieve ecological balance and equitable resource distribution, offer a transformative pathway even for financial institutions like this one. While the profit-driven ethos of such organizations appears incompatible with degrowth principles, a rethinking of economic activity's purpose can align their investments with ecological health and societal well-being over perpetual financial growth (Kallis et al., 2024).

Advocates of traditional economic models might argue that such a transition compromises the efficiency and performance of firms. However, implementing degrowth projects necessitates a broader structural reform, shifting from a purely monetarized economy to a model where the value of transactions includes ecological and social considerations. This transition involves creating alternative "tokens" or currencies that assign value based on social equity and environmental impact rather than monetary profit alone. For instance, ecological restoration projects or investments in social infrastructure could generate value tokens tied to their measurable benefits in carbon reduction or community well-being, fostering a new framework for understanding wealth (Raworth, 2018).

Degrowth challenges GDP and financial growth as primary metrics of success, advocating instead for systems prioritizing human and environmental well-being. For BlackRock, this could mean investments in community-led initiatives like renewable energy cooperatives or urban agriculture, which reduce carbon footprints and enhance local resilience (Daly & Farley, 2011). Circular economy ventures, such as businesses focused on repair and recycling, align with degrowth by enabling economic activity without continuous resource extraction.

Reducing overconsumption, particularly in affluent nations, is another critical tenet of degrowth. BlackRock could target investments in durable and repairable goods, moving away from planned obsolescence. Examples include companies like Fairphone, which creates repairable smartphones, reflecting degrowth principles of waste reduction (Fairphone, 2024). Furthermore, sectors that enhance societal well-being without fostering material growth,

such as public transportation, healthcare, and urban green spaces, provide opportunities to balance financial returns with ecological and social goals (Jackson, 2013).

Transforming the economic system also requires government and regulatory support. Policymakers can facilitate this shift by incentivizing alternatives to traditional monetary systems. For example, governments could establish frameworks that recognize social and ecological tokens as forms of wealth, allowing these assets to be exchanged for goods and services, integrating social goals into broader economic transactions (Bauwens et al., 2020). This transition demands regulatory policies such as carbon taxes or public funding for degrowth-aligned projects, fostering systemic support for a redefined economy. For instance, developing specialized investment funds for degrowth-compatible projects and adopting alternative value metrics—such as ecological restoration tokens or social equity measures—could reconcile these tensions. Collaborative efforts with governments and civil society can further align corporate objectives with degrowth principles (Raworth, 2018).

While degrowth may challenge some foundational assumptions of the current financial system, it offers a compelling framework for addressing the intertwined crises of environmental degradation and social inequality. By integrating degrowth-inspired principles into its investment strategies, big firms could play a pivotal role in fostering a new economy that prioritizes sustainability and equity. The path forward will require significant innovation, collaboration, and a willingness to challenge entrenched norms, but the potential benefits for society and the planet make these efforts essential in an era of escalating ecological and social crises.

9. CONCLUSION

Achieving meaningful accountability in multinational corporations requires a dual approach that bridges systemic reforms and internal governance transformations. Current CSR practices and stakeholder-driven models often fall short because they lack integration with broader economic and regulatory changes and fail to address deep structural issues. Embedding the principles of responsibility, transparency, answerability, and participation into both the external systemic environment and the internal governance structures of corporations is essential for fostering trust, legitimacy, and sustainable practices. However, this endeavor also demands confronting new and evolving challenges that were not fully addressed here.

At the systemic level, the molar dimension must align corporate incentives with sustainability and equity through robust regulatory frameworks and

alternative economic structures. Governments and international organizations must play active roles in creating enforceable standards and incentives that prioritize long-term social and environmental objectives over short-term profit maximization. Alternative metrics of success, such as social equity indices or ecological restoration indicators, are critical for measuring progress. Additionally, transitioning away from a solely monetarized economy to one that incorporates tokens of social and ecological value could redefine corporate wealth and decision-making processes.

Internally, the molecular dimension requires participatory mechanisms to democratize decision-making within corporations. Inclusive governance structures, such as councils integrating employees, community representatives, and other stakeholders, are essential to ensure diverse voices influence corporate strategies. This internal democratization not only enhances accountability but also strengthens innovation and resilience by tapping into collective wisdom. However, such approaches face significant obstacles in industries with deeply entrenched hierarchical structures and profit-driven priorities, necessitating strategic alignment with external reforms to foster internal transformation.

Emerging challenges, particularly in artificial intelligence and technology sectors, further complicate the landscape of accountability. Companies in these sectors, such as global big tech firms, operate in multiple jurisdictions while often being headquartered in a single country. These firms extract and monetize vast amounts of user data from millions of individuals worldwide, raising profound accountability issues. Remote dataification and surveillance practices could undermine traditional accountability frameworks, as users are disconnected from the systems that govern their data, and algorithmic decisions often lack transparency due to the "black box" nature of artificial intelligence systems. Despite increasing external regulations, especially in data protection and competition policies (Kira et al., 2021) to restrain monopolistic tendencies, challenges persist in integrating the four accountability principles into algorithmic governance. In the cases studied, despite exploitation of sources and concentration of capital, users and people are intermediates that could be actively involved in the democratic process within each company, whereas in the model of digital business, users are also commodities on the extraction of information in the data cycle. Thus, international regulatory cooperation, cross-border stakeholder councils (beyond councils of experts or 'illustrious' citizens with no binding effects), and mandatory transparency frameworks for algorithms are essential steps. Moreover, rethinking user participation to allow for collective data governance models could empower users to assert their rights and influence data-driven systems beyond privacy are mandatory.

The transition to this integrated accountability framework faces significant challenges. Entrenched interests within corporations, financial markets, and

political systems often resist changes that threaten established power dynamics and profit-driven motives. Overcoming these barriers requires a multi-pronged strategy: building coalitions among civil society organizations, policymakers, but especially corporate leaders; fostering public awareness and demand for greater corporate accountability; and developing financial instruments and metrics that reward companies for advancing social and ecological goals. Moreover, this shift must address the limitations of monetarized economies by creating new frameworks for valuing and transacting social and ecological assets. These models require strong governmental and institutional support to gain legitimacy and scalability, creating an economic system that aligns with the principles of sustainability but even with new forms of wealth and degrowth.

Ultimately, advancing accountability in both traditional and emerging corporate sectors is not just a matter of ethical necessity but a strategic imperative in the face of accelerating ecological, social, and technological crises. By aligning systemic reforms with internal democratization and addressing the specific challenges posed by new technologies, corporations can transform into agents of change in a best scenario, and as agents of survival for the human species vis-a-vis nature in a worst-case scenario of ecological and interconnected crisis. This accountability framework provides a path forward for reshaping corporate practices to align with societal and environmental imperatives. By embracing this vision, corporations can move from being part of the problem to becoming a central part of the solution, fostering trust, legitimacy, and shared value. This transition represents not only a profound shift in business practices but also a reimagining of the role of corporations in society, paving the way for a more just future.

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SHAREHOLDERS IN CORPORATE LAW AS POTENTIAL PROTAGONISTS OF ENVIRONMENTAL RESTORATIVE JUSTICE IN RELATION TO ESG CRITERIA

Pilar Farias[1]

1. INTRODUCTION

Even though corporations have been major drivers for progress, there is a progressive acknowledgement that their quest for profit contributes to a broad range of society's concerns and might have negative externalities on the community and the environment (Bebchuk & Tallarita, 2020). As growing literature has suggested, this rise of consciousness has reached shareholders, who may wish to sacrifice certain number of profits to pursue some social goals (Hart & Zingales, 2017).

The Paris Agreement, of December 2015, adopted at the climate conference COP21 meant the first legally binding global climate change agreement establishing, the objective of limiting the global temperature increase to 1.5°C, with the purpose of significantly reducing the risks and impacts of climate change. After this, the Sustainable Finance Action Plan ("SFAP")[2] was coined in May 2018 (European Commission, 2018a). Its fundamental objectives were to redirect capital flows towards sustainable investments, to integrate ESG (environmental, social and governance) criteria in risk management, and to encourage transparency and long-term investments.

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[1] Degree in Law and Business Administration from Universidad Carlos III de Madrid. Master's Degree in Law. This work is a synthesis and update of the final dissertation (TFG) for the Degree in Law, defended in 2023. For the completion of the TFG, the author collaborated with various research projects indicated in the repository containing the original work.

[2] See the Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions on an Action Plan: Financing Sustainable Growth, (COM 2018) 97 final (March 8, 2018) [hereinafter SFAP].

Following this line, ESG criteria have been coined over the last decade, becoming a usual term in corporations, including board meetings and investment committees alike (Serafeim, 2021; Teh & Khan, 2024; Che, Song & Li, 2024). For the purpose of this work, ESG will be referred to as environmental, social and governance principles that the United Nations believe should guide all management and investment decisions worldwide (Principles for Responsible Investment [PRI], 2021). This term was created within a collaboration between the United Nations and some of the major players in the financial industry with the aim to pursue broad goals (Pollman, 2022).The relevance of ESG has increased in recent years with international integration driven by the notion given by the OECD (2011) that to "identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence" (p. 17). This is where shareholders come into play. One example of this is paragraph 14 of the Preamble of the Directive 2017/828/EC. This paragraph establishes that shareholder involvement in corporate governance can play a valuable role in improving the financial and non-financial performance of companies (Network for Greening the Financial System, 2024), including ESG factors, as referred to in the mentioned Principles for Responsible Investment (Directive 2017/828/EC, Preamble, par. 14).

Conceived as either a mirror or a driver of society's demands, Law, especially Corporate Law, a discipline very much related to the market forces, has reflected the changes towards environmentalism following pressures from different stakeholders (for example, employees and consumers). From my perspective as a young researcher in Law, this topic is of utmost relevance because the future of our planet and, hence, of our coexistence will be partly defined by the concrete decisions taken by corporations at the national and international legal arena, particularly in relation to environmental protection, conservation and reparation.

The main objective of this work is to analyze the problem of including ESG principles within Corporate Law, in relation to restorative justice, throughout the study of a variety of norms, as well as the relevant proxy fights[3] conducted by shareholders. In concrete, within the general framework of restorative principles, this chapter seeks to provide answers to the following challenges regarding fostering environmentalism by shareholders:

1. How can we integrate agency theory with stakeholderism theory?
2. Is fostering environmentalism changing the purpose of the corporation?

[3] A proxy is a person who represents a member in the shareholders' meeting of a company. A proxy fight refers to the act of a group of shareholders joining forces and attempting to gather enough shareholder proxy votes to win a corporate vote.

3. Can we quantify the attainment of environmental goals?
4. Which, among the three proposed alternatives – exit, voice, or coercion - would be the appropriate mechanism to foster environmental concerns of shareholders?
5. How can we pretend that those who make decisions (directors, but also investment managers and institutional investors) care about environmentalism while at the same time not conflicting their fiduciary duties?
6. Are proxy advisors an effective means of mitigating agency concerns which at the end are the origin of shareholder activism?

To answer those questions, restorative justice theory and practice will be taken into account to finally propose the use of diverse restorative dynamics to other potential protagonists[4]. A very concrete proposal will be to consider the use of proxy to have a say on climate associated to remuneration of executives. It is not that difficult to link remuneration to plans with specific and measurable sustainable objectives, and it might be effective in this realm. Executives, in turn, should be properly held accountable by shareholders in a say on climate. In other words, I propose that managers do what principals say by associating their remuneration to certain objectives. That would be done with a "say on climate pay". For some this might not be totally coherent with restorative justice as usual, but, preserving its core principles, restorative justice has to seek to be effective in this realm where impunity and "green and restorative washing" operate. In concrete, restorative principles and dynamics can be used for participatory and inclusive understanding.

After a literature review restricted to the above mentioned objectives, mainly at the European, United States and Spanish level, the following section will seek to explain the origin of the ESG objectives, the reasons for their emergence, as well as the inrush current they have comprised regarding previous notions of corporate purpose. The third section will be focused on analysing shareholder impacts in Corporate Social Responsibility ("CSR"), concretized in ESG. Three viewpoints will be considered: as exit, coercion, and voice mechanisms. As said before, a proposal of voice mechanisms, concretized in ESG tied to remuneration, will be discussed. The work will end with some concluding remarks.

[4] Including the use of apologies, when appropiate and beyond tokenism, see Hornsey et al. (2024) and Grappi et al. (2024).

2. CONTEXTUAL AND LEGAL FRAMEWORK OF ENVIRONMENTAL ISSUES IN CORPORATE LAW

2.1. Critical Issues: Agency problems

The growing concern for environmental issues in corporate law has been analysed by current literature on the incentive problems faced by managers, who are not strictly the firms' owners, when it comes to decision making in these contexts (Fama, 1980). This classic problem on the ownership versus control dates back to Berle and Means (1932), and was also noted by Jensen and Meckling (1976), who at the same time quoted Adam Smith (1776).

Incentives are an essential part of the shaping of behavior of corporate leaders (Holsmtröm, 1982; Murphy, 1986, as cited in Renneboog & Trojanowski, 2010). It must be borne in mind that incentive structures that boost monitoring between decision makers are among the devices for separating ownership and control (Fama & Jensen, 1983). To reduce the problem of shirking and monitoring of team production, outlined by Demsetz (1983), the monitoring cost needed to decrease shirking[5] must be less than the value lost in resources shirked.

However, when ownership of shares is dispersed among shareholders, there is an apparent lack of control of shareholdings, as only those with large enough shareholdings will perceive they have enough at stake to incur in monitoring costs over corporate management decisions (Bebchuk et al., 2015, as cited in Bebchuk & Tallarita, 2020). This apparent lack of engagement has led to shareholders being characterized as "rationally apathetic" (Kraakman et al., 2017, p. 30). Jensen & Meckling (1976) outlined that this alleged lack of control of shareholdings is closely related to agency costs. To address this problem of lack of control that comes from dispersed ownership, a suggested solution by Demsetz (1983, p. 387) was "correlating managerial wages and corporation performance".

In Fama's (1980) *The theory of the firm*, it is claimed that managers of a firm are (faced by) the so-called "discipline" and opportunities of the markets for managerial labor and for corporate control, which leads to the development of tools for monitoring the performance of the corporation as a whole, as well as its individual members. The way governance structures serve to limit agency problems, in other words, managerial discretion, in large corporations has been carefully studied by the literature (Williamson, 1983; Martin & Falardeau, 2024), including corporate criminology (Bisschop, 2010).

[5] Shirking, as defined by Alchian and Demsetz (1972) is the tendency to do less work when someone works as part of a team and, thus, his or her own work is not so easily monitored.

Bebchuk and Tallarita (2020) indicate that the incentives of directors are only partly in line with the interests of shareholders. However, they also put forward that there is at least some alignment between those two constituencies' interests, as "directors obtain some direct benefits from increases in shareholder value" (p.50). As examples, they mention equity-based compensation for executives (Core et al., 1999, as cited in Renneboog & Trojanowski, 2010), labor and control markets as defined by Fama (Brav et al., 2020), and the arrangements that facilitate hostile takeovers (Bebchuk et al., 2002; Agrawal and Knoeber, 1998, as cited in Renneboog & Trojanowski, 2010) because they lead to director incentives being more aligned with shareholder interests.

However, they claim that there are no mechanisms established to encourage directors to pursue stakeholder interests "beyond what would be desirable for shareholder value" (Bebchuk & Tallarita, 2020, p. 33). What is more, there is evidence that directors and executives will likely be discouraged from seeking stakeholder benefits that would be detrimental for shareholders (Bebchuk & Tallarita, 2020). Ascertaining whether the incentives of executives are in favor of fostering shareholder and stakeholder interests has been at the core of the issue regarding the potential agency problems faced by stakeholderism (Bebchuk & Tallarita, 2020).

The main problem seems to stem from the fact that it involves managers fulfilling their fiduciary duties to shareholders, while at the same time keeping a balance among the different interests of shareholders (Culpan & Trussel, 2005). Some authors have argued that some shareholders may be prosocial and thus favor stakeholders' requests (Hart & Zingales, 2017). Nevertheless, the question of whether shareholder voting on ESG proposals is actually a potential tool to achieve shareholder wishes that at any given time favor stakeholders remains a heated debate among academics.

This agency problem would mean higher costs for society, resulting in agents being held less accountable and more isolated from shareholder supervision, which will have a negative impact on performance and, therefore, lower economic profits to be distributed among shareholders and stakeholders (Bebchuk & Tallarita, 2020).

2.2. Redefinition of the purpose of the corporation? – The rise of stakeholderism as a potential solution

The ever-ending debate on the purpose of the corporation stems back to with the classic work of Milton Friedman (1970), *The Social Responsibility of Business is to Increase Its Profits*, whose title by itself is a declaration of intentions that seems unaware of climate emergencies and social shifts. Friedman defended that executives are employees of owners of the business, and that directing

shareholders' money towards purposes that were not the increase of profits, as could be the environmental purposes, would be following their own objectives.

Bebchuk and Tallarita (2020) rely on Friedmans' premise to question what they call "the illusory" promise of stakeholder governance, as they believe that there is no such thing as a possibility to internally alter the ultimate corporate purpose of profit maximization. Once again, the effectiveness of the different approaches proposed by the doctrine to promote environmentalism is discussed. According to authors quoted, there are two ways of protecting stakeholders. One is the enacting of rules external to corporations (formal external social control). The other consists in corporations internally promoting making choices favoring stakeholders - "stakeholderism"- (informal and formal internal or self-social control). The recent popular ESG criteria, which encompasses environmentalism, is based on this last approach.

Among those against stakeholderism, it is worth mentioning Bainbridge (1997) and a singular phrase by Bebchuk and Tallarita (2020), explaining that "Stakeholderism should be rejected, including and especially by those who take stakeholder interests seriously" (p.1), as they believe that stakeholderism entails major policy concerns. In fact, these authors have recently argued that the fundamental weakness of stakeholderism is that corporate executives lack, autonomously, strong enough incentives to give weight to the welfare of stakeholders (Bebchuk & Tallarita, 2022).

This might raise the question of whether a redefinition of the purpose of the corporation is taking place. The reality is that there has been a rising demand for corporate governance reforms that claim to be focused on "stakeholders" (Lipton et al., 2022; Flammer, 2013; Servaes & Tamayo, 2017; Barzuza et al., 2019; Mayer, 2020; Sjåfjell & Taylor, 2019). The concept of stakeholderism was introduced by Freeman (1984), whose book *Strategic Management: A Stakeholder Approach* had a significant impact in defending that managers of corporations have to consider the interests and role of stakeholders. With regards to promoting environmentalism, in recent words of Edmands (2023), "Considering long-term factors when valuing a company isn't ESG investing; it's investing" (p. 2).

The fact that the preservation of the environment is nowadays a concern for our society is a premise that has been mentioned in the Introduction, with regulatory aims as consequence of it. However, it is unclear whether internally promoting environmental values by corporate leaders and becoming an intrinsic part of the ultimate purpose of corporations mean an effective course of action for encouraging environmentalism (Bebchuk & Tallarita, 2020; Elhague, 2021; Mayer, 2020; Savitt & Kovali, 2022). Here proposals to introduce restorative mechanisms to foster honest and inclusive dialogue for prevention, intervention, reparation and supervision can be mentioned.

2.3. From agency conflict to shareholder welfare – an evolution or change of paradigm

There is evidence that corporations tend to concentrate on short-term profit maximization at the expense of long-term sustainability, which has earned them the reputation of being the main responsible for the climate crisis (Fuller & Jensen, 2002; Jackson & Petraki, 2011; Savitt & Kovvali, 2022). Moreover, recently, the UN secretary condemned the big oil corporations at the World Economic Forum in Davos for masking the true nature of the role of burning fossil fuels in contributing to climate change (Meredith, 2023). Directors' duties, remuneration and stakeholder involvement have been found to be critical contributors to the mentioned tendency to "short-termism" in corporate law (European Commission, 2020a). In this direction, Sjåfjell (2017) puts forward the need to discuss corporate sustainability and the shareholder. The Norwegian author defends the need to create sustainable value within the planetary boundaries, redefining the main objective of the company as well as the duties of the board, and suggesting the way shareholders should be integrated (Sjåfjell, 2017).

The uncertainty on how to allocate the risks associated with environmental challenges leads us to the fact that careful decisions must be made regarding trade-offs to adapt to climate change. One of the main purposes of the Sustainable Finance Plan is to integrate sustainability in risk management, enforcing risk-sharing mechanisms and realigning incentives to identify and address climate-related risks. These climate-related risks encompass not only exposure to climate risks in financial terms, but also litigation risks[6]. As shown by the IPCC Sixth Assessment Report on April 2022, climate-related litigation has had a significant impact on climate governance. In order to assimilate this litigation risks, these can be distributed between two kinds: physical risk and transition risk, both of which are intertwined, as the litigation risk can be translated in a higher credit price risk (Perales et al., 2022). Nevertheless, restorative dialogue on these issuses might go beyond the risk vocabularies if we want to understand the real scope of the problem at stake.

2.4. European legal framework in sustainable finance. Europe taking the lead

Europe has led transition from soft law to hard law. In coherence with the non-binding United Nations principles on Business and Human Rights (OECD, 2011; 2024)[7], European countries have given steps towards a transition to a

[6] See chapter by Gema Varona in this book.

[7] Véase la web de la ONG Business and Human Rights Resource Center en https://www.business-humanrights.org/en/big-issues/governing-business-human-rights/un-guiding-principles/.

so-called climate-neutral economy with some binding norms. With the Paris Agreement (2015), as well as the 2030 Agenda for Sustainable Development[7] (United Nations General Assembly [UNGA], 2015) and the Decarbonization Objectives for 2050 (European Commission, 2018b), the continent started with norms and standards that regulated activity externally to businesses.

In the recent years, even wih limitations, the European Green Deal (European Commission, 2021a) evidences that the priority for enhancing the quality and level of protection of the environment form an integral part of the fundamental European values. In addition to this, consciousness has risen of the fact that the behavior of businesses pertaining to all economic sectors is key to the success of the European Union's sustainability purposes, and to the realization that European businesses, especially big ones, are dependent upon global value chains (Siewers, Martínez-Zarzoso & Baghdadi, 2024).

Thus, the regulatory activity has revolved around businesses, recognizing them as changing agents. It is in this context where sustainable finance and supply chain as obligations concerning means arise. The significance of this is explained by the fact that it was only two years after the Paris Agreement entered into force that the Commission launched the Sustainable Finance Action Plan (SFAP) (European Commission, 2018a). In this sense, "Sustainable finance" refers to the process of integrating climate, environmental and social considerations when it comes to investment decision-making, with the aim to achieve an increase in longer-term investment and sustainable activities (European Commission, 2021a). Thus, sustainable finance focuses on decision-making processes, which encompasses improved measuring, monitoring and disclosing, and it is precisely in thee dynamics of those processes where restorative principles and dynamics might be included.

As we will see in the following sections, the process of sustainable finance has three main tenets: taxonomy, transparency, and standards and ratings (De Nadal & Fernández, 2022).

2.4.1.European taxonomy[8]

The first is the European Taxonomy 2020/852 complemented with Climate Delegated Act and Complementary delegated Act on nuclear and gas (Spinaci, 2022). This basically intends to be a science-based classification system of sustainable activities (European Commission, 2021a). For instance, Article 3 establishes the four prerequisites so that an economic activity "qualifies as

[8] For general updates, see at the official website of the UE, https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en.

environmentally sustainable" (p. 2)[9]. In application of the DNSH principle, on 1 January 2022, the Climate Delegated Act entered into force, precising the technical screening criteria ("TSC") for two environmental objectives, climate change mitigation (Article 10(3)) and climate change adaptation (Article 11(3)) (Spinaci, 2022). This was based on the recommendations of the final report on EU Taxonomy published by the Technical Expert Group on Sustainable Finance ("TEG") (2020), which collected feedback from stakeholders. In that collection of feedback, considering different languages and perspectives in knowledge and interests, restorative dialogues might be relevant.

The importance of this Delegated Act lies in the fact that, supplementing Article 8 of the Taxonomy Regulation, it specifies the content, methodology and presentation of the information to be disclosed by financial and non-financial "undertakings", with regards to their environmentally sustainable economic activities (Spinaci, 2022). In this sense, Article 8(2) specifies the key performance indicators ("KPIs") with reference to turnover, capital expenditure and operational expenditure to be disclosed by non-financial undertakings, that serve to translate environmental performance into measurable financial variables (European Commission, 2021b).

2.4.2.Transparency

The second tenet would be the emphasis for disclosure or transparency which should not imply any kind of contradiction with the confidentialiy principle in restorative dialogues because confidentiality should not equal secrecy or forgetting public interest and community values.

The EU Commission advocates for international forums and standard-setters[10] to develop consistent climate-related financial risk disclosures. As for the legislative field, examples of this are the Sustainable Finance Disclosure Regulation 2019/2088 ("SFDR"), as well as Non-Financial Reporting Directive 2014/95/EU ("NFRD"), laying down the rules on disclosure of non-financial and diversity material information by certain large companies. The materiality emphasis of this information is key, as it was conceived in a double way that was intertwined at the same time: environmental materiality (developments in

[9] According to the European Taxonomy an economic activity qualifies as environmentally sustainable if it respects four conditions (i) substantially contributes ("SC") to at least one of the six defined environmental objectives (Article 9); (ii) while not doing significant harm ("DNSH") to any of the other objectives (Brühl, 2021); (iii) it must be carried out in compliance with the minimum social safeguards; (iv) and comply with the technical screening criteria ("TSC") established by the Commission.

[10] An example of this would be the Task Force on Climate-Related Financial Disclosures ("TFCD") created by the Financial Stability Board ("FSB"), as reflected in its 2022 Status Report (TFCD, 2022).

response to climate change) and financial materiality (financial performance of the company).

The SFDR established three investment categories, according to their sustainability degree: Article 6, which basically are non-sustainable labelled but can integrate ESG risks; the aforementioned and controversial Article 8, i.e, those that "promote" ESG characteristics; and, finally, Article 9, those that pursue by themselves a concrete and measurable sustainability "objective". Recently, the Platform on Sustainable Finance ("PSF") of the EU has been published, based on the report "The Extended Environmental Taxonomy" that aims to complement the existing Taxonomy regulation (Platform on Sustainable Finance [PSF], 2022). This regulation is key for "green" investments, as it aims to establish a non-static regulation: instead of defining sustainable activities as opposed to the unsustainable ones (which fostered a kind of "exit" strategy from those unsustainable-labelled activities), it seeks to establish a "traffic light" kind of classification (Biurrun, 2022).

With regards to addressing the shortcomings of the provisions of the NFDR, mainly, comparability, relevance, and reliance of data (Ransome & Taylor, 2022), as well as the overlapping of regulation, in the Green Deal, and as a result of a public consult that took place on 20 February 2020 (European Commission, 2020b), the European Commission issued a Proposal for a Directive as regards corporate sustainability reporting ("CSRD"). This Directive, while following the double materiality perspective, has as main legislative developments the fact that the companies that will now fall under its scope will be obliged to report sustainability information in compliance through the European Sustainability Reporting Standards (ESRS) (European Financial Reporting Advisory Group [EFRAG], 2022). In addition to this, the sustainability information will now be disclosed into the management report alongside financial information[11].

On the 28th of November of 2022, the Council finally gave green light to the to the Directive 2022/2464/UE ("CSRD)"[12], whose major contributions are that non-EU entities with significant EU operations will be also subject to disclosure requirements – among others, US entities with significant EU operations-. It introduces an audit assurance requirement (European Council, 2022) to monitor the "ESRS" or basic common reporting standards, which will be developed based on the EFRAG published standards. These will include how the corporations' results are affected by ESG factors, or the financial materiality, which is particularly unprecedented. It is relevant to highlight, however, that Spain, by passing Law 11/2018, has been the first country under which issuers

[11] See the EU website at https://finance.ec.europa.eu/news/commission-provides-further-clarifications-eu-corporate-sustainability-reporting-rules-2024-08-07_en.

[12] On 5 January 2023, the Corporate Sustainability Reporting Directive (CSRD) entered into force.

were required to submit their externally assured non-financial information to the binding vote of shareholders under a separate agenda item on an annual basis (Morrow Sodali, 2022). The information must be included in a report that must be independently verified; additionally, the company's auditor must check that the report has been either included in the management report or provided as a separate report (Jaakkola, 2019).

The Directive 2017/828 ("SRDII") should be considered as well. Its transposition main implications in the Spanish Legal System have taken place in the Royal Legislative Decree 1/2010, of 2 July, approving the consolidated text of the Corporate Enterprises Act (Ley de Sociedades de Capital, "LSC") and in the Securities Market Law or Royal Legislative Decree 4/2015, of 23 October, among others. This framework relating to investors' engagement is to be reviewed by the Commission so that it may better reflect EU sustainability goals and align with global best practices in stewardship guidelines (European Commission, 2021c).

Finally, in July 2024, the Directive 2024/1760 on Corporate Sustainability Due Diligence entered into force[13], amending Directive (EU) 2019/1937 (Nartey, 2024; European Coalition for Corporate Justice et al, 2024; Paricio, 2024; Giovannone, 2024). This Directive stresses the transparency of information, and also the significance of an obligation that concerns the means throughout the value chain process.

2.4.3. Standards and ratings

The third tenet of sustainable finance would be investment tools such as standards and ratings, as measurement tools for those environment-related risks that organizations are increasingly obliged to disclose (European Central Bank, 2020). Examples of this would be the EU Climate Benchmarks Regulation (EU) 2019/2089, as well as the Proposal for a Regulation on European green bonds. In these proposals, the Commission stresses the importance of including sustainability within accounting and financial reporting, while stakeholders have expressed their concerns about the need to ensure methodological transparency in the way credit rating agencies (Tang et al., 2022) incorporate sustainability, something that is quite controversial due the many different perspectives on the matter, beyond economic and scientific technicalities. In this context, the need for an effectiveness evaluation of the measures in force by European Securities and Markets Authority ("ESMA") has risen.

[13] See the official webpage of the EU at https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

The need for detailed information on the degree of attainment of sustainability criteria of investments seems rather urgent. At the moment, the main problem seems that the data available are scarce and of poor quality. For instance, ESG ratings of individual companies produced by a range of analysts are poorly correlated and based on different procedures (Panetta, 2021). This process has to do with procedural justice and trust, and, hence, with restorative justice principles of inclusiveness and honesty, among others.

As reflected by Berg, et al. (2019) findings, ESG rating measurement divergence is based on a fundamental disagreement about the underlying data, which is problematic if the premise is that ESG ratings should be based on objective observations. To address this, initiatives such as the Sustainability Accounting Standards Board ("SASB") have emerged, which work to establish comparable disclosure standards on ESG issues across companies, as well as the Carbon Disclosure Standards Board ("CDSB") and the Global Reporting Initiative ("GRI"). The three of them have been consolidated by the International Financing Reporting Standards ("IFRS") (Berg et al., 2019).

3. SHAREHOLDER IMPACT IN CORPORATE SOCIAL RESPONSIBILITY: ESG

As commented before, when the concept of sustainable development entered business strategies in the 1990s, the problem of how to "measure" the sustainability of those business practices arose (Bergquist, 2017, as cited in Jones, 2018; Robinson, 2004). Financial performance is reliable because the fulfillment of its objectives is measurable by different tools (Ramos Muñoz et al., 2021). In an apparent contrast to this, arguments in favor of ESG objectives rest on normative claims about the changing paradigm regarding the focus on social benefits of corporate value creation (Harper Ho, 2021). Nevertheless, the thesis that I seek to put forward in this work is that the attainment of these objectives is measurable beyond the subjective social benefits they may also encompass. To narrow the scope of this investigation, this analysis will be focused on the measurement of the "E" (Environmentalism) of ESG criteria.

With the purpose of promoting ESG objectives, in relation to restorative justice, three main strategies will be briefly analyzed: exit, coercion, and voice (Broccardo et al, 2021; Ramos Muñoz et al., 2021).

3.1. "Exit-based" strategies: a shaky strategy in the long-run

Exit encourages the shareholder's exit from the relationship; it seeks to increase the information available and thus the possibility to divest of non-

sustainable instruments (Ramos Muñoz et al., 2021, p.6). The measurement of E criteria is done through accountability mechanisms that measure the "green promises" attainment, similarly, though not equally, to those of financial performance. One example of this would be the Task Force on Climate-Related Financial Disclosure ("TCFD") created by the Financial Stability Board in 2015, which is aimed at encouraging transparency regarding climate-related risks and the usefulness of that information for the financial sector.

The problem with this lies with the numbers: the global sustainable fund market only represents 4% of the whole market by value (Sustainable Finance Working Group, 2022, p.54). In other words, the legal structure created by efforts to increase transparency is one-sided if these metrics fail to integrate sustainability across decision making. It is in fact one of the heated debates of ESG, if divesting from "non-green" assets is an appropriate approach for the sake of tackling climate change (Serafeim & Fulton, 2014, as cited in Serafeim, 2021).

Some authors have stressed the importance of establishing norms that prevent being lulled into a mere change of hands of these limited green investments (exit strategy), with no perceived added value to address climate change (Edmands, 2023). Built on the premise that climate change is a global concern, the law should aim at incorporating sustainability as a structural element across the financial market, through a focus in the already existing investments. In this case, exit's fundamental problem seems to be that trusting the market to correct a market problem may well not be an appropriate solution. Inclusiveness might entail broadening the implicated agents that should collaborate in that kind of correction.

3.2. "Penalty-based" strategies: the lack of consensus to change fiduciary duties

In light of the difficulties of exit-based strategies, a potential alternative may be in penalty-based strategies. We define penalty-based strategies as enforcement or liability arising from false information, or a breach of "enlightened" duties of care and loyalty for equity instruments, among others (Ramos Muñoz et al., 2021). At first glance, an advantage of penalty-based strategies would be that those in charge of taking decisions could be held liable for a breach of environmental promises. Here restorative justice answers could also be included.

To address this, indicators and metrics should also encompass an evaluation of the progressive transformation and fulfilling of the sustainability business plans. In this sense, the new Directive on Due Diligence seeks to address the risk of short termism and the perspective of sustainability across the whole supply chain, without discriminating against traditionally pollutant sectors (Delgado,

2022). Fiduciary duties, as related to the diligence expected of a financial actor, are thus also born in mind by the directive.

For example, the UK Country Report reflected the activism of some allegations filed by an NGO against listed companies for failing to establish risks related to climate change in their legal records. This type of activism can result in directors raising consciousness of the need to identify that potential environmental and social matters comprise an issue that is material for shareholders, as proven by shareholder resolutions. In the UK, for instance, even if section 172 of the Companies Act 2006 provides for the need to have regard to the environment, among others, in performing director duties, this is "within the context of a broader fiduciary duty to promote the success of the company for the benefit of the members as a whole" (UK Country Report, as cited in European Commission 2020c, p. 174). Nevertheless, recognizing that human rights and envioronmental issues can have "reputational, financial or legal" consequences, the inability to conduct due diligence may reflect that a corporation's executives are misplaced to inform on risks that are material for the corporation (European Commission 2020c).

Trying to include ESG issues into duties of directors leads to considering not only the purpose of the corporation, but also the very role of directors and to whom they owe their fiduciary duties (Debevoise & Plimpton, 2020). Certain ESG factors in a given time horizon may not be perceived as material by a director, thus at least at first sight, both the purpose of the corporation and the duty of care would have to be redefined. Additionally, the duty of loyalty, would be defined with the purpose of the corporation as well. In any case, it would be extremely difficult for stockholders to impose liability on directors who do not consider ESG factors. However, the Business Judgment Rule ("BJR") would be compromised. There is a social consensus upon which directors act "in the best interest of the corporation." This is, that they act in good faith, and on an informed way, as explained in Aronson v. Lewis (1984), that they fulfill their duty of care and loyalty.[23] This gives them the advantage that their decisions will not be questioned by the courts (Debevoise & Plimpton, 2020), but yes by society and investors.

The BJR was first coined in 1742 in the UK with the case Charitable Corp v. Sutton (1742), which basically established the foundations that even if a decision made by directors had a negative effect on a corporation, they should not be liable for it provided they had made the decision in good faith. The basis for this was that there were no grounds to determine that directors had intentionally breached trust if they had acted with fidelity and reasonable diligence (Sabao, 2022). Interestingly enough, this rule is not recognized in the UK.

In the US, as well as in several jurisdictions, the BJR is recognized, but in this case, contrary to the duty of care, it is a revision standard that can be traced to

Percy v. Millaudon (1829). With regards to recent cases, in the Delaware SC Smith v Van Gorkom (1985) case, it was established that directors are presumed to act in good faith, on an informed basis, and honest belief to act in the corporations' best interests (Sabao, 2022). Additionally, as established in Bouwman (2009), the BJR seeks to prevent excessive shareholder litigation against directors as their claims are likely to fail to be successful (Sabao, 2022).

Thus, the BJR provides directors with a shield of discretion which stems from the fact that every business decision entails certain risks. In Germany, for instance, this in enshrined in Section 93 (2) sentence 2, German Stock Corporation Act ("AktG"). In Spain, this rule is enshrined in Article 226 LSC. As established by the Decision of the Provincial Court of Madrid on 10 October 2000 (SAPM 13657/2000), the negative result of the corporation is not by itself enough to determine the responsibility of directors (Alfaro, 2018). This is, the director is not required to accomplish some results, but to develop his activity with regards to due diligence or "prudency". It is the lack of that very diligence that causes responsibility. As explained by Paz- Ares (2003), what this rule seeks to protect is the technical discretionality of directors by granting them that the technical correction of their business decision will not be reviewed by the judges. However, there might be an ethical accountability that could be dealt via restorative dynamics.

Recent literature has provided potential solutions to the apparent problem of reconciling BJR with ESG issues. Even if standards may vary across jurisdictions, general requisites to apply the BJR can be traced: made in good faith (1), with the care of a "reasonably prudent" person (2), and in the best interests of the corporation (3) (Cornell Law School, n.d.). When it comes to "good faith" (1) and to the care of a "reasonably prudent" person (2), the advent of climate-based litigation seems to be a reasonable threat to consider when it comes to integrating ESG issues within the BJR. With reference to acting "in the best interest" of the corporation (3), this is intimately related to the question of "whose interest?". Boards are being urged to take into account the wellbeing of society as a whole when taking decisions for their stakeholders (Katz & McIntosh, 2020). If stakeholders were included, or, in other words, provided that boards clearly establish that a series of concrete environmental initiatives are "within the best interest of the principals" (or stakeholders), the apparent contradiction would be gone (Raymond, 2019). Again, here restorative dialogues for prevention, intervention and reparation could be considered[14].

In line with this, the Commission ordered a study on fiduciary duties and sustainability (European Commission, 2020a) that was highly criticized (Roe

[14] See the chapter by Nagore Barrena in this book.

et al., 2020; European Company Law Experts Group [ECLE], 2020). Among the critics, the main issues where the ill-defined concept of short-termism, with the alleged evidence of gross shareholder payout rates (Roe et al., 2020). Additionally, risks associated with the already discussed redefinition of corporate purpose and the advent of stakeholderism were superficially taken into account by the study (ECLE, 2020). This led to lowering expectations on Corporate Sustainability Disclosure. In conclusion, it appears that, not only due to the fact that penalty mechanisms need a social consensus which is not here (yet), but also to the law of unintended consequences (they may have consequences that are difficult to calibrate) (Ramos Muñoz et al., 2021), penalty-based strategies cannot fill the gap for promoting ESG goals.

3.3. "Voice-based" strategies: the way forward?

Having concluded that penalty-based strategies are not adequate, and that exit mechanisms are not enough, this section examines the viability of voice-based strategies, a concept related to restorative justice. We define voice-based strategies as those that ensure the shareholder raises her voice in the decision (Broccardo et al., 2021; Hirschman, 1980, as cited in Ramos Muñoz et al., 2021). In other words, they are tools that seek for investors channeling their voice towards sustainability by their decision-making inside organizations (Ramos Muñoz et al., 2021).

A context in which voice mechanisms, perhaps through restorative mechanisms, supplement transparency mechanisms are preferable to a litigation that seeks to enforce certain duties of diligence and loyalty. The issue of decision-making necessarily involves addressing the role of financial intermediaries, shareholders and institutional investors, and proxy advisors.

Regarding the measures on disclosure towards investors in a broader project to adapt advisors' "fiduciary duties", ESMA's approach has sometimes limited to targeted reforms of concrete rules, without insisting on structural change of financial firms.[26] (Ramos Muñoz et al., 2021). However, as normative requirements condition essentially the behavior of financial intermediaries, there is evidence that "institutional investors and asset managers still do not systematically consider ESG considerations and risks in the investment process" (European Commission, 2018a, p.18). Efforts in this direction would be the entry into force of "Green MIFID" or MIFID II on 2 August 2022, that obliges entities to take into account investors' sustainability preferences.[27] In addition to this, ESMA has launched several calls for evidence to ensure that businesses take part in the efforts to establish the criteria to apply these normative requirements. Under MIFID, advisors had to make an assessment of appropriateness and sustainability before recommending a product to

their clients. Now, advisors must include an additional consideration on the sustainability preferences of existing or new clients.

From the external perspective, this is, the relationship of intermediaries with investors and firms, firms' "fiduciary duties" enter at play, such as the duty of care, duty to look after clients' interests, or conflicts of interests. The importance of this lies in the way they interact with regulatory duties contained in MiFID II or IDD rules (Ramos Muñoz et al., 2021). The question that arises is, how can fiduciary duties of investment managers and duties of institutional investors encompass sustainability? Some authors claim that such "environmental fiduciary standard" should be envisaged as an "enlightened" or extended scope of the duties of care and loyalty (Jensen, 2002). Two factors are to be tackled here: short-termism and the improvement of regulatory standards systematically across the investment chain. Including more voices (particularly of young and future generations, but also of representatives than other-than-humans) on risk impact could help, at the same time that including those voices in supervision and correction procedures via restorative principles and mechanisms.

In this sense, the ECB published in 2020 a final guide on climate-related and environmental risks for banks, specifying its prospects on how banks should consider environmental risks in their balance sheets (European Central Bank, 2020), and in 2022 it conducted a supervisory review of banks to monitor its implementation (European Central Bank, 2022). This may be especially relevant with reference to the influence of banks' capital and public disclosure, thus creating awareness of these risks among intermediaries and investors (Panetta, 2021).

Regarding institutional investors, to contribute to the Green Deal targets, fiduciary duties of investors and pension funds towards members and beneficiaries must also mirror the systematic environmental, social, and governmental risks of investments within their investment decision-making processes (European Commission, 2021a). The Shareholders' Rights Directive was reformed in 2017 to foster shareholder engagement, including rules on institutional investors and asset managers engagement (Ramos Muñoz et al., 2021). According to the SRD, corporations have the right to gather data on the identity of shareholders and any intermediary who has information of that kind, showing the preference of the Directive for transparency or compliance duties. In this sense, the SRD establishes that intermediaries have the obligation to convey such data immediately. Nevertheless, as indicated by Article 3a (1), European countries can set a threshold of minimum holding of 0.5% of shares or voting rights to request that information (European Union, 2020).

In addition to this, intermediaries are also obliged to provide shareholders with all corporation data that enables them to exercise their rights in a proper way. According to Directive 2017/828 ("SRDII"), they also have to convey to the

corporation the information received from shareholders in the exercise of their rights. In the enormous challenge that supposes the adequate management of risks, the information that businesses will have to publish on sustainability plays a valuable role. In turn, this information will constitute the base so that financial entities can manage that risk and channel their resources in a more efficient, and maybe ethical, manner (Delgado, 2022).

3.3.1.Voice-Based strategy that works for ESG goals

3. 3. 1. 1 Shareholder activism led by proxies

Shareholder activism has been defined as the use of ownership position to actively influence company policy and practice (Sjöström, 2008), particularly here in relation to environmental protection. Shareholder activism is mainly done by shareholder proposals, private negotiations and non-proposal pressure, hedge fund activism, and proxy fights or "contested proposals" (Denes et al., 2016). For the purposes of this chapter, I will focus on shareholder activism led by proxy advisors as potential agents in restorative dialogues that might hold certain restorative justice facilitators' abilities.

Proxy advisors, as defined by Article 2 (g) SRDII, advise shareholders or institutional investors on voting policies (Ramos Muñoz et al., 2021). This kind of shareholder activism has been subject to academic debate in recent years (Karpoff, 2001; Gillan & Starks, 1998). However, as Renneboog and Szilagyi (2009) examine, the key question is whether they are an effective means of mitigating agency concerns which in the end are the origin of activism. Among their findings, it is important to highlight the fact that proposals that are takeover- related and sponsored by public pension funds are by far the most successful.

The role of shareholder activism comes into place when shareholders seek to induce changes in the firm without a change in control (Renneboog & Szilagy, 2009). However, there is evidence that shareholder activists tend to target poorly performing firms and governance structures (Denes et al., 2016; Choi, 2001). In addition to this, corporate leaders are exposed to an increased activism by hedge fund activists and more concentrated ownership blocks by institutional investors (Bebchuk et al., 2015, as cited in Bebchuk & Tallarita, 2020; Gillan & Starks, 1998; Renneboog & Szilagy, 2009; Denes et al., 2016).

The consensus in the literature seems to be that shareholders tend to be passive on voting issues, and that this is mainly due to the free rider problem; there is a cost associated with shareholder activism and increased ownership and, thus, only large institutional shareholders have the means and incentives to monitorize and control (Gillan & Starks, 1998; Renneboog & Szilagy, 2009, as cited in Grossman & Hart, 1983; Shleifer & Vishny, 1986; Admati et al., 1994;

Maug, 1998; Noe, 2002). In fact, CEOs have recognized that some institutional investors will simply implement proxy advisors' advice rather than "do any thinking of their own", and that is why some CEOs try to persuade managers of proxy advisors to recommend their votes in a certain way (Choi et al., 2010, as cited in Hitz & Lehmann, 2014; quoting Delaware's former Vice-Chancelor Leo Strine Jr 2005, p. 688).

In the European context, even if proxy advisory is still developing, the growing importance of proxy advisory industry was recognized by ESMA in 2012 (ESMA, 2012; Hitz & Lehmann, 2014). In Europe, proxy voting is mainly lead by ISS, Glass Lewis, and Proxyinvest. Just like in the US, proxy advisors have pre-established proxy voting guidelines so that investors and shareholders cast their votes in a predetermined way (ESMA, 2012).

As recognized by Hitz & Lehmann (2014), proxy advisory does matter in the European context, with literature showing that proxy advisors play an important role in the determination of corporate governance practices (Ertimur et al., 2013). Even though traditionally there have been less proxy or institutional investors in Europe, they are having a huge impact in environmental issues. In addition to this, with regards to shareholder resolutions in Europe, the fact that they are still scarce may be due to the high ownership requirements, as well as to cultural differences regarding institutional investors' preferences (Horster & Papadopoulos, 2019). An example of this would be the fact that some German commentators have recently described the proxy advisor ISS as *Mächtige Aktionsärsflüsterer* (*powerful shareholder whisperers*) (Hitz & Lehmann, 2014, p. 2).

3.3.1.2. Concept and evolution: From "Say on pay" to "Say on climate"

There is evidence of an underutilization of voice mechanisms, as the proliferation of ratings and financial advice seeks to enhance transparency, fostering an "exit" strategy (Ramos Muñoz et al., 2021). As proponents of the rational apathy theory contend, only those who have more stake, such as institutional investors, will be incentivized enough to monitor and raise their concerns over corporate management decisions (Bebchuk et al., 2015, as cited in Bebchuk & Tallarita, 2020). Additionally, there are scarce channels for shareholders to voice their concerns. However, these channels can be further developed, perhaps with a restorative sense, and it is not necessary for all shareholders to get involved.

One of the channels best suited for shareholders to voice their concerns is the "say on climate" or remuneration, as a means for shareholders to carry weight within the system of incentives. This would be the least intrusive mechanism, especially compared to exit and coercion, as it would neither be too rushed –

every constituency would have time to get involved – nor is it about changing radically. Rather, it is about changing in a way outcomes, such as the reduction of CO2 emissions, can be properly monitored, and quantifiable.

Say on pay arrived in 2011 in the US, born out of the Securities Exchange Commission's ("SEC") rule Dodd-Frank-Act (2010), which included a mandatory, though non-binding "say on pay". In Europe, it was introduced by Commission (EU) Recommendation 2009/385/EC. Its common objective is to promote financial stability by ensuring congruency between incentives and risks, and firms are given incentives to focus on the long-term rather than the short-term (Hausmann & Bechtold-Orth, 2010; Jackson & Petraki, 2011). In Spain, executive pay is regulated in Articles 217-220, 249 (3) and (4), and 529 sexdecies to 526 novodecies of the Spanish Capital Corporations Act, as well as by Corporate Governance Codes provisions on remuneration.

In 2022, ESG was the topic most often covered during shareholder engagements that included company directors (Castañón et al., 2022). In addition to this, remuneration policy votes were the resolutions with the highest proportion of negative recommendations from proxy advisors in 2022: ISS opposed 35.0% of remuneration policy votes; Glass Lewis 35.0%, and Corporance 60.0% (Georgeson, 2022b, p.127). This initiative was launched by hedge fund activist Chris Hohn through the Children's Investment Foundation in 2020, part of The Children's Investment Fund ("TCI") Management. Since then, major companies have put their climate plans to a vote, such as Unilever, Moody's, Nestlé, Global Dutch Shell, Standard & Poor's (S&P) Global and Canadian Pacific Railway (SquareWell, 2021). Some restorative dialogue might be necessary before voting to take all voices into account.

Hopwever, there is evidence that shareholders are demanding Say on Climate votes with the threat that they will vote against a director or propose another item on the ballot at the General Meeting (Georgeson, 2022b; Blackrock, 2022). The specificity and governance mechanisms of these votes, while mirroring "Say on Pay", have a lack of consensus (Galloway, 2022). On the one hand, it is positively seen as a path to comply with the TCFD framework (Keatinge, 2021). However, the support to this initiative is not unanimous. As reported by Sommer & Tufford (2022), some institutional investors, such as Vanguard and CalPERS are cautious of Say on Climate Votes (Ramchandani et al., 2021). The main concern seems to be that Say on Climate votes could facilitate greenwashing. The issue here lies in the lack of transparency and appropriate metrics for the establishment and monitoring of the attainment of adequate emission targets, as a way for companies to try to justify their plans in future years as they were backed by shareholder approval (Sommer & Tufford, 2022; Galloway, 2022).

In Spain, it is noteworthy that Aena became the first major corporation in the world to commit to holding Say on Climate votes at its annual meetings

(Morrow Sodali, 2022). These resolutions were endorsed by the main proxy voting advisors ISS, Glass Lewis and Corporance. With regards to investors, Blackrock voted in favor. The proxies voting guidelines and the precedent set by the recommendations at Aena, are a good likelihood for support for analog proposals in other corporations in Spain. For instance, Ferrovial S.A. has already introduced an advisory proposal at its 2021 General Meeting (GM) "to approve, on a consultative basis, the Company's Greenhouse Gas Emissions Reduction Plan" (Ferrovial, 2021, p.19).

3.3.1.3. Possible solutions: Voice or executive pay tied to ESG goals

In 2015, Mark Carney, former Governor of the Bank of England, anticipated implications of climate change for the value of climate portfolios (Carney, 2015). Only five years later, and as analyzed by Bebchuk and Tallarita (2022), companies have been increasingly using ESG performance metrics for CEO compensation. As previously analyzed, plans of executives are a major feature of corporate governance (Ritz, 2022). In 2019, Shell declared that it would link the variable pay of its chief executive to CO2 objectives. After that, and under shareholder pressure, it was followed by other major oil and gas companies, such as BP and Chevron (Ritz, 2022). Under mounting pressure for corporate climate action, tying director remuneration to climate performance has emerged at some of the world's largest companies. In short, and surprisingly, corporations are starting to use CO2 emissions as a KPI for management (Ritz, 2022).

Nevertheless, there are big differences in compensation metrics across companies. Generally, the implementation of short-term incentive plans (STIP) is higher than that of long-term incentive plans (LTIP). In addition to this, there is an evident divergence between European and US companies.

Maybe because of these heterogeneities, some authors do not agree with tying executive pay to ESG issues. Bebchuk and Tallarita (2022) find that ESG-based remuneration incentives are in reality a disguised way for executives to exacerbate the agency problem of executive pay, as their alleged lack of transparency prevents effective scrutiny by outsiders. According to Edmands (2021), as ESG performance is seen by them as an intangible, it should not be favored over engagement on other value drivers. It is clear that ESG is multifaceted, with several stakeholders to be taken into account, and difficult to be measured. However, other authors claim that even if climate-related executive remuneration is "no silver bullet", it still conveys a positive message to stakeholders about the future of business (Ritz, 2022, p.135). A possible solution could be to select ESG metrics carefully based on materiality, and report in an inclusive restorative dialogue on whether corporations are meeting them (Edmands, 2021).

In any case, it is imperative to develop proper measures or KPIs to prevent perversion of ESG-based remuneration, as well as greenwashing. In Spain, the majority of IBEX35 companies have already adopted ESG-tied remuneration schemes (Medina, 2022). However, their adoption has not been homogeneous in terms of efficacy. The trend is to link variable remuneration to ESG metrics. This is made in different ways. Most of them have included this factor on an annual basis, linking it to Annual Variable Remuneration ("AVR"), while others have (also) included it in their Long-Term Incentive Plans, that normally last for a period of around two to four years (Farias, 2023).

Another heterogeneity lies in the metric they use to measure the attainment of these "green" objectives. One of the TFCD Recommendations on Climate-Related Financial Disclosures (TFCD, 2021) is to include metrics related to greenhouse gas ("GHG") emissions or "tCO2e". Others have linked their AVR to green indexes such as Dow Jones Sustainability Index ("DJSI"), and others have even developed their own indexes to measure the attainment of these objectives (Farias, 2023; Paschoaleto & Martínez-Zarzoso, 2024).

Additionally, some of them have linked AVR to a generic "ESG" indicator, which others call 'Sustainability'. The majority of IBEX35 Banks call it "Mobilization of Sustainability Finance", while some others link it to the fulfillment of Sustainability Plans (Farias, 2023). Finally, the relative weight that the IBEX35 corporations give to these green objectives varies. For instance, ACS links its AVR to the reduction of greenhouse gas emissions with a 11,11% weight in AVR basis, as well as to being among the firsts in the DJSI index. In contrast to this, other companies give lower percentages to this weight and link it generically to "ESG" without properly disclosing the metrics that hide behind those ESG factors that, at the same time encompass, for instance, the presence of women in management positions (Farias, 2023).

One possible solution for this should be the enforcement of norms requiring further transparency in the environmental disclosure by mandating for a disaggregation of ESG objectives and the possibility of a exchange of communication via a restorative dialogue. This way, a company will not be able to declare itself "green" without properly disclosing its concrete alignment with reduction of GHG emissions, as well as the associated percentages and the concrete impact they have.

Another example would be the clawback provisions, which have their origin in claiming compensation promised or already paid to executives for misconduct. This was first introduced in the Sarbanes-Oxley Act ("SOX") in 2002, and there is evidence that their adoption in incentive systems has proliferated as a result of supervisory board and shareholder initiatives (Müller et al., 2020). In Spain, and as stated in the Georgeson Report 2022 on the remuneration of executives of IBEX35 companies, 31 companies (94%) include malus and clawback provisions

in their remuneration, 30 of which use clawback in AVR and PILP, and only 1 that applies it only to PILP (Georgeson, 2022a). Always based on voluntariness and honest, as well as equal treatmentmt and accountability, the claiming of those compensations could be made via restorative processes.

Besting, for its part, refers to the fact that part of the remuneration is paid a posteriori, or to the possibility of being claimed against if it has generated any risk that has materialized subsequently. There is then the need to better articulate remuneration so that interests are not sacrificed in exchange for a better image. Therefore, clawbacks and the possibility of being sued play a role not only as purely coercive mechanisms, but also as instrumental mechanisms. Without being intrusive, they can, if so restoratively, penalize those who deny the possibility of driving that change.

However, this chapter has provided evidence that coercion mechanisms, at least given the current situation, make more sense as instrumental voice mechanisms or exit mechanisms. Treating them as independents has proven difficult as they need a social consensus that is not present now. Therefore, and contrary to what it may seem, it is not argued that the BJR should be circumvented, but rather that coercion mechanisms can play a valuable role in driving a change in remuneration systems. In this case, clawback provisions would not be applicable because the remuneration had not been previously agreed, but the equivalent would be to claim for having been reckless, that is, for having ignored the factors that determine the remuneration.

Voice representing an "engagement" mechanism has been criticized for allegedly having "no teeth"; no tangible process, and thus as a greenwashing mechanism (Serafeim, 2021). Since the early 1990s, the exponential increase in green declarations among corporations has led to the mainstreaming of environmental disinformation (Furlow, 2010). The development of a Greenwashing Index to monitor the accuracy of the allegedly green information is a symbol of how common such a practice has become (Miller 2008, as cited in Furlow, 2010). Yet, emulating environmental responsiveness remains difficult for consumers to check.

In any case, there are real cases that should be considered. Thus, in 2016, ExxonMobil and Chevron refused to enforce shareholder resolutions that insisted on increased awareness regarding global warming. Less than a year later, shareholders made them integrate this consideration into their climate change strategies. Concretely, ESG issues were central in the proxy fight against ExxonMobil, which concluded in the election of three directors nominated by Engine No.1, a hedge fund activist with only 0.02% -which is relatively low for a successful proxy fight- (Grossman & Stronski, 2021). By appealing to the increasing consideration of ESG issues among institutional investors, its resolutions were backed by ISS and Glass Lewis proxy advisors, as well as by

CalPERS state public pension funds, among others (Grossman et al., 2022). Another example of this would be the case of another activist against Royal Dutch Shell, that stressed the need to break up the oil company so that one of them could have a strategy of investing in renewable and carbon-reduction energies (Grossman et al., 2022). This shows that, if corporations seek to be prepared for the impact ESG issues may have in their boards, regardless of whether they see ESG factors as important or not, they should carefully consider the role ESG is playing in turning proxy fights. There are other cases like the UK activist investor Bluebell Capital Partners has attempted to replace BlackRock CEO Larry Fink, which represents less than a 0,01% in the hedge funds' capital, over an apparent "hypocrisy" over the use of ESG factors (Masters, 2022).

Also, while owning very small stakes, Bluebell has a history of ousting big companies such as Richemont, Danone, and Solvay (Christie, 2022). Concretely, in 2021, this London-based activist hedge fund targeted Danone (Abboud, 2021). The activist campaign against Danone was substantially different from that of ExxonMobile as, unlike the latter, Danone had a history of promoting environmental issues (Abboud, 2020). However, both campaigns had similarities. On the one hand, activism against Danone provided evidence of the fact that ESG issues do not prevent CEOs from being targeted by activists who are under the impression that the corporation is financially underperforming (Christie, 2022). Furthermore, both Danone and ExxonMobile were targeted by hedge funds with minimal shareholdings in such large corporations, which necessarily had to have additional backing from institutional investors (The Economist, 2021, p.1).

As signaled by Christie (2022), opponents of ESG activists are likely to contend that ESG issues are being used to hide the actual financial motivations behind the campaigns of small activists. As large assets owners are under an increased societal pressure to support ESG campaigns, they may end up calling the shots in these issues, which remains subject to future streams of work. Beyond the motivation behind support for ESG issues, evidence from the US and UK shows that they are becoming central to proxy fights. Consequently, corporations should carefully consider the impact that ESG issues may have on their governance.

In Spain, for instance, on June 23, 2022, four independent directors were dismissed at an extraordinary shareholders' meeting at Indra (Bravo, 2022). The reform of the LSC and Directive (EU) 2017/828 have played a valuable role in forcing management entities to report their voting activity at shareholder meetings as of 2022. This has had an impact on shareholders meetings in Spain, favoring the start of activism among Spanish institutional investors -less than 40% used to vote, a smaller percentage compared to their English or French counterparts. Now, thanks to the shareholder engagement directive, whose purpose was to force institutional investors to exert their fiduciary duties,

Spanish management entities such as insurance companies and pension funds are increasing their activism (Triana & Prieto, 2022).

Additionally, the extraordinary shareholder meeting of Amadeus in 2021 rejected the *Informe Annual de Remuneraciones de Consejeros* ("IARC") with 62% against it (Corporance, 2021). Even if the approval of these kinds of resolutions is voluntary, the law establishes that if the rejection exceeds 50%, the company must present a new plan and shareholders closely follow the results of these votes, which are considered a symptom of the well-being of the company (Domínguez, 2022). Proof that voting against IARCs is a form of shareholder activism in our country is the fact that, after the rejection in 2021, Amadeus eliminated the discretion of the board to increase its bonus randomly by around 25-30% (Domínguez, 2022). Telefonica also found a 40% of rejection of its IARC (Corporance, 2021). In the US, JPMorgan shareholders voted against Jamie Dimon's extra bonus payment proposal (Goodkind, 2022). Even if these "say on pay" votes were non-binding, the voting results of remuneration can affect companies' reputation in dramatic ways.

To recap, in Spain, thanks to the SRDI and to the reform of the LSC, shareholder activism has increased in recent years. As reflected in this chapter, executive pay has been at the heart of the debate, with shareholders increasing their "voice" or engagement through "say on pay" resolutions. Therefore, it is natural that "say on climate" is playing and will continue to play a valuable role in conveying their concerns towards sustainability by claiming their decision-making rights inside organizations. This could be made, balancing better economic and more ethical concerns, through restorative inclusive dialogues at different levels.

4. CONCLUSIONS: ESG ISSUES, A TROJAN HORSE?

1. Preservation of the environment is a growing concern for society throughout the world, with increasing regulatory efforts.
2. Having been recognized as necessary actors to step towards this change, corporations are promoting environmental values internally, and changing the traditional "ultimate purpose" of corporations, as defended by Friedman (1970) fifty years ago.
3. Corporations internally promoting taking into account stakeholders – "stakeholderism"- in their decision-making processes have favored an evolution, from an apparent agency conflict to embracing the "shareholder welfare" approach. The recent ESG criteria is related to this approach.

4. Agency theory can be connected to stakeholderism theory, which would also help to minimize the corporate tendency to "short-termism", opening the way to introducing sustainability in the business strategy, as well as stakeholder involvement, perhaps via restorative dialogues in different steps of the decision, implementation and supervision processes. Additionally, sustainability is to be taken into account in risk management, enforcing risk-sharing mechanisms and realigning incentives to identify and address climate-related risks.
5. Sustainable finance as regards the decision-making processes of corporations, has three main tenets: taxonomy, transparency, and standards and ratings. Taxonomy has served to provide common definitions and to translate environmental performance into measurable financial variables. Transparency regulations, for example the recent CSRD, with its double materiality perspective, have managed to equate sustainability information with financial information, by establishing requirements to disclose it in the management report along with financial information. Restorative mechanisms, based on honesty and trust, might play a role in processes for that disclosure and understanding. Finally, and with regards to standards and ratings, they are the paradigm of the importance of having comparable disclosure standards on ESG issues between companies.
6. A classical problem regarding the introduction of environmental concerns in the internal processes of corporations is how to "measure" the sustainability and enforcement of those business practices. Restorative justice processes could help to integrate different expertise and knowledge.
7. The attainment of environmental objectives is measurable beyond the subjective social benefits that they may also encompass: what is relevant is to specify or put numbers to these "environmental objectives", that is, GHG emissions reduced with concrete percentages, but also listening to the voices that value that reduction and its impact in their lives.
8. Three courses of action are available in this regard: exit, coercion, and voice.
9. Exit encourages the shareholder's exit from the relationship, but divesting from "non- green" assets is not an appropriate approach for tackling climate change.
10. Coercion requires a consensus to change fiduciary duties of directors, which is not here yet and would seem disproportionate, at least to date. I discussed the duty of diligence, the duty of loyalty, as well as the BJR, across the different jurisdictions, and explained the possible

solutions to make it an appropriate course of action. To carry out those duties, specific independent restorative mechanisms can be used.

11. Voice mechanisms are the ones that seem most suitable, since they ensure that shareholders raise their voice in the decision, as they are tools that foster shareholder concerns for sustainability by their decision-making inside organizations. Within voice, I have made reference to the role financial intermediaries (banks, but also investment funds, credit rating agencies, stock agents, etc.) play in allowing sustainability concerns to be expressed, since they are in charge of identifying, measuring, and informing about risks associated with climate, and incorporate them on their investment decisions. Finding and conducting restorative dialogues with all these implicated agents is important.
12. With regards to the question of how fiduciary duties of investment managers and duties of institutional investors can encompass sustainability, two factors needed to be addressed: fighting short-termism and systematically considering ESG risks in the investment process through improving regulatory standards throughout the investment chain. Efforts in this direction would be the recent entry into force of "Green MIFID" or MIFID II, as well as ESMA's calls on evidence. Ethical evidence through dialogue should also be taken into account.
13. Regarding institutional investors, it is necessary that investors' and pension funds' fiduciary duties towards members and beneficiaries also reflect ESG risks as part of their investment decision-making processes. The SRD reforms to encourage shareholder engagement, including rules on institutional investors and asset managers, Art. 3g (1) (a) SRD, are on this line. Intermediaries are also obliged to convey to the corporation the information obtained from them in the exercise of their rights.
14. Mainly because of the free rider problem, only large institutional shareholders have the means and incentives to monitor and control directors. Therefore, the consensus in the literature seems to be that shareholders tend to be passive or "rationally apathetic" on voting issues. However, previous restorative dialogue showing the multiple and relevant interests at stake might help to avoid that apathy.
15. Proxy advisors are defined by Article 2(g) SRDII a agents who advise shareholders or institutional investors on voting policies. There is evidence that shareholder activism is led by proxy advisors, as shareholdings today are more concentrated in blocks owned by institutional investors. Proxy advisors could be trained in restorative principles in relation to environmental matters.

16. Shareholder activism enters into place when shareholders strive to induce changes in the corporation without a change in control. Compared to exit and coercion, this would be the least intrusive mechanism, as it is not about radical change – which requires a consensus among constituencies -, but rather about a change in which outcomes, such as reduced CO2 emissions, can be adequately quantified. However, there is evidence of underutilization of voice mechanisms.
17. Based on "say on pay" voting as a means for shareholders to gain weight within the incentive system, one of the best suited channels for shareholders to voice their concerns is the "say on climate" or remuneration. In 2022, ESG was the most frequently discussed topic during shareholder engagements that included company directors.
18. My proposed solution is to give shareholder concerns a voice through executive pay tied to ESG goals, thus appealing to incentives rather than to duties of managers. In Spain, the majority of the IBEX35 companies have already adopted ESG-tied remuneration schemes. However, recognition of green engagement can also be made beyond payment through direct contact and awareness of the positive impact of decisions in real lives and environments.
19. If proper ESG metrics are developed to link remuneration or acknowledgement to ESG, and incentives are still misaligned, reconceptualizing the BJR by introducing ESG issues may be an option. A breach of the BJR could be evidenced by having ignored the possibility of having a more balanced remuneration or positive feedback, and that more risks have been generated *a posteriori* for the company itself (for example, that certain corporation faces divestment and liability claims).
20. In relation to the importance of controlling greenwashing, the recent proxy fights over environmental issues in the US and the UK, as well as the rise of shareholder activism in Spain should be taken into account, particularly, the role played by IARCs in Spain as a form of shareholder activism.
21. Trying to introduce restorative justice within corporate law is not impossible, but certainly difficult because rationales are different. Environmental harms and their reparation cannot be envisaged just like risks to be compensated or avoidance to be remunerated. Only if aligned with common principles of real social corporate responsilibility, participation, transparency and voluntary due diligence, restorative justice might help to make real some theoretical principles in business life. One way for that is amplifying the restorative justice dialogue knowledge and possibilities to proxies and shareholeders.

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INTEGRATING RESTORATIVE JUSTICE INTO SUSTAINABLE NATURAL RESOURCES MANAGEMENT: FINDINGS FROM THE OMO-TURKANA CASE STUDY

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1. INTRODUCTION[1]

1.1. The WEFE Nexus

Sustainable development is a complex issue which necessitates the integration of different disciplines to ensure its successful implementation. The management of natural resources is one of the most pressing challenges facing our world: water, food and energy are basic human needs and are deeply connected elements. A symbiotic relationship exists between water and energy: water is a prerequisite for food production and is employed directly or indirectly in the vast majority of energy generation mechanisms. Furthermore, energy is indispensable to the distribution of water and the processing and transportation of food. Moreover, by-products of food production can be utilised for energy generation. Finally, it is crucial to recognise the pivotal role of ecosystem services in human well-being, a notion that has been extensively documented (Costanza et al., 1997). These vital services are frequently contingent upon water availability and human activities that exert a demand on the ecosystem. Environmental, social and economic perspectives must be carefully integrated to respond to existing challenges regarding natural resources and to mitigate potential future risks. The requirement for such a multi-faceted perspective is a widely accepted

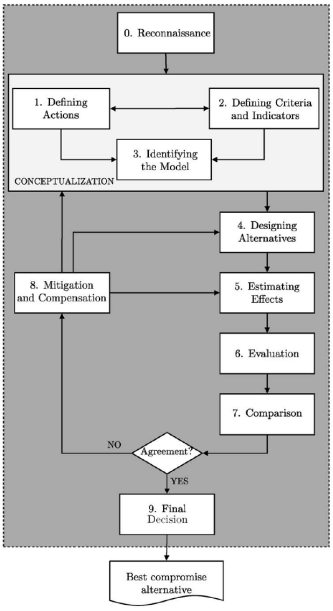
[1] Note: Some of the content in this chapter is adapted from an earlier (unpublished) work by the author, archived at https://hdl.handle.net/10589/165348 (access is restricted to members of the university).

concept within the field of environmental sciences and engineering: over the past two decades, the Water-Energy-Food-Ecosystem (WEFE) Nexus paradigm has emerged as a comprehensive and advanced framework for balancing competing interests on some of the most critical natural resources (Albrecht et al., 2018; Carmona-Moreno et al., 2019). This paradigm provides a transparent and systematic approach to decision-making by recognizing the intricate interdependencies between water, energy, food production and ecosystems. Acknowledging that actions undertaken in one sector can have significant effects on the others (e.g., the development of hydropower infrastructures can impact downstream ecosystems and food security), the Nexus paradigm would evaluate feasible management alternatives across a broad spectrum of indicators, thereby representing the different interests involved.

1.2. The PIP procedure in natural resources management

Participation is at the core of this process: all interested stakeholders should be involved from the outset of any project addressing the management of natural resources. In particular, we will focus on a state of the art, transparent and participatory approach developed to deal with the complex and integrated nature of the WEFE Nexus. This procedure is called PIP procedure (*Figure 1*), for Participatory and Integrated Planning procedure (Soncini-Sessa et al., 2007).

Figure 1: *Scheme representing the PIP procedure, as presented in Soncini-Sessa et al., 2007.*



The PIP provides the foundation for the resolution of complex issues in the WEFE Nexus. It suggests that stakeholders, decision-makers and analysts should collectively establish suitable criteria and indicators (phase 2 of the PIP procedure, as illustrated in *Figure 1*) to reflect the system performance in relation to each specific interest under various proposed management alternatives. The involvement of stakeholders in this phase is crucial for the effective incorporation of their perspectives into the definition of criteria and the construction of indicators. This collaborative approach ensures that the criteria and indicators accurately reflect stakeholders' mindsets and behaviours, establishing them as trusted tools that enhance subsequent phases of the PIP procedure, promote stakeholder involvement, and facilitate negotiation. In fact, phase 7 of the PIP procedure ("Comparison") involves a crucial negotiation process between stakeholders to identify a best compromise management alternative, informed by the preceding phases of the procedure and facilitated by the analyst. The analyst's role is to transparently provide performance indexes associated with the proposed alternatives to all stakeholders. The decision maker(s) are responsible for the ultimate decision, but this is facilitated and supported by the insights obtained from the preceding negotiation process (Soncini-Sessa et al., 2007). Free and transparent participation is critical in these two phases of the PIP procedure: (i) phase 2, to define criteria and indicators that appropriately describe system performances; and (ii) phase 7, to ensure a balanced negotiation process between stakeholders and the selection of a best compromise alternative.

However, in real-world scenarios, a wide range of distortions could compromise the fairness of the participation procedure. One example of this is the non-participation of one or more stakeholders in the PIP procedure, which would result in the un-representation (or underrepresentation) of one or more interests over the natural resources in the design of the indicators and in the negotiation process. The underlying reasons for non-complete representation of stakeholders can vary, including the presence of power asymmetries amongst relevant stakeholders or actual conflict. In the context of escalating conflicts over water resources, it is imperative to examine the implications of the WEFE Nexus not only in relation to the Sustainable Development Goals of Zero Hunger (SDG 2), Affordable and Clean Energy (SDG 7) and Responsible Consumption and Production (SDG 12), but also of Peace, Justice and Strong Institutions (SDG 16). To provide a framework for understanding the link between water and conflict dynamics, conflicts over water resources have been categorised based on the utilisation, impact, or effect of water in the conflict (UNESCO, 2019): (i) trigger, when there is a dispute over the control of water or water systems, or where economic or physical access to water, or scarcity of water, serves as an inciting factor for violence; (ii) weapon, in case the restriction of access to water resources or water systems is used as a weapon in a violent conflicts; (iii) casualty, in cases

when water resources or water systems that have been damaged or destroyed as a result of conflict, whether intentionally or incidentally. Conflicts and asymmetries have the capacity to influence the process, particularly in the two phases previously delineated, to the extent that a single stakeholder could possess the capability to exclude the others, thereby reducing the process to a single-objective perspective. Incomplete stakeholder representation has a detrimental effect on the WEFE approach and the PIP procedure itself. To mitigate such effects, the analyst could adopt some corrective actions: (i) In phase 2, criteria and indicators can be built from analogue case studies, or by capturing non-participating stakeholder's interest from evidence of its past behaviour; (ii) In phase 7, the analyst can display the effects of selected alternatives on missing stakeholder(s) together with the others during the negotiation, so that the decision maker is still informed of the impacts on all stakeholders when selecting the best compromise alternative. In particularly complex cases, such as the one that will be presented in this chapter, the decision maker (e.g., the local or national government body) may also act as a stakeholder (e.g., through its state agencies or state-owned enterprises), thereby introducing new and more complex challenges to the effective application of the PIP procedure. These challenges necessitate a collaborative approach with other disciplines to ensure their successful resolution.

2. THE OMO-TURKANA CASE STUDY

2.1. The DAFNE project

The DAFNE (Decision Analytic Framework to explore the water-energy-food NExus in complex transboundary water resource systems of fast developing countries) project was a EU-funded initiative that sought to establish a decision-analytic framework (DAF) for participatory and integrated planning in transboundary river basins in Sub-Saharan Africa. Starting in 2016 and continuing until 2020, it was funded under the "Horizon 2020" EU Research and Innovation programme. The DAFNE methodology followed the WEFE Nexus paradigm in the exploration of alternative planning and management solutions for natural resources. The DAFNE initiative engaged stakeholders from both the public and private sectors in Europe and Africa, integrating research across a wide range of disciplines, including engineering, environmental sciences, social sciences, economics, and law (DAFNE, 2017). Within the project, two aspects were identified as crucial for supporting adaptation in rapidly developing economies, such as those of African river basins, faced with rapid population growth and climate change. Firstly, a better understanding of the WEFE Nexus in complex and transboundary water systems that are under significant pressure from human activities was developed. Secondly, innovative management

approaches were developed and adopted. The overarching objective of the project was to optimise the utilisation of natural resources while ensuring both profitability and equity, avoiding transgressing environmental limits or creating societal and/or stakeholder conflicts (DAFNE, 2017). DAFNE applied its novel approach in two illustrative case studies, the Omo-Turkana and Zambezi river basins in Sub-Saharan Africa, where important hydropower expansion projects and major development schemes are being implemented. Both basins are transboundary, which adds complexity to their management as water needs to be shared between stakeholders belonging to different countries and cooperation, little or absent prior to the project, can be hard to achieve.

The project's modelling core is constituted by the Decision-Analytical Framework (DAF), a quantitative assessment instrument that facilitates understanding of the impact of alternative planning options on a wide range of heterogeneous interests that are often competing amongst each other. The DAF framework is a simulation of the complexity of relationships between actions and their impact on natural and socio-economic systems, and it ultimately quantifies the effects of alternative planning options. It fully describes actions and indicators in the system, allowing stakeholders to propose future alternative pathways. These pathways are defined by a set of actions for all sectors of the WEFE Nexus and lead to eventual solutions to resource management issues. The results should enable policymakers to make an exhaustive assessment of the anticipated effects of expanding the capacity for energy and food production and eventually take more informed, balanced and fair decisions (DAFNE, 2018a; DAFNE, 2018b; DAFNE, 2018c; DAFNE, 2019a).

2.2. The Omo-Turkana river basin

The Omo-Turkana Basin, which will be the focus of this chapter, is located across Ethiopia and Kenya, along the lower course of the river Omo and the shores of Lake Turkana (Figure 2). It encompasses five counties in Kenya and two regions in Ethiopia. The Omo River, the main affluent of Lake Turkana, is the seventh largest river in Ethiopia and it empties through its delta in Lake Turkana in Kenya after a course of 760 km. The Omo River is formed by the confluence of the Gibe and Wabe rivers in Ethiopia and its hydrological basin, the Omo-Gibe basin (also known as the Omo basin), covers an area of approximately 79,000 km^2. The topography surrounding the river is characterised by a transition from the Ethiopian highlands to a vast floodplain, where the river first meanders, then branches into a delta (Avery, 2012). Lake Turkana is the largest lake in Kenya and the fourth largest lake in Africa, with a surface area of 6,750 km^2 and an average depth of 30 meters.. It is the world's largest desert lake, as well as an endorheic lake, meaning that water only leaves it through evaporation. The catchment area of the lake is 145,500 km^2, extending across Ethiopia and

Kenya, with minimal encroachment in South Sudan and Uganda (Carr, 2012) . The lake's very existence is contingent on the influx of water from the Ethiopian highlands through the Omo River, which contributes 80% of the lake's annual inflow (Avery, 2010). This is due to the fact that local annual rainfall is 10 times smaller than the annual evaporation losses (Carr, 2012), resulting from the hot, dry climatic conditions experienced by the region. The Omo floods, which bring nutrients to the surface, contribute to the proliferation of fish populations, and fluctuations in the surface level enable more effective spawning (Ojwang, 2007; Avery, 2012). However, as one moves away from the lake's shoreline, a dramatic change in its morphology becomes evident. The soil, unsaturated with moisture and exposed to elevated temperatures, undergoes desiccation, resulting in the presence of a hot desert.

The region is inhabited by a plurality of culturally divergent tribal groups (as shown in *Figure 2*), with a total population of around 550,000 people. The majority of these groups are agro-pastoralist nomads or semi-nomads, relying on the breeding and trade of livestock (predominantly dairy and beef cattle, goats, and poultry) and flood-recession agriculture for their subsistence. This specific flood-based farming system is characterized by agricultural practices that take advantage of the fertile soil and moisture left behind following the retreat of floodwaters, when farmers sow small fields in locations along the river course, typically in the meanders but also in temporary wetlands. It has been estimated that 67,000 people in the region are to some extent dependent on this agricultural practice, with the actual figure potentially being higher due to incomplete population data (SOGREAH, 2010; Carr, 2012). Tribes share the same resources and engage in active and diverse interactions, ranging from trade to armed conflict, concerning water and land rights. Within communities, organised in large family groups, there is a clear division of labour between men and women, who are assigned specific activities. The management of livestock (ovine and bovine) – involving the spending of several days away from the village for trading and herding – is an exclusive responsibility of the male population. The female population instead engages in flood-recession agriculture near the villages, while also providing childcare. The significance of livestock in the context of the Omo Valley is underscored by its role in determining social status and economic power, with the result that women frequently lack a voice in significant decisions. The indigenous tribes of the lower Omo valley have historically maintained a symbiotic relationship with their environment, utilising the Omo River as the primary source of water for both humans and livestock. These communities typically adopt a nomadic or semi-nomadic lifestyle, migrating to and from the shores of Lake Turkana to ensure the availability of water and grazing land for their livestock and to access optimal agricultural areas. The identification of suitable locations is a matter of expertise for indigenous communities, and even for nomadic agro-

pastoral tribes, settlements are located in close proximity to these sites during the cultivation period. Overall mobility patterns are organised seasonally according to water and pasture availability (Gabbert et al., 2020; Carr, 2012).

Figure 2: *The Omo-Turkana basin area, as described by Carr (2012). Lake Turkana and its affluences, including the main one, the Omo River, are clearly visible. The current river delta is indicated, on the border between Ethiopia and Kenya. The names in bold indicate the approximate location of the main indigenous tribes in the region.*

2.3. Recent developments in the basin

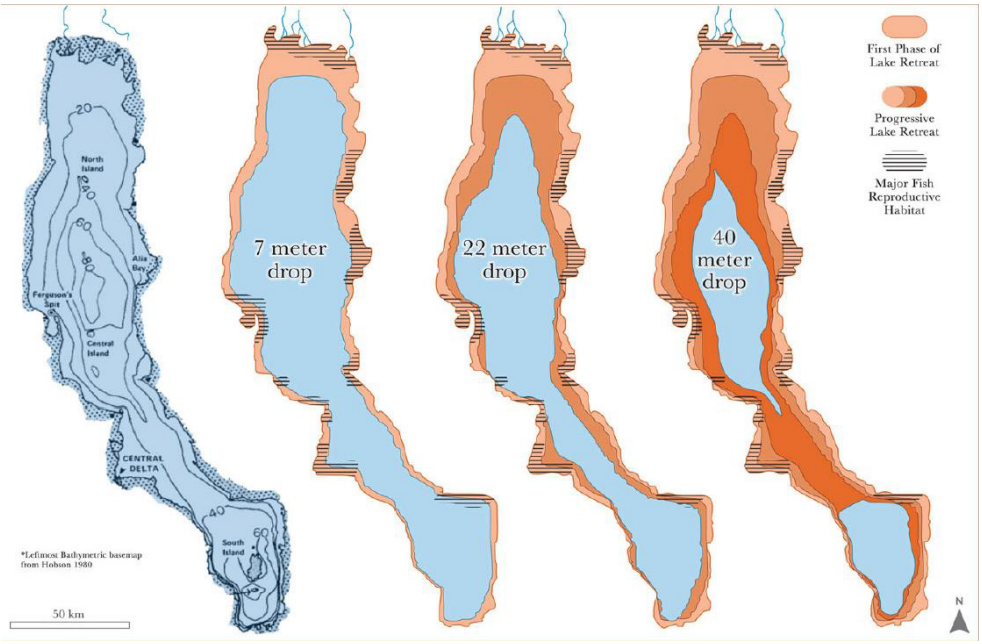
The basin is undergoing a period of rapid environmental and social changes, including: (i) increase in human and livestock populations, (ii) construction of hydropower infrastructures, (iii) creation of new agricultural districts and (iv) climate change. Reports revealed that the population of the lower Omo area in Ethiopia was 173,000 in 2010, and that of the Turkana district in Kenya was 652,000 in 2009. Compared with previous census data, these figures demonstrate a substantial increase in population, with a 4-fold increase over the previous 40 years. Population growth in such a challenging environment exacerbates inter-community conflicts over resources such as food, land ownership and water

rights (Snyder, 2006; Aemun et al., 2008; Watson et al., 2008). Since 1996, the Ethiopian government has been pursuing the exploitation of the hydropower potential of the Omo River (Woodroofe, 1996). Three hydropower plants have been constructed: Gibe I, II and III. The latter is the most substantial: completed in 2015, with an installed capacity of 1.9 GW and reservoir of 14 km^3, Gibe III stands out as one of the largest hydropower projects of the continent (IEA, 2019). All hydropower plants were commissioned by the Ethiopian Electric Power Corporation to the Italian company Salini-Impregilo (now renamed Webuild). Ethiopia's ambitious development plans also included large-scale irrigated agriculture expansion in various locations throughout the country, including the Omo basin, which was developed by the state-owned Sugar Corporation. A 2,450 km^2-wide agriculture district has been planned for sugar cane cultivation along the Omo River, across the former Omo National Park and Tama Community Conservation Area, under the Kuraz Sugar Development Project. Subsequent government statements suggested a contraction in the project's scope, with reports indicating a reduction to approximately 1,100 km^2 (Human Rights Watch, 2012). Nonetheless, as evidenced by satellite imagery captured in April 2023, an area of 330 km^2 was actively cultivated, with an additional 1,450 km^2 of land having been cleared and prepared for agricultural use. The Omo-Turkana basin is experiencing significant changes in its climatic conditions, with a notable increase in temperatures boosting the already significant levels of evaporation from Lake Turkana. This phenomenon, estimated to be between 2,200 and 2,400 millimetres per year (Velpuri et al., 2012), has a substantial impact on the water balance of the region. This has resulted in a decline in lake levels, an increase in variability in lake levels, an increase in lake salinity, and a decrease in dissolved oxygen concentration (Avery, 2012).

The infrastructural development of the region has the potential to radically modify Omo River streamflow and subsequent inflow to Lake Turkana. The filling of the Gibe III dam in 2015 was associated with a 2-metre drop in the water level of Lake Turkana. While the reduction in inflow resulting from reservoir activity was largely limited to that period, the long-lasting water deficit downstream is primarily attributable to the water abstraction activities of the newly established agricultural sector. The scenario associated with the establishment of the full 2,450 km^2 planned agricultural districts is predicted to result in a minimum 20-metre drop in lake level (*Figure 3*), which would have profound consequences for the region, including the loss of critical aquatic habitats, reduced water availability for local communities, and significant disruptions to local livelihoods dependent on fishing, agriculture, and ecosystem services (Avery, 2012; Carr 2017). Indigenous tribes have been disproportionately affected by these changes (Hodbod et al., 2019). The flood recession agriculture practices have been heavily damaged by the disruption of natural variability in the Omo River's flow, consequent to absent or

inadequate artificial releases from the dam and excessive water withdrawals for large-scale agricultural projects (The Oakland Institute, 2013; Survival International, 2016). The establishment of these agricultural districts has also resulted in the expropriation of ancestral lands from thousands of indigenous people, frequently without their consent or adequate compensation. This has been accompanied by reports of threats and mistreatment by authorities (Carr, 2012; Human Rights Watch, 2012; The Oakland Institute, 2013). This resulted in increased competition over grazing lands, diminished livestock herds and reduced fisheries productivity, as the aforementioned studies anticipated just a few years earlier. The challenges already being faced by the local population in achieving adequate water, food and health security were further compounded: as tribal groups were forced to migrate from their usual territories, conflicts between tribes intensified, facilitated by the high arms availability in the region (Carr, 2012; Human Rights Watch, 2012; The Oakland Institute, 2013; Survival International, 2016). The Omo-Turkana area is now highly dependent on food aid, and is also experiencing a bitter phenomenon as food aid causes additional immigration from other rural areas nearby, further increasing anthropogenic pressure.

Figure 3: *Predicted future progressive retreat of Lake Turkana caused by reduced inflow from Omo River (as in Carr, 2017). Note that beyond the 22-meter drop in the water level the lake splits into two smaller lakes.*



2.4. Barriers to the application of the PIP procedure

For the Omo-Turkana case study, the DAFNE project identified stakeholders and fostered cooperation between them and project researchers, in accordance with the PIP procedure. The objective of this was to gain a better understanding of the impacts of water resource exploitation and to identify pathways towards sustainable development. Regular meetings called Negotiation Simulation Lab (NSL) were held, where stakeholders gathered to share their perspectives and their interests over the water resources management, and where negotiation processes over alternative scenarios and pathways occurred. A key point of these sessions was the identification of the options to be considered (decisions) and the metrics used to quantify impacts (indicators). The meetings also helped to build the capacity of stakeholders to visualize management issues and their solutions in the basin. Information regarding tangible impacts was disseminated by project stakeholders, thereby illustrating shared concerns and divergent perspectives on basin state and development. From the Kenyan perspective, dam construction may result in increased poverty due to heightened water scarcity on the Kenyan side. In contrast, Ethiopian stakeholders emphasised the positive impact of the dam, including its role in regulating floods and ensuring consistent water availability throughout the downstream system. They identified that this would have a beneficial effect on food production, and consequently on social, demographic and cultural (SDC) issues. It was noted that a number of SDC issues were shared between the two countries, including poverty, migration, health, conflict, urbanisation and food security. The interviews facilitated the acquisition of pivotal information, which was instrumental in comprehending the values underpinning the stakeholders' assessments. Subsequently, DAFNE researchers devised sectoral tables for candidate actions and indicators, which were subsequently presented to the stakeholders for validation. The comprehensive set of evaluation indicators and actions identified through the participatory process was analysed to identify a subset of design indicators. These indicators were then used in the Decision Analytic Framework (DAF) to capture the main components of the WEFE Nexus, as well as for the design of efficient development pathways (DAFNE, 2017; DAFNE, 2018a; DAFNE, 2018d; DAFNE, 2019b; DAFNE, 2019a). However, the involvement of a delegation representing the indigenous tribal groups was not possible due to ongoing tension in the region between these groups and the Ethiopian authorities. Consequently, the indicator representing recession agriculture and the objective function expressing local farmers' interest over this activity could not be based on their information and feedback. As no specific indicators for flood-recession agriculture were found in literature for flood-recession agriculture, a novel Area-Based Recession (ABR) indicator was developed. The ABR indicator sought to capture the existing physical link between the area available for flood-recession agriculture and river streamflow

by combining data from satellite imagery, used for the identification of such plots, and hydrological modelling, which produced simulated river streamflow values. As the Ethiopian government (the decision maker) acted also as stakeholder in the project, through its Ministry of Water, Irrigation and Energy, the state-owned Ethiopian Sugar Corporation and Ethiopian Electric Power Company (EEPCo), there were concerns over possible bias being introduced in the PIP procedure, in the consideration of the interest of the indigenous communities. In the following section we present a framework for the application of restorative justice and responsive regulation, in order to facilitate a correct application of the PIP procedure and a full stakeholder participation.

3.. POTENTIAL APPLICATION OF RESTORATIVE JUSTICE

3.1. Litigation over the Gibe III dam project

The recent state-sponsored development in the Omo-Turkana basin has given rise to a number of concerns regarding the overall sustainability of the projects, as well as the potential for human rights violations. As described in Avery (2012), the construction of the Gibe III dam was begun without an Environmental and Social Impact Assessment (ESIA) study, which instead was commissioned by the Ethiopian Government's Environmental Protection Agency (EPA) only in 2009, three years after construction works had begun (EEPCO et al., 2009). Notably, the ESIA was not independently carried out, as the company in charge of it was selected by the constructor Salini-Impregilo. Moreover, the ESIA didn't assess the impacts of the dam on Lake Turkana, nor did it analyse impacts deriving from the planned irrigated agricultural districts, a significant departure from standard practice which calls into question its reliability. In 2016, NGO Survival International, representing the indigenous peoples of the Omo-Turkana region, initiated a formal complaint against Salini-Impregilo before the Italian OECD National Contact Point (NCP), highlighting alleged breaches of the OECD Guidelines for Multinational Enterprises (See section 3.3). The complaint alleged that: (i) the communities had not been adequately consulted nor had they been asked for their prior consent on the project, thus violating their right to self-determination; (ii) the communities had partly lost and were at risk of losing their basic livelihoods, previously guaranteed by the annual flooding of the Omo River; (iii) the communities had been denied the right to development because the project had not undergone a proper environmental impact assessment and an adequate consultation process had not been carried out. Salini-Impregilo refuted the allegations, asserting its adherence to both Ethiopian and international law. Subsequent to an initial assessment, the NCP determined that the case warranted further scrutiny. However, this practice was

brought to a halt when Survival opted against signing the terms of reference for the conciliation procedure, which included a non-disclosure agreement that was to be in effect during and following the conciliation procedure. Survival contended that maintaining confidentiality towards third parties would hinder its capacity to apprise the represented populations of the procedural developments and outcomes. In its concluding statement, the NCP observed that the violations alleged by Survival, pertaining to the right of self-determination of indigenous peoples and the right to development, were not to be subjected to further examination. The request by Survival for a new ESIA to evaluate the actual impacts of the infrastructures (Gibe and irrigation districts) on the Omo basin was dismissed, as it was deemed to be "obviously too late" (Italian NCP, 2016).

3.2. Restorative justice and responsive regulation in the context of natural resources management

The principles of restorative justice have been applied to the study of environmental crimes, creating a fairly novel field of application (Boyd, 2008; Stark; White, 2017). However, the number of studies published on this topic is limited, and only a few of these refer to existing case studies. The majority of restorative practices are applied in cases involving pollution, land clearing, and the harm inflicted upon protected species or their habitats (Strickland & Miller, 2007; White, 2017; Forti et al., 2018; Dore & Endangered Wildlife Trust, 2018). A few studies proposed the application of restorative justice to climate-related issues (Robinson & Carlson, 2021; Correia, 2024; See, 2024). The scientific study most relevant to this work is the project "Victims and Corporations" due to its comprehensiveness and the significance of the case studies it contains. This project was initiated in 2014 with the aim of implementing the Victims Directive (Directive 2012/29/EU), which stipulates the rights, support and protection for victims of crimes, and their participation in criminal proceedings. The project's primary focus is corporate violence, defined as criminal offences committed by corporations or their employees in pursuit of the organisation's objectives, resulting in harm to physical persons (Clinard, 2007). Case studies from a number of countries, including 14 "leading cases" ranging from the environmental field (e.g., Eternit Casale Monferrato, Italy), to disasters (e.g., Gas Explosion in Ghislenghien, Belgium), to pharmaceutical and medical devices (e.g., UB Plasma, Germany), have been examined. The findings of the project suggest that restorative justice's focus on empowering victims, seeking restoration through the active participation of the offender, creating opportunities to discuss an injustice and making amends, seems particularly suited to also deal with cases of natural resource mismanagement (Braithwaite, 2002; Braithwaite, 2004; Van Ness & Strong, 2010). Moreover,

restorative justice principles are closely aligned with participatory processes like the PIP procedure: empowering communities, democratising the decision-making process and preventing conflict are objectives that both approaches seek to achieve (Vasilescu, 2022). Analysing the outcomes of the "Victims and Corporations" project has further contributed to identifying the challenges and opportunities most pertinent to applying restorative justice in cases of natural resource management:

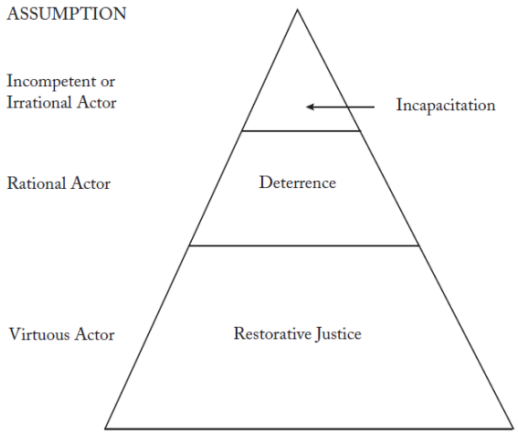
- complex victimisation processes are evident in corporate crimes, often unfolding over an extended period of time or without exhibiting a clear cause-and-effect relationship (e.g., for extended latency periods). It is important to note that corporate crime falls under the umbrella of so-called "crimes of the powerful" (White, 2017), which are characterised by a strong resistance to criminalisation. This often results in a hindrance to the recognition of the role of victims;
- in the context of numerous human rights bodies, both judicial and quasi-judicial, there has been a growing focus on ensuring that victims have the opportunity to make a claim before the Court, seeking redress or reparation;
- despite the fact that such cases often impact large communities, victims often face significant challenges due to power and information asymmetries, or their dependence on the offender (e.g., employees of a polluting firm). This vulnerability significantly hinders their access to justice and fair judicial decisions. Appropriate protection measures should be implemented to prevent the risk of secondary victimisation, intimidation, retaliation, and damage to privacy;
- public opinion and media participation can serve as instruments of pressure on corporations, in terms of reputation loss (or gain). In many cases, social or judicial pressure is necessary to compel corporations to engage in a restorative justice process. The propensity for corporations to engage in restorative justice processes may be influenced by self-interest, with financially advantageous negotiations with victims being a potential incentive. However, the prevailing academic consensus suggests that the primary motivational factor for corporations is the preservation of their reputation and public image (Boyd, 2008; Braithwaite, 2002). A significant challenge in implementing restorative justice for offenders is the facilitation of open, non-defensive communication;
- in order to adapt restorative justice to address corporate crime, there is a necessity to modify its conceptualisations of offenders, victims, harm, crime and community. Furthermore, the adoption of models that engage all stakeholders in practice is imperative (Mazzucato, 2017);

- in adopting a preventive strategy that can recognise the risks in a timely manner, it is crucial to pay due attention to every warning sign emanating from scientific studies. The role of non-governmental organisations (NGOs), trade unions and other advocacy entities in "blowing the whistle" is also of significant importance (Forti et al., 2018).

Other relevant examples were the Terra Nova FPSO oil spill within Canadian jurisdiction and the restorative justice conferencing practices in New Zealand. The first one revealed the difficulties of issuing probation orders for companies due to the lack of a legal framework accommodating restorative justice sentences, emphasizing the need to amend outdated legislative acts (Strickland & Miller., 2007). In the second example, regarding a number of cases in the New Zealand environmental offending context, restorative conferences were convened (sometimes involving indigenous representatives), with the offender agreeing to the process as an alternative to prosecution. The conference could result in an agreement on environmental restoration costs, which were borne by the offender, along with a public media statement acknowledging the wrongdoing. Notably, representative authorities participated in the process to advocate for the harmed environment, and criminal charges remained in place until the agreement was fully implemented, ensuring timely compliance (Hamilton, 2021). It is worth noting that successful applications of restorative justice's principles between indigenous tribes have been reported in this very region in the past (Ogot et al., 2023; Aurah, 2018). These events included meetings between conflicting communities based on traditional conflict resolution practices, where the elders of the two communities met in circles to resolve the conflict. One particular mediation in 2002, supported by local religious authorities and aid agencies, reportedly ended a series of violent raids and counter-raids between the Turkana and the Dassanech tribes and fostered a peace agreement that lasted for over two years.

In order to establish a framework for the application of restorative justice for this case study, an examination of the concept of responsive regulation, as defined in Ayres & Braithwaite (1992), was conducted. The fundamental notion of responsive regulation is that governments should be responsive to the conduct of those they seek to regulate in deciding how to modulate the force of their intervention. In particular, law enforcers are expected to demonstrate a high level of responsiveness to the extent to which offenders (citizens or corporations) are regulating their own conduct, prior to any decision being taken regarding the escalation of intervention. The Regulatory Pyramid constitutes an attempt to address the dilemma of determining the appropriate point at which to resort to punishment and at which point to employ persuasion (*Figure 4*).

Figure 4: *Scheme of a typical responsive regulation pyramid as in Braithwaite (2002). Restorative justice constitutes the base, representing the primary tool to address the case. In the event that a restorative process cannot reach a positive outcome, the pyramid is scaled upwards in order to increase enforcement, towards deterrence and incapacitation measures.*



At the base of the pyramid is the most restorative dialogue-based approach it can be crafted for securing compliance with a just law. Restorative Justice practices are well indicated to be at the base of the pyramid. As we move up, more and more demanding and punitive interventions are involved. The fundamental premise of the pyramid is that the presumption should invariably be to initiate proceedings at the base of the pyramid, subsequently escalating to more punitive approaches only in instances where dialogue has failed, and finally, resorting to the most punitive measures only when the more modest forms of punishment have been unsuccessful. In contrast with retributive regulation, this methodology is characterised by its dynamism: it is not specified in advance which are the types of matters that should be dealt with at the base of the pyramid, or which are the more serious ones that should be in the middle or at the peak. The pyramid paradigm posits that unless lawbreaking is addressed and resolved through an agreed action plan near the base of the pyramid (the base representing a low enforcement, not a weak punishment), the law will be enforced much more severely higher up, with increasingly coercive measures. It must be clear for the offender that law enforcement agencies are unequivocally prepared to utilise the full extent of their authority. Very few criminal offenders who participate in restorative justice processes would be there absent a certain amount of coercion. Without their detection and/or arrest, without the spectre of the alternative of a criminal trial, they simply would not cooperate with a process that puts their behaviour under

public scrutiny. Under these conditions, it becomes convenient for the rational offender to get to the punishment through a mediated process closer to the base of the pyramid (e.g. for corporations, as by agreeing to payouts to victims, community service). Another pyramid completes the integrated policy scheme for Responsive Regulation: the pyramid of supports. In addition to the capacity for law enforcement, the public regulator is also empowered to offer assistance to individuals and corporations, praising and rewarding their efforts to comply to the law. This should apply also to offenders, if they become actively engaged in strengthening their observation of the law. The aim is to proceed towards a crime prevention meta-strategy based on the theory of minimally sufficient deterrence, described by Braithwaite (2018) with its seven principles:

1. Escalate enforcement. Display intent to progressively escalate a responsive enforcement pyramid that involves progressive escalation of sanctions for wrongdoing and support for social responsibility.
2. Inexorability. Pursue inexorable consistency of detection of predatory crime. Communicate inexorable community commitment to stick with social support for those struggling with problems of lawbreaking until the problems are fixed.
3. Escalate social support. With repeated offending, increase social support. Even when there is escalation to a last resort of severe incapacitation, escalate social support further. Keep escalating social support until desistance is consolidated.
4. Sharpen the Sword of Damocles. Cultivate the perception that "Trouble hangs inexorably over my head; they want to support me to avert it."
5. Dynamic concentration of deterrence. Focus deterrence on lines that should never be crossed after an announcement date. Then progressively lift that line, raising our expectations of socially responsible citizens.
6. Community engagement. Engage the community with offenders in widening restorative conversations that educate in the shamefulness of criminal predation for the many who participate in the conversations. Avert stigmatization.
7. Modesty. Settle for the modest general deterrence delivered by this shamefulness and a minimal number of cases that escalate to-ward the peak of the enforcement pyramid.

A practical example of the application of responsive regulation can be observed in the Environmental Protection Authority (EPA) of South Australia, which serves as the state's principal environmental regulatory agency and integrates a responsive regulatory approach into its case management practices. A range of tools is employed, with the full enforcement force being used only in

cases of clear criminal behaviour. The Authority's approach is characterised by its support for and facilitation of compliance, with a focus on educational initiatives for minor infringements. The Authority's regulatory actions are intended to instil a sense of responsibility in those who transgress, emphasising the importance of environmental protection and compliance (South Australian EPA, 2013).

3.3. The business and human rights legal framework in Africa

A first step, consistent with the principles of responsive regulation, involves the assessment of the scope and limitations of the existing legal frameworks within the business and human rights context. A particular focus is given to the subject of corporate behaviour and social responsibility. The "Declaration on the Rights of Indigenous Peoples" was adopted by the UN General Assembly in 2007 and is the most comprehensive document on human rights for indigenous peoples, although it is not legally binding (UN General Assembly, 2007). The document explicitly states the principle of free, prior and informed consent, which is to be obtained from indigenous peoples in a cooperative process for any legislative or administrative measure that may affect them (Art. 19). Furthermore, the Declaration stipulates the right of redress and restitution for instances where indigenous peoples' property is expropriated without their consent (Art. 11, 2).

The foundational treaty for the protection of human rights on the African continent is the "African Charter on Human and Peoples' Rights", which was adopted in 1981 and came into force in 1986. A distinctive characteristic of the Charter is its recognition of human rights not only to individuals, but also to peoples and communities (OAU, 1981). The right of all individuals to access public property and services is recognised (Art. 13). In the case of peoples, the Charter guarantees their right of self-determination, through the pursuit of freely-chosen policies for economic and social development (Art. 20). It also states their right to dispose of their natural resources, as well as the right for compensation in case of deprivation (Art. 21). Ratified by both Kenya and Ethiopia, by virtue of article 30 of the Charter, an African Commission on Human and Peoples' Rights (ACHPR) was established. The primary function of the Commission is to promote and protect human and peoples' rights among member states. Following the receipt and examination of a case, the Commission has the capacity to facilitate an amicable resolution. In instances where such a resolution is not feasible, the Commission formulates reports that contain recommendations for the concerned states, although these recommendations are not legally binding (Art. 52). In emergency situations, the Commission may request that a member state refrain from taking any action regarding a pending case until the Commission has delivered its final decision on the matter. The Commission is organised into working groups

according to subject matter. The working group with responsibility for cases similar to the one illustrated in this chapter is the "Working Group on Extractive Industries, Environment and Human Rights Violations". The African Charter has also had a pivotal role in the establishment of the African Court on Human and Peoples' Rights (AfCHPR). The Court possesses enforcement powers over states that have ratified its Protocol and recognised its competence (State Parties). However, it should be noted that at the time of writing (December 2024), Ethiopia is not among these states. The Commission has the capacity to appeal to the Court, as well as to State Parties, NGOs and individuals. In accordance with the provisions of the Charter, the Court may attempt to reach an amicable settlement between the parties.

The United Nations "Protect, Respect and Remedy" Framework elucidates the roles and responsibilities of states, companies and other social actors in the business and human rights sphere. The Framework is founded on three pillars: the state duty to protect against human rights abuses by third parties, the corporate responsibility to respect human rights, and greater access by victims to effective remedy. The Framework is implemented by a set of specific guidelines, called Guiding Principles on Business and Human Rights (UN OHCHR, 2011), developed by the Special Representative of the Secretary-General. The Guiding Principles apply to all States and business enterprises. Although not legally binding, they set a number of policy commitments. Among these commitments, it is affirmed that corporations have the responsibility to address adverse human rights impacts in which they are involved, even if they have not contributed to those impacts. This commitment requires the taking of measures for their prevention, mitigation and remediation (Guideline 13). Furthermore, it is recommended that states consider augmenting their efforts to protect against human rights abuses by business enterprises that are state-owned or controlled (Guideline 4). In the context of business enterprises, a human rights due diligence is recommended, encompassing all impacts of operations, even if only linked to them, and incorporating a recursive temporal dimension (Guideline 17). Guideline 22 further stipulates that corporations which have identified the occurrence of adverse impacts should provide for their remediation or cooperate in this process. The Guiding Principles were endorsed by the UN Human Rights Council in 2011.

The Addis Ababa Action Agenda (AAAA) was presented as the outcome of the Third International Conference on Financing for Development (FFD, 2015), and was endorsed by the UN General Assembly in 2015 (UN General Assembly, 2015). Both Kenya and Ethiopia signed the AAAA. The document acknowledges the specific needs of indigenous communities and calls upon countries to provide them with adequate social protection (Art. 12). The right of indigenous peoples to maintain, control, protect and develop their

cultural expressions is affirmed (Art. 117). Furthermore, adherent countries have committed to ensuring greater transparency regarding financing for development through the implementation of a proper and effective follow-up mechanism (Art. 127) and the regular publication of information pertaining to development projects. The Global Infrastructure Forum was established subsequent to the AAAA, constituting a consortium of multilateral development banks (MDBs) that aspires to enhance coordination among its constituents and their development partners, with the objective of facilitating the advancement of sustainable, accessible, resilient, and quality infrastructure for developing countries. Its primary focus is on the identification of strategies through which governments and their collaborative partners can enhance the attraction of resources for infrastructure development. The Industrial and Commercial Bank of China, that funded both Gibe III and Kuraz development projects, is a partner of the Global Infrastructure Forum. It has been observed that the same partners appear to belong also to a parallel organisation: The Global Infrastructure Facility, which is funded by Australia, Canada, China, Japan, Singapore and the World Bank, has a more extensive scope and does not refer to the AAAA in its mission statement.

The OECD Guidelines for Multinational Enterprises are a set of recommendations that governments have issued to multinational enterprises operating in or from adhering countries. Inspired by the UN Guiding Principles, the Guidelines provide principles and standards for responsible business conduct in a global context (OECD, 2011). They form part of the OECD Recommendations, which are not legally binding but which, through their implementation, gain great moral force as they represent the political will of adhering countries. Adherents are expected to implement these recommendations to the fullest extent possible. Specific instances can be presented before the National Point of Contact (NPC). In Guideline II.12, enterprises are strongly encouraged to prevent or mitigate the impacts associated with their operations, regardless of their contribution level, thereby adopting an integrated approach. It is expected that Adherents will implement a Recommendation with the utmost diligence. Specific instances can be presented before the National Point of Contact (NPC), as outlined in Chapter 2.3. In Guideline II.12, enterprises are unequivocally requested to prevent or mitigate impacts associated with their operations, irrespective of whether they are contributing. This approach is similarly sought for human rights, as the impacts are to be prevented or mitigated even in cases of operations exclusively linked to them (Guideline IV.3). The impacts on health, safety and the environment are to be continuously assessed over the life-cycle of the project, with the objectives periodically reviewed (Guidelines VI.1-3). Salini-Impregilo publicly states its commitment to operating in compliance with the OECD Guidelines for Multinational Enterprises.

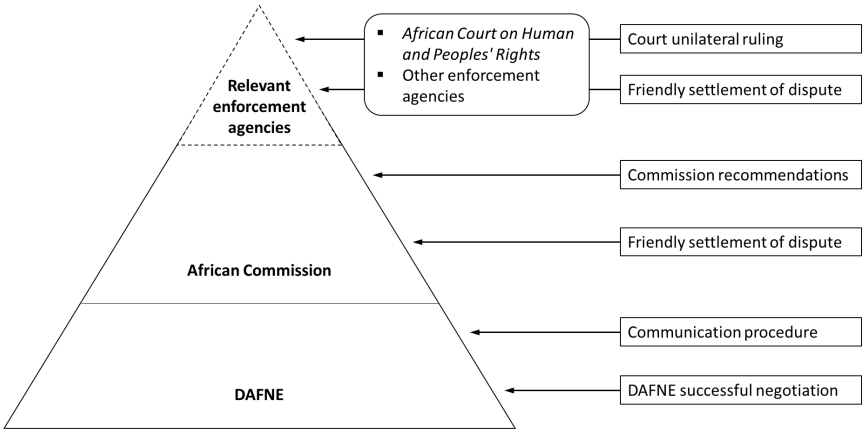
As part of the EU's 2011-14 strategy for Corporate Social Responsibility, the European Directive "on disclosure of non-financial and diversity information by certain large undertakings and groups" (Directive 2014/95/EU) asserts the primacy of public concern over the legitimate interests of large companies in maintaining non-financial information in a reserved state. The directive stipulates the disclosure of environmental impacts, respect for human rights and social concerns (Art. 6). Member states are provided with guidelines on the terms of disclosure. For Italy, the national transposition of the Directive (D.Lgs. 254/2016) specified which corporations are required to disclose non-financial information and the subjects covered in it, reporting on a yearly basis. Exemptions are granted to businesses with net revenue lower than 40,000,000 € and that are not listed on the stock market (Art. 1-2). Since 2017, Salini-Impregilo has been redacting a non-financial disclosure ("Dichiarazione Consolidata di Carattere Non Finanziario" - DNCF). The document provides information on a range of issues, including labour conditions, safety policies, transparency and more (Salini-Impregilo, 2019; Webuild, 2022). It also includes some information about environmental impacts and the measures implemented to assess them. In the description of the obligations of its role as a contractor, Salini-Impregilo dismisses accountability for incomplete environmental impact assessment related with the infrastructure, adducing its responsibility of the proponent. The section on soil and hydrology merely outlines minor interactions during the construction phase, without referencing any specific project. It instead provides generic strategies for waste management in construction sites and soil storage following excavation processes. It is notable that there is no reference to the Gibe III project, nor to the potential impacts of hydropower projects on the hydrology of the local basins.

3.4. A restorative justice framework for the case study

A responsive enforcement pyramid (*Figure 5*) was proposed as a framework for the application of restorative justice, with consideration for the advanced state of the project. It is imperative that all stakeholders and the decision maker are aware of the contents of the pyramid in advance, so that they could consider modifying their position upon conflict issues. As a preliminary measure, indigenous tribal representatives should be included in the negotiation process by a human rights organisation that possesses knowledge of the Omo case and their needs, with the option of expert support if required. The NGO "Human Rights Watch" was considered suitable for this role, being already part of the DAFNE project. The "Human Rights Watch" organisation would be responsible for evaluating the effects on indigenous tribes via direct interaction and with support from the DAFNE monitoring capability. Should the outcome prove satisfactory to the indigenous communities, escalation of the response would be avoided. Conversely, should the outcome prove unsatisfactory, the

NGO would utilise its advocacy role to instigate a "Communication Procedure" submitted to the African Commission on Human and Peoples' Rights. The regulatory framework on human rights, in particular the African Charter on Human and Peoples' Rights, provides the necessary foundation for the submission of a complaint. The complaint should explicitly request that the Commission act as a facilitator in a restorative justice procedure concerning environmental and corporate harm, thereby ensuring the participation of all relevant stakeholders. This role should be regarded as one of the means of the Commission for securing an amicable solution, which is the primary goal of the institution. The Commission has previously determined that a State has violated the African Charter through the exploitation of natural resources without regard for the health or environment of its rural populations (ACHPR, 2002). In the event that no progress could be made at this stage of the process, the Commission would issue a report containing its recommendations to the parties involved. In the event that the Commission identifies evidence of human rights violations, it has the capacity to submit its report to the African Court on Human and Peoples' Rights or to other relevant enforcement authorities within the framework of the regional or international human rights protection system, depending on their jurisdiction. The specific enforcement agency that could be competent for this matter was not addressed in this study. The position adopted by Human Rights Watch is that the initiation of a restorative justice programme should be a prerequisite for engagement with any of these authorities. It is hypothesised that, under increasing pressure, the restorative justice solution would become increasingly appealing to stakeholders and the decision maker. Should a restorative process be initiated at any stage of the pyramid, it must be capable of evaluating the damage caused by prior actions. The re-definition of a suitable indicator for recession agriculture, built with the usual participation, should be one of the outputs of the process. Furthermore, a new best compromise alternative should be reached through another negotiation phase. These changes may have ramifications for other phases of the PIP, necessitating reiteration and adaptation as appropriate. Representatives of corporations should be drawn from a medium-high level within their respective organisations, ensuring that they are able to assume responsibility for both past and future decisions. In addition, the involvement of technical experts is imperative to elucidate the underlying causes of the adverse consequences, as well as the potential remedies, as recommended by other studies (Mazzucato et al., 2017).

Figure 5: *Proposed responsive enforcement pyramid for the Omo-Turkana case study.*



The following are specific obstacles that could be envisaged, together with their possible solutions:

- Stakeholders and/or decision-makers are reluctant to engage in meetings with indigenous tribes, and vice versa. It is recommended to attempt to initiate the process informally (and in strict confidentiality) with reform-oriented individuals within corporations who wish to participate individually. A "shuttle diplomacy" approach, where the mediator meets with each party separately, at least in the initial stages of the restorative process, has been proposed by Braithwaite (2002), Van Ness & Strong (2010) and Bertagna et al. (2015) for such cases.
- Ambiguity over who can represent the environment in the negotiation process. The following institutions have been identified as potential representatives of the environment in the negotiation process: (i) Environmental Protection Agencies from both Ethiopia and Kenya; (ii)UNESCO, since Lake Turkana is among its Endangered Heritage Sites list; (iii) the "Friends of the Turkana" organization, already a stakeholder in the DAFNE project.
- DAFNE negotiation does not take into account past conditions, which are useful for quantifying harm in a restorative perspective. New indicators could be developed to quantify the harm caused by past decisions, and a new indicator could be introduced to account for the occupation of indigenous land caused by the Kuraz agricultural expansion.

4. CONCLUSIONS

The Omo-Turkana case study has been the subject of various developments that have resulted in adverse impacts on indigenous tribes. These included the construction of Gibe III, which was undertaken without a comprehensive and timely environmental impact assessment, and the establishment of the Kuraz irrigation district within their traditional lands. Their relationship with their government was at its lowest, with ongoing conflict and distrust between the parties. Additionally, the participation of indigenous communities in the DAFNE project was lacking and the possibility of a future involvement appeared remote, introducing bias in the implementation of the PIP procedure. Nevertheless, the selection of the policy regulating the upstream reservoirs would have a significant impact on them. To overcome past issues and prevent further ones a restorative justice and responsive regulation framework was proposed, tailored to the legislative background concerning business and human rights in Africa. We find that the restorative justice paradigm and the PIP procedure, although developed in different contexts, both adopt a participatory approach to conflict resolution, fostering distributed decision-making processes. We argue that an integrated approach involving restorative justice and responsive regulation could prove effective in correcting the bias introduced in the PIP procedure, addressing ongoing conflicts and preventing future ones. This approach could provide multiple benefits to the overarching objective of sustainable development: (i) providing an opportunity to avoid direct litigation between stakeholders, fostering positive relations between them; (ii) producing shared outcomes to be used in sentencing as a form of redress or concrete reparation; (iii) exploiting technical expertise and well-established participatory procedures (e.g., the PIP) to carefully tune environmental restoration actions. The larger the scale of the issue, such as the case of ecocide, the more beneficial this approach could prove itself, for its capacity to analyse the different components of an ecosystem in an integrated way, following the Nexus paradigm. A similar approach could similarly be envisioned for application in large-scale collaborative frameworks for environmental governance, such as international climate negotiations under the UNFCCC. To the best of our knowledge, restorative justice has not yet been applied in these contexts, even though it has been mentioned in the discourse regarding the Just Transitions – the wide topic addressing the need for an equitable shift from high-carbon economies to sustainable, low-carbon systems (Montmasson-Clair, 2021) – and in the discussion regarding the need for a justice framework to guide climate research and policy discussions (Zimm et al., 2024; Millward-Hopkins et al., 2024). Over the past decade, climate litigation has instead been the means by which communities have sought to pressure governments to implement stronger environmental regulations and meet climate commitments, and to force private companies to be more transparent

about emissions, climate risks and to align their mitigation strategies to global climate goals. The outcomes of climate litigation have been heterogenous (Setzer & Higham, 2024). While it proved to be effective in cases addressing climate-washing, litigation targeting government and corporate frameworks and has faced greater challenges, achieving a low success rate. Although some ongoing cases are demonstrating potential to drive positive changes in climate governance, these outcomes highlight the necessity for a more integrated approach to the resolution of climate-related conflicts. We believe that the inclusion of a restorative justice perspective, as in the proposed framework, could indeed be beneficial for the resolution of past conflicts, addressing the need for recognition and accountability, and promoting an environment conducive to reaching agreements on climate policies and the co-creation of sustainable solutions.

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JUSTICIA RESTAURATIVA EMPRESARIAL: SOSTENIBILIDAD MEDIOAMBIENTAL Y BIENESTAR ANIMAL

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1. INTRODUCCIÓN[1]

Frente a las amenazas que enfrenta el entorno natural y las especies que lo habitan, las políticas públicas determinan qué acciones deben sancionarse y de qué manera (Quintero Burgos, 2008). En los últimos años, se ha cuestionado la eficacia del sistema sancionador tradicional para abordar los conflictos relacionados con los daños ambientales derivados de la actividad empresarial. Ante esta problemática, han surgido nuevas perspectivas sobre el uso del Derecho penal (Bernuz Beneitez, 2020; Cid Moliné, 2007; García Magna, 2019), que apuntan a reducir el uso de la prisión y a promover alternativas enfocadas en la responsabilidad por los daños ocasionados y su reparación. En este contexto, la justicia restaurativa emerge como un enfoque transformador que, siguiendo la Recomendación CM/Rec (2018)8 del Consejo de Europa, consiste en un proceso participativo y voluntario en el cual las partes afectadas por un conflicto colaboran activamente en la resolución de las consecuencias derivadas del delito, con la ayuda de un tercero imparcial y cualificado. La justicia restaurativa corporativa implica que los daños han sido producidos por una empresa, en su caso, en relación con los ecosistemas, la salud humana y el bienestar animal, si bien se puede utilizar con un enfoque preventivo, previo a la comisión del daño o riesgo.

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El objetivo de este estudio es explorar las posibilidades de la justicia restaurativa empresarial en la resolución de daños producidos a ecosistemas y a seres vivos, con el fin de reflexionar si la justicia restaurativa puede ser efectiva para la prevención y la reparación de daños derivados de la actividad empresarial. Para observar si la justicia restaurativa cumple con los objetivos planteados, un total de 12 empresas y 3 grupos defensores de los animales y del medio ambiente participaron en una encuesta específica, permitiendo evaluar el impacto de esta herramienta en la gestión de conflictos ambientales.

1.1. Relevancia científica y social del estudio

Ante la sensibilidad social e institucional sobre la justicia climática e interespecies, relacionadas con la justicia intergeneracional, esta investigación resulta de gran interés social y científico. El estudio se alinea con los Objetivos de Desarrollo Sostenible (ODS) de la Agenda 2030, adoptados en la Resolución 70/1 de la Asamblea General de las Naciones Unidas en 2015, que promueven un desarrollo equitativo y sostenible a nivel global. Particularmente, el estudio se muestra asociado al objetivo 11 (sobre ciudades y comunidades sostenibles); al objetivo 12 (sobre producción y consumo responsables); al objetivo 13 (sobre acción por el clima); y al objetivo 15 (sobre la vida en ecosistemas terrestres). Por tanto, explorar las posibilidades de la justicia restaurativa para resolver conflictos medioambientales causados por empresas implica comprometerse con prácticas de producción y consumo responsables que fomenten una convivencia más sostenible en ciudades y comunidades. Asimismo, adoptar medidas restaurativas supone implementar estrategias que corrijan o sustituyan hábitos perjudiciales que contribuyen al calentamiento global, afectando tanto a la salud de los ecosistemas como el bienestar humano. En general, vinculado al objetivo 16 (sobre la paz, justicia e instituciones sólidas), este estudio ofrece la oportunidad de abordar de manera equitativa los riesgos y daños que afectan al entorno natural y a la vida animal, tratando de visibilizar a las víctimas de este tipo de conflictos.

Por otro lado, el estudio se inscribe dentro del enfoque de "Una Sola Salud", impulsado por la Organización Mundial de la Salud (OMS), que pretende optimizar la salud de las personas, los animales y los ecosistemas, partiendo de una visión de interconexión, particularmente tras la pandemia por el Covid-19. Esta estrategia de la OMS está orientada a "aumentar la colaboración interdisciplinar en el cuidado de la salud de las personas, los animales y el medio ambiente, para elaborar e implementar programas, políticas y leyes", con el propósito de promover mejoras en la salud global (Arce, 2022, p. 1). Con este enfoque, se busca evidenciar la interdependencia entre la salud humana, el bienestar animal y la integridad de los ecosistemas, resaltando la urgencia de proteger la salud planetaria (Organización Mundial de la Salud, 2023).

Las decisiones político-criminales tienen un impacto directo en la sociedad, especialmente cuando están en juego su bienestar y el del entorno que la rodea. En este contexto, otro de los factores relevantes de esta investigación es el interés que la justicia restaurativa puede despertar en la sociedad para tratar los conflictos medioambientales, con respuestas preventivas, de intervención y sancionadoras más eficaces y eficientes en términos éticos, jurídicos, empíricos y económicos, en línea con la últimas Directivas de la Unión Europea, donde el concepto de disuasión y los medios para alcanzarla deben ser debatidos criminológicamente.

Desde 1995 hasta 2024, el Código Penal ha sido objeto de más de treinta modificaciones, gran parte de ellas orientadas a endurecer las penas o ampliar figuras delictivas (Díez Ripollés, 2013). Un ejemplo de ello es la Directiva 2024/1203, relativa a la protección del medio ambiente mediante el Derecho penal. La reciente Directiva adoptada considera necesario incorporar nuevos delitos derivados de infracciones más graves. Este tipo de decisiones políticas expansivas o criminalizadoras terminan impactando en la sociedad y en la normalización de lo que parece la única o principal respuesta a la delincuencia.

Según autores como Tamarit Sumalla (2007), esta tendencia punitivista se debe a la escasa consideración que los responsables políticos tienen hacia las opiniones expertas de la dogmática y los estudios criminológicos. El autor argumenta que, a diferencia de otros países europeos, la política criminal española carece de una base científica sólida. Esta deficiencia se atribuye a la falta de estudios previos para fundamentar las reformas en la legislación penal. En consecuencia, la comunidad científica muestra su insatisfacción por la falta de reconocimiento aportado por la ciencia en este ámbito. Entre otros, Arce (2022) enfatiza la importancia de considerar la opinión de los expertos para poder "anticiparse a los acontecimientos que pueden aparecer en el corto y medio plazo" (p. 4). Esta afirmación no impide incorporar como expertos las voces de la ciudadanía más afectada e, incluso, la de otros seres vivos.

En línea con lo anterior, cabe destacar el Grupo Español de Política Legislativa Penal (GEPLP), el cual muestra un especial interés en abordar la creación de normas penales desde una perspectiva multidisciplinar. Propone establecer un foro de discusión que incluya la participación de profesionales de diversos ámbitos, como la Ciencia Política, la Criminología, el Derecho Penal, el Derecho Constitucional, la Evaluación de Políticas Públicas, el Periodismo, la Sociología, entre otros. Este enfoque tiene como objetivo analizar profundamente cada materia en cuestión y elaborar una legislación penal más racional (Grupo Español de Política Legislativa Penal, s. f.). Con anterioridad a la creación de este Grupo, el Grupo de Estudios de Política Criminal (GEPC) también se constituyó como una asociación dedicada al estudio, desarrollo y promoción de investigaciones y propuestas en el ámbito político-criminal, con el objetivo de satisfacer

las demandas y necesidades de las sociedades y comunidades (Grupo Español de Política Criminal, s.f.). Ambos grupos abogan por una política criminal más reduccionista e informada por los estudios criminológicos.

Autores como Ayllón García (2019) destacan que algunas de las reformas más recientes han comenzado a considerar la implementación de prácticas restaurativas, como la mediación penal, lo que refleja un cambio progresivo hacia modelos menos rigurosos y más inclusivos y participativos en el ámbito de la justicia. Por esa razón, el presente estudio se centra en los aspectos demandados por la sociedad o en aquellos ámbitos que puedan resultar de interés para la misma en el ámbito del medioambiente y el bienestar animal.

No obstante, desde grupos ecologistas y animalistas se defiende "la no privatización, la no impunidad y la no banalización del daño", pidiendo, a su vez, más sanciones o sanciones más severas (Varona Martínez, 2024a). La comunidad científica también alude a la necesidad de crear políticas más eficaces destinadas al cuidado del entorno natural. Para poder introducir estrategias como la de "Una Sola Salud", los expertos reclaman que aquellos delitos que afecten tanto a ecosistemas como a seres vivos deben ser sancionados con penas más severas, ya que el cambio climático avanza progresivamente y requiere de soluciones eficaces (Arce, 2022). En el fondo, las asociaciones piden que el daño sea reparado y que el infractor asegure que el mal producido -o similar- no volverá a ocurrir.

Es evidente que se trata de una situación que requiere de acción inmediata, pero, a pesar de que se soliciten medidas más rigurosas, varios estudios realizados en el campo muestran que más punición no implica más efectividad para prevenir la reincidencia o futuros delitos (Varona Martínez, 2020) y que las normas penales suelen funcionar de forma discriminatoria, afectando más a personas excluidas socialmente. Con esta perspectiva, la justicia restaurativa puede resultar un instrumento fundamental para tratar los conflictos generados a causa de las actividades corporativas.

1.2. Objetivos y metodología

1.2.1. Objetivos

Al tratarse de un tema muy novedoso desde un prisma criminológico, en este estudio se explora el nivel de conocimiento y la opinión de los participantes sobre la justicia restaurativa empresarial, centrándose su aplicación en el cuidado medioambiental. Además de valorar el conocimiento sobre la cuestión, se analiza la perspectiva de incluir la justicia restaurativa en distintas áreas de la actividad empresarial:

- Se explora la posibilidad de incluir medidas restaurativas en el ámbito del *compliance*, proponiendo la incorporación de medidas que fomenten la participación de aquellos individuos que tengan contacto directo con la empresa y/o puedan verse afectados por sus actividades en el diseño y la elaboración de los programas de cumplimiento.
- Se analiza la posibilidad de integrar medidas restaurativas como elemento de la Responsabilidad Social Corporativa (RSC), ya que esta estrategia implica asumir la responsabilidad de reparar impactos empresariales en el medio ambiente y promover un comportamiento ético.
- El estudio explora la valoración de las empresas sobre el papel de la justicia restaurativa para fomentar un desarrollo moral y ético adecuado en individuos y en la comunidad, incluido el mundo empresarial.

1.2.2. Metodología

El presente estudio consiste en una investigación exploratoria de carácter cualitativo, realizada mediante un cuestionario estructurado como herramienta de recogida de datos sobre la valoración de las potencialidades y riesgos de la justicia restaurativa. El cuestionario, redactado en castellano, inglés y euskera, consta de tres secciones, cada una destinada a recopilar información de diferentes ámbitos relacionados con el tema en cuestión.

Cabe destacar que dicho cuestionario fue revisado por los profesores Ivo Aertsen (Universidad de Lovaina) y Adán Nieto Martín (Universidad de Castilla la Mancha), reconocidos profesionales en el campo de la justicia restaurativa, lo que asegura su relevancia y fiabilidad en la obtención de datos para este estudio.

El objetivo de esta encuesta es recabar la opinión de las empresas sobre los conceptos abordados y determinar si las entidades estarían dispuestas a incorporar este tipo de prácticas para la prevención y resolución de conflictos. Así mismo, se pretende conocer la opinión de grupos defensores del medio ambiente y los derechos de los animales con el fin de obtener una visión integral y contrastada que permita mejorar el análisis y las conclusiones de la investigación.

El cuestionario dirigido a las empresas[2] no formula las preguntas de la misma manera que el cuestionario respondido por las asociaciones activistas, dado

[2] Como se ha indicado, el cuestionario fue elaborado en inglés, castellano y euskera. En caso de interés, puede verse el relativo a las empresas, en inglés, en https://forms.office.com/Pages/ResponsePage.aspx?id=jtnCg643xUakNbfy03il_pyA5OGAQIZDpWHNdE3v5FNUQTYzNklaMDZHQjBGWUZLVjlKNllOR01PSy4u y el relativo a colectivos activistas, en castellano, en https://forms.office.com/Pages/ResponsePage.aspx?id=jtnCg643xUakNbfy03il_pyA5OGAQIZDpWHNdE3v5FNUMzFEV1NCMlk5V0RQUUtWTEVFWUxQUktERS4u.

que el rol de la persona jurídica difiere del rol desempeñado por las organizaciones ecologistas y animalistas en el contexto analizado. Los cuestionarios proporcionados a los grupos activistas fueron adaptados específicamente para permitirles expresar su opinión sobre las medidas que las empresas deberían tomar en relación con la justicia restaurativa.

El universo potencial de empresas a entrevistar abarcaría aquellas cuyas actividades laborales tengan impacto en el bienestar comunitario, medioambiental y animal, ya sea de manera directa o indirecta. Por la amplitud de este grupo y su complejidad para un análisis detallado, la muestra de este estudio exploratorio consta de empresas que operan en uno o más países de la Unión Europea y que accedieron a responder. Por otro lado, el cuestionario está orientado hacia colectivos ecologistas y animalistas cuya misión es proteger el medio ambiente, así como a los seres vivos que lo habitan, frente a fenómenos como el cambio climático, la contaminación o el maltrato animal, entre otros.

Los participantes se seleccionaron de forma no aleatoria y se empleó un muestreo de conveniencia, ya que se trata de un estudio cualitativo exploratorio donde se pretendía llegar, dentro de los recursos temporales y materiales disponibles, a una diversidad de destinatarios. De esta manera, se buscaron empresas, instituciones y colectivos comprometidos con la ecología y el bienestar animal, accesibles para establecer contacto con ellos a través de correo electrónico u otras vías disponibles. En un campo tan complejo como el que aborda este estudio, aunque se realizaron envíos de emails a correos generales, resulta complicado que un cuestionario tan detallado sea respondido por grandes corporativas. En consecuencia, y sin perjuicio de posibles sesgos, los participantes que accedieron a participar destacan por su accesibilidad y disponibilidad.

En total, 12 empresas y 3 grupos defensores de los animales y del medio ambiente respondieron al cuestionario. Las 12 empresas tienen su sede en la Unión Europea y 7 de ellas operan con departamentos, fábricas y sucursales propias, o venden sus productos en más de un país. En el caso de las asociaciones activistas, las tres trabajan o colaboran en la Unión Europea, pero solo una de ellas opera internacionalmente.

Como ya se ha indicado, se utilizó una muestra de conveniencia con la técnica bola de nieve para aumentar el tamaño de la muestra, es decir, algunos de los participantes contactaron con otros posibles participantes. Esta técnica fue la que mejor se ajustaba a la hora de contactar con empresas y colectivos que cumplieran con las características demandadas por el estudio.

Concretamente, el cuestionario se realizó y completó mediante la aplicación "Microsoft Forms", ya que asegura el anonimato y la no identificación, siendo la recomendada por el Comité de Ética de la Universidad del País Vasco. No se recogieron datos personales ni trazables y se suministró la información necesaria

para que las personas pudieran contextualizar el estudio y recabar más información sobre el mismo. Para su distribución, se utilizó el correo electrónico y las redes sociales con el fin de hacerlo llegar a aquellas empresas conocidas o accesibles que cumplían con los criterios requeridos. Se solicitó a estas empresas que ellas mismas contactaran con otras que cumplieran con los requisitos y compartieran el cuestionario. A su vez, el Foro Europeo de Justicia Restaurativa (EFRJ), la Universidad de Castilla – La Mancha y Deusto Business School colaboraron en la distribución del cuestionario.

Otro método empleado para la recopilación de respuestas consistió en asistir a una feria de empleo, organizada por la Universidad del País Vasco en San Sebastián (Gipuzkoa), en abril de 2024, la cual contó con la participación de diversas empresas de distintos sectores. Se solicitó a aquellas que cumplían con los criterios establecidos que colaboraran respondiendo a las preguntas.

Por otro lado, para contactar con las organizaciones ecologistas y animalistas, se empleó el correo electrónico para realizar el cuestionario, a excepción de una con la que se estableció contacto mediante una llamada telefónica.

El análisis de contenido de las respuestas obtenidas se realizó mediante un análisis temático manual, con procesador de texto, partiendo de las preguntas de investigación surgidas de los objetivos planteados. Al tratarse de un estudio cualitativo no se aspira a la generalización, pero sí a la profundización en las respuestas significativas sistematizadas, en conversación con la contextualización realizada en la revisión del estado de la cuestión.

2. MARCO TEÓRICO Y CONTEXTUALIZACIÓN: CONTRIBUCIÓN DE LA CRIMINOLOGÍA Y LA VICTIMOLOGÍA VERDE

La Victimología, en una acepción amplia, es una disciplina que se ocupa del estudio científico de las víctimas, tanto de hechos delictivos como de accidentes, catástrofes naturales y otros sucesos traumáticos (Baca, Echeburúa y Tamarit, 2006). En el ámbito legislativo, la definición de víctima suele basarse en un enfoque antropocéntrico, que restringe la victimización a una perspectiva humana. Esta percepción del delito, que sitúa al ser humano en el foco central, a menudo conlleva una falta de atención hacia las víctimas de delitos ambientales y contra otros seres vivos no humanos (Aertsen, 2020).

En respuesta a esta limitación, han surgido propuestas que defienden un punto de vista ecocéntrico, que amplía la noción de víctima para incluir al medio ambiente y a otros seres vivos como afectados legítimos (Angkasa, 2020). Dentro de estas propuestas destaca la contribución de la Criminología verde, una rama de la Criminología que estudia los daños producidos al medio am-

biente, las leyes y la regulación ambiental, que puede también ampliarse a la violencia contra los animales (White, 2008).

La Criminología, según Lynch et al. (2017), tardó mucho tiempo en centrarse en los daños causados al medio ambiente (citado en Tourangeau, 2022). De hecho, no fue hasta 1990 cuando la Criminología verde fue desarrollada y comenzó a investigar los peligros que acechan al planeta y a los seres vivos que lo habitan (Tourangeau, 2022). Desde entonces, los expertos dedicados a este campo se han ocupado de definir los daños contra las especies no humanas y el medio ambiente.

Esta perspectiva más inclusiva amplía el concepto de víctima para abarcar no solo a los seres humanos, sino también a aquellos ecosistemas y animales afectados por acciones humanas. Williams (1996, p. 35) define a las víctimas de daños y delitos medioambientales como "individuos de generaciones pasadas, presentes o futuras que resulten perjudicadas como consecuencia de un cambio en el entorno químico, físico, microbiológico o psicosocial, provocado por una acción u omisión humana deliberada o imprudente, individual o colectiva" (citado en Hall, 2017). Dicho en otras palabras, el daño medioambiental o animal se refiere a los perjuicios e injusticias ocasionadas al medio ambiente debido a comportamientos, negligencias u omisiones (Aertsen, 2022).

Un concepto clave en este ámbito es el de *slow violence* (traducido del inglés como "violencia lenta"), introducido por Nixon (2011), que describe un tipo de violencia que se manifiesta gradualmente, con efectos retardados en tiempo y espacio, y que frecuentemente no es percibida como tal. Otros autores como Aertsen (2020) y Varona Martínez (2020) señalan la invisibilidad de estas víctimas. Los delitos ambientales abarcan acciones como el uso o comercio de especies no humanas (tanto de flora y de fauna), la contaminación o el transporte de sustancias tóxicas o prohibidas (Hall, 2017; Varona Martínez, 2020). Estos comportamientos suelen ser difíciles de detectar debido al alcance de su impacto, razón por la cual se recurre al término "invisibilidad". Entre las características que repercuten a la poca visibilidad de estos delitos, se encuentran las siguientes de acuerdo con los autores Varona y Hall (2018):

1. Se trata de una victimización difusa, ya que es un daño colectivo que no afecta principalmente a un individuo. En ciertas ocasiones, este fenómeno afecta a la totalidad del planeta, generando un impacto muy diverso.
2. Son daños que impactan en seres vivos no humanos, quienes a menudo carecen de conciencia y capacidad para expresarse.
3. El contexto en el que se producen los hechos conlleva dificultades para responsabilizar a Estados y empresas, ya que los daños importantes

se deben al poder que suelen tener los responsables y a las conexiones con el poder político y económico.

4. Estas actividades delictivas suponen un daño potencial para las futuras generaciones.
5. Se trata de delitos con un carácter complejo, en los que a menudo resulta difícil perseguir y responsabilizar a los autores. En estos delitos, la actividad procesal se enfoca en determinar si la conducta constituye un delito, lo que dificulta diferenciarlo de un mero ilícito administrativo. Por otro lado, también surgen dificultades a la hora de individualizar la responsabilidad dentro de las empresas u organizaciones. En este contexto, la Victimología verde se enfrenta a problemas para exigir responsabilidades debido a la dificultad de establecer una línea causal para acciones que generan daño ambiental a largo plazo, a menudo aceptadas socialmente por los beneficios económicos inmediatos.
6. Cabe destacar el clima económico-cultural que promueve el progreso y el crecimiento ilimitado como valores prioritarios, a pesar de sus efectos contradictorios en la delincuencia ambiental. Este tipo de delincuencia puede generar tanto victimización como beneficios sociales, debido a la mezcla de actividades legales e ilegales y al valor percibido de las empresas infractoras en términos de empleo. Se señala que algunos infractores evitan la criminalización argumentando que la aplicación de las leyes penales sería perjudicial para la economía y, por lo tanto, para la sociedad en general.
7. No se trata solamente de una victimización difusa, también puede denominarse victimización *oculta* (Varona y Hall, 2018). Hay efectos o contaminaciones invisibles, como la radiactividad o el amianto, que generan la sensación de que todo sigue igual pese al daño letal que causan.

La detección de estas características se ve obstaculizada no solo por su complejidad, sino también por la escasez de investigaciones criminológicas en este campo. Más allá de ampliar los estudios, resulta fundamental integrar perspectivas de otras disciplinas como la ecología, la física y la ciencia de la conservación para abordar esta problemática de manera interdisciplinaria (Tourangeau, 2022).

Ramage y Shipp (2020) destacan la importancia de concebir el planeta como un sistema interconectado, donde los diversos elementos que lo componen interactúan entre sí, algo que se relaciona con la idea de "Una Sola Salud" de la OMS, ya mencionada. Este es un enfoque conocido como el *system thinking approach* o pensamiento sistémico (Bertalanffy, 1950; Parsons, 1951; Wiener, 1948). En este contexto, es esencial interpretar la relación entre el ser humano y el medio ambiente como recíproca. El sistema socio-ecológico

se fundamenta en la idea de que la interacción entre el ser humano, sus actividades y el medio ambiente es interdireccional (Brisman y South, 2018). Es evidente que las interacciones entre humanos y ecosistemas están en aumento (Fischer et al., 2015), lo que conlleva consecuencias como el cambio climático, la sobreexplotación de recursos naturales y la extinción de especies animales, entre otras. Partiendo de esta premisa, la Criminología verde, basada en el *system thinking approach*, permite analizar los elementos que conforman el medio ambiente como un sistema para buscar alternativas sostenibles, éticas y justas para resolver los daños producidos por relaciones y efectos adversos (Tourangeau, 2022).

3. EL IMPACTO DEL SECTOR EMPRESARIAL Y LA JUSTICIA RESTAURATIVA COMO RESPUESTA

El sector empresarial desempeña un papel fundamental en la dinámica de las comunidades en las que opera, estableciendo vínculos estrechos al proporcionar bienes y servicios a los consumidores. Este intercambio no solo satisface necesidades materiales, sino que también refuerza la responsabilidad económica de las empresas, ya que una relación positiva y sostenible con los consumidores constituye la base del crecimiento y desarrollo empresarial (Carroll, 2016). Sin embargo, esta interacción, en apariencia beneficiosa, no está exenta de desafíos.

Es crucial reconocer que el sector empresarial puede representar una amenaza considerable para el equilibrio ambiental. Sus actividades, especialmente las de industrias con altas emisiones de gases de efecto invernadero, como es el caso del sector petrolero, sitúan a estas empresas entre los principales actores asociados al impacto negativo en la salud de los ecosistemas y los seres vivos, dado su contacto directo con el entorno natural (López Escorial, 2021). La emisión de dióxido de carbono (CO2), principal gas asociado al calentamiento global (Nunez, 2023), es una constante en el quehacer de muchas corporaciones, exacerbando el cambio climático y sus consecuencias devastadoras (Gallizo, Moreno y Sánchez, 2022). Este fenómeno no solo repercute negativamente en la salud del planeta, sino que también amenaza el bienestar de los seres que lo habitan y pone en riesgo la calidad de vida de las generaciones futuras.

En este contexto empresarial, la Victimología corporativa emerge como una herramienta crucial para comprender "las relaciones entre empresas y víctimas, dedicándose a establecer quién y cómo es victimizado por el comportamiento empresarial" (Laufer, 2006; citado en Nieto Martín y Calvo Soler, 2023, pp. 51-52). Por la naturaleza de estos delitos y la desigualdad -sobre

todo económica- que hay entre las empresas y las víctimas, estas victimizaciones suelen pasar inadvertidas.

Existe una gran variedad legislativa el ámbito empresarial, pero la forma en que el Derecho penal o el sistema jurídico ha tratado los casos relacionados con los graves daños ambientales causados por grandes empresas deja mucho que desear y evidencia la necesidad de mejoras significativas (Nieto Martín y Calvo Soler, 2023) que, al mismo tiempo, contrarresten la percepción de impunidad de la sociedad en este tipo de delitos. En muchos casos, las sanciones impuestas parecen no reflejar adecuadamente la magnitud del daño ambiental causado ni proporcionan suficiente disuasión para evitar futuras transgresiones. De hecho, los daños producidos por empresas, o incluso Estados, a menudo son considerados legítimos y no delictivos (Varona Martínez, 2014b). Por ello, un número creciente de autores aboga por un uso más racional del Derecho penal (Bernuz Beneitez, 2020; Cid Moliné, 2007; García Magna, 2019), comenzando por disminuir la frecuencia de la prisión y promoviendo alternativas que se centren en la responsabilidad por el daño causado y en su reparación. Dentro de este enfoque, la justicia restaurativa emerge como una perspectiva transformadora del sistema penal, si bien hasta el momento ha tenido una aplicación marginal y desigual territorialmente.

El sistema penal actual se centra en la vulneración de la norma creada por el Estado, dejando en un segundo plano el hecho que supone haber causado daños a la víctima (Domingo, 2017). En cambio, la justicia restaurativa empresarial en el ámbito medioambiental se presenta como una herramienta idónea para fomentar la reflexión sobre el compromiso de los seres humanos con la salud y el bienestar de los ecosistemas y los seres que los habitan, incluidos los humanos. Aunque la justicia restaurativa se ha centrado tradicionalmente en las relaciones interpersonales, puede abordar también las especificidades de las interacciones con los ecosistemas y los seres vivos, así como los contextos institucionales u organizativos, como los corporativos o empresariales.

A diferencia de las limitaciones del proceso penal tradicional, la justicia restaurativa permite reflexionar sobre el valor de la vida, identificar los riesgos y daños potenciales, reconocer a las víctimas y abordar los delitos junto con las sanciones o respuestas correspondientes (Varona Martínez, 2020). En el marco de este estudio, cabe mencionar a Beckett y Keeling (2019), para quienes la reparación emerge como una herramienta fundamental en los casos de daños medioambientales. La reparación no solo busca responsabilizar a las instituciones culpables de la violencia medioambiental, sino que también posibilita la restauración, reversión o detención del daño producido al medio ambiente, a los seres humanos y no humanos, contemplando, en ocasiones, respuestas como la descolonización de la tierra (Beckett y Keeling, 2019).

4. TRABAJO DE CAMPO Y RESULTADOS

Tras la contextualización anterior, se presenta a continuación, brevemente, el trabajo de campo realizado con base en los conceptos previamente expuestos.

4.1. Estructura del cuestionario

4.1.1. Contexto de los encuestados

La primera sección del cuestionario está diseñada para recopilar información contextual sobre el participante de forma anónima. Su objetivo es comprender el entorno en el que se trabaja, abarcando aspectos como el sector de actividad, el tamaño aproximado de la plantilla y la ubicación geográfica. Asimismo, se incluyen preguntas orientadas a identificar la existencia de programas o iniciativas relacionadas con el bienestar social, la sostenibilidad ambiental y el respeto hacia los seres vivos.

En el caso de las entidades de protección del medio ambiente y de bienestar animal, la primera sección del cuestionario pregunta por las causas que la asociación apoya, el número de personas colaboradoras, así como el alcance geográfico de la organización.

4.1.2. Escenarios de aplicación de la justicia restaurativa

La segunda sección del cuestionario tiene como propósito recoger las opiniones de los participantes sobre posibles aplicaciones de la justicia restaurativa en el ámbito empresarial. Esta sección presenta distintos escenarios en los que una empresa podría enfrentarse a conflictos derivados de su actividad. Se destaca que los principios de la justicia restaurativa son aplicables en todas las etapas del conflicto, abarcando desde la prevención hasta la implementación de sanciones (Nieto Martín y Calvo Soler, 2023).

A continuación, se describen los seis escenarios identificados en la encuesta, con el objetivo de recopilar la opinión tanto de las empresas como de las organizaciones activistas participantes en el estudio, pero adaptado, en su caso, las preguntas a dichos destinatarios:

1. Antes de implementar un programa de cumplimiento es fundamental realizar una evaluación de riesgos que contemple el análisis del entorno de la comunidad local donde la empresa opera o planea operar (Nieto Martín, 2022).

   Este escenario sugiere que, previo al inicio de las actividades, las empresas lleven a cabo reuniones preliminares con comunidades

locales y grupos potencialmente afectados. Estas reuniones formarían parte de la evaluación de riesgos y, posteriormente, del programa de cumplimiento, con el propósito de identificar y comprender los riesgos asociados a las operaciones de la empresa desde una perspectiva más amplia, considerando no solo los aspectos normativos y técnicos, sino también los sociales, culturales y ambientales.

2. El segundo escenario se enmarca en la situación en la que ya se ha identificado o detectado un riesgo o daño derivado de una actividad empresarial, aunque no se ha iniciado una investigación que puede ser en diferentes órdenes jurisdiccionales.

   En este contexto, el escenario sugiere que la empresa responsable mantenga encuentros o diálogos restaurativos con el fin de identificar y acordar las medidas de intervención más adecuadas para las personas, comunidades o entornos más afectados.

   Es crucial recordar que, desde un plano preventivo, la empresa podría contemplar estas medidas en su plan de prevención de riesgos, programa de cumplimiento o protocolo de actuación en tales situaciones (Nieto Martin y Calvo Soler, 2023), incluyendo aspectos más específicos si el riesgo ya se ha llegado a producir.

3. El tercer escenario plantea su incorporación durante un proceso de investigación o sanción relacionado con los riesgos o daños producidos por una actividad empresarial ilícita.

   En estos casos, es habitual que la empresa sea denunciada en la jurisdicción civil, social, administrativa, contencioso-administrativa o penal, ya sea a por una ONG o por la propia administración. Con la intención de evitar recurrir a la vía penal o aminorar su impacto, el tercer escenario contempla la posibilidad de que la empresa responsable participe voluntariamente en un proceso restaurativo orientado a la reparación del daño causado Este proceso podría incluir herramientas como la mediación, las conferencias restaurativas, los círculos de diálogo o los enfoques basados en diálogos apreciativos (Nieto Martín y Calvo Soler, 2023).

   Este escenario se modifica en el caso de las asociaciones activistas que participan en el estudio, preguntándoles si estarían estas dispuestas a participar en dichos procesos como ONG o entidad representante del medio ambiente o bienestar animal de forma voluntaria.

4. La justicia restaurativa ofrece múltiples recursos que pueden sustituir o servir como complemento en relación con la atenuación o alternativas a la pena (Nieto Martín y Calvo Soler, 2023). Entre otras, se encuentran la suspensión de la pena, la aplicación de sanciones restaurativas fuera de prisión o la progresión en grado, cuando ya se ha entrado en prisión.

Este escenario tiene como objetivo explorar la opinión de los participantes acerca de implementar, en los programas de cumplimiento empresariales, mecanismos restaurativos que puedan tener algún efecto potencial en este tipo de respuestas penales.

5. La justicia restaurativa puede desarrollarse a través de facilitadores o mediadores imparciales, capacitados específicamente para guiar procesos como encuentros bilaterales o círculos restaurativos, teniendo en cuenta los principios de voluntariedad, respeto y confidencialidad (Miguel Barrio, 2020). En este sentido, este escenario plantea la posibilidad de resolver los conflictos empresariales mediante círculos restaurativos como forma de diálogo para el entendimiento y, en su caso, la reparación de daños tangibles e intangibles, tengan o no repercusión en un posible proceso judicial o en una sanción.

   Los círculos restaurativos buscan la recuperación integral de todas las partes afectadas, ofreciendo al infractor la oportunidad de rectificar y dando a las víctimas, y a los miembros de la comunidad, la posibilidad de solucionar el conflicto de manera colectiva, expresando sus sentimientos y emociones (Bazemore y Umbreit, 2001). Estos círculos, además de servir para que la víctima relate los hechos y exprese sus necesidades, sirven también para que el infractor se responsabilice por su conducta, reconozca el daño causado y se comprometa a no repetirlo (Nieto Martín y Calvo Soler, 2023).

   No obstante, su aplicación en contextos empresariales presenta ciertas complejidades. Se trata de un proceso que requiere una participación muy cuidada y bien preparada, ya que la intervención de múltiples partes interesadas puede aumentar la complejidad del proceso y dificultar su eficacia (Nieto Martín y Calvo Soler, 2023). Por ello, este escenario plantea una cuestión clave: ¿qué miembros de la empresa deberían participar en el círculo para garantizar un uso adecuado de esta herramienta y cumplir con los objetivos restaurativos?

6. Anteriormente se hacía referencia al vínculo entre la justicia restaurativa y la Responsabilidad Social Corporativa (RSC). Dicho esto, las condiciones de trabajo y de producción emergen como temas centrales de una estrategia de RSC, estableciendo una estrecha relación con la prevención de la violencia empresarial en aspectos como la seguridad laboral, la calidad de los productos y la preservación del medio ambiente (Giavazzi, 2017; citado en Aertsen, 2022).

   Para cumplir con la RSC, es imprescindible que las empresas tomen medidas que promuevan un entorno laboral seguro y saludable, comprometiéndose con el cuidado del medio ambiente y el bienestar

de los seres vivos. Este tipo de medidas suelen estar orientadas a las partes interesadas (Carroll, 2016), conocidas en inglés como *stakeholders*[3], pero las empresas deben también incluir medidas que garanticen la protección del medio ambiente y la sostenibilidad, como bienes comunes, a la hora de realizar sus operaciones.

En el contexto del proceso de elaboración de un programa de cumplimiento, orientado a abordar los principales impactos sociales y medioambientales derivados de las actividades de una empresa, el sexto escenario propone incluir en dicho plan políticas que aseguren su compromiso con el medio ambiente y el bienestar de los seres vivos, como un elemento dentro de la RSC general. Esto implica analizar cómo esta inclusión podría influir en potenciales inversores, accionistas y otras partes interesadas.

Tras exponer los escenarios, el cuestionario contiene una pregunta que enfatiza la necesidad de añadir a la RSC la dimensión de aprendizaje moral a la que hace referencia Schweigert (2016). En el sistema actual se prioriza la acción inmediata sin reflexionar ni considerar al otro como ser, sujeto o igual en diferentes formas de convivencia; sin embargo, la justicia restaurativa ofrece la alternativa de ver los problemas como oportunidades para la reflexión (Calderón y Rached, 2020), con un enfoque preventivo-reparador, de medio y largo alcance. Mientras que la ley puede proporcionar procedimientos formales, el "aprendizaje moral"[4] puede desarrollarse y adaptarse de una manera mucho más poderosa, desde una perspectiva común, de "moralidad reflexiva" en diferentes foros (Schweigert, 2016; citado en Aertsen, 2022).

Según Schweigert (2016), la justicia restaurativa combina dos formas de autoridad moral: una arraigada en tradiciones locales o comunitarias y otra basada en normas universales (citado en Aertsen, 2022). El autor insiste en que este enfoque educativo reconoce la complementariedad entre normativas locales y globales, centrándose en el espacio intermedio donde se encuentran distintos grupos sociales. Asimismo, destaca que la justicia restaurativa promueve un modelo educativo que aprovecha la diversidad de experiencias sociales y utiliza los recursos comunitarios para abordar las causas subyacentes de los conflictos o riesgos y daños. De acuerdo con sus argumentos, este enfoque adopta una perspectiva integral e interdisciplinaria. Además, señala que la justicia restaurativa facilita un aprendizaje moral inclusivo y efectivo, promoviendo la participación afectiva, cognitiva y performativa para fortalecer los lazos comunitarios y fomentar la resolución pacífica de conflictos (Schweigert, 2016; citado en Aertsen, 2022).

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[3] Véase el capítulo de Pilar Farias en este libro.

[4] Cfr. el capítulo de María José Bernuz en este libro.

Considerando lo anterior, se puede concluir que la justicia restaurativa puede servir como complemento o herramienta para mejorar los enfoques clásicos de la justicia en cuanto a la promoción de la rendición de cuentas y la reparación del daño. En este contexto, se pregunta a los encuestados si se muestran a favor de que, a largo plazo, la justicia restaurativa promueva el desarrollo moral y ético adecuado, tanto en los individuos como en las empresas y en la sociedad.

Como se ha indicado, los escenarios planteados en el cuestionario están ideados para que cualquier tipo de empresa, ya sea pública o privada, reflexione sobre la asunción de responsabilidades éticas y se comprometa con la salud de los ecosistemas, así como de los seres que los habitan. Con este propósito, en el cuestionario se incluye una pregunta adicional que sobre la opinión sobre dicha asunción de responsabilidades y qué tipo de regulación sería necesaria para garantizar su cumplimiento.

4.1.3. Preguntas complementarias

Finalmente, en la tercera y última sección del cuestionario, se incluyen preguntas complementarias destinadas a evaluar si, gracias al diseño y al contenido de la encuesta, los participantes han logrado obtener una mayor comprensión de la justicia restaurativa y los conceptos utilizados en el cuestionario. Asimismo, esta sección plantea una pregunta orientada a conocer cómo pueden incorporarse este tipo de prácticas en el régimen laboral de las empresas.

5. RESULTADOS Y ANÁLISIS

Dado que el presente estudio constituye una investigación pionera, pero limitada y de corte cualitativo, en el campo de la justicia restaurativa empresarial, carece de la opción de contrastar los datos con estudios previos. Por consiguiente, en este punto solamente se exponen los análisis de los resultados obtenidos directamente de la encuesta, con el fin de proporcionar una visualización detallada de los hallazgos.

Tras observar los resultados de la encuesta, mediante un análisis de contenido temático, se puede concluir que la idea de incluir la justicia restaurativa ha resultado de interés entre las empresas participantes en el estudio. En general, las empresas manifestaron su disposición para incorporar medidas restaurativas en sus operaciones, tanto para la prevención como para la reparación de conflictos.

Por otra parte, el estudio partía de la premisa de que las asociaciones activistas preferirían sanciones más severas, algo que no se alinea con los principios de la justicia restaurativa. Sin embargo, los datos recopilados no respaldan esta

afirmación, si bien solo se ha entrevistado, a modo de exploración, a tres asociaciones. Las asociaciones activistas también han apoyado la iniciativa de que las empresas contemplen la justicia restaurativa como una opción para resolver los conflictos, no solo con la sociedad, sino también aquellos conflictos que afecten al entorno natural.

A pesar de que la justicia restaurativa representa un nuevo ámbito de estudio para la Criminología, sobre todo en el sector del medio ambiente, las empresas que respondieron el cuestionario demostraron un nivel notable de familiaridad con ella. El 86% indicó tener conocimientos previos del tema, aunque es posible que exista un sesgo entre las empresas que accedieron a participar en la encuesta.

Es innegable que incluso aquellas empresas que respondieron el cuestionario, y nunca han experimentado conflictos relacionados con el medio ambiente o los derechos de los animales, han reconocido el potencial riesgo o daño inherente de sus actividades, y han mostrado un compromiso firme en la prevención y búsqueda de soluciones para evitar tales situaciones. De hecho, resulta sorprendente descubrir que la gran mayoría de los participantes, salvo algunas excepciones, se referían a medidas relacionadas con la justicia restaurativa que toman en consideración las perspectivas de los diferentes grupos de interés.

Si bien es cierto que las empresas responsables de daños al medio ambiente a veces parecen evadir su responsabilidad y muestran poco interés en reparar el daño causado, las respuestas obtenidas muestran otra realidad, al menos sobre el papel. Así, se enfatiza la importancia de que las entidades responsables de riesgos o daños, especialmente aquellas que tienen mayor impacto en la contaminación, consideren el alcance de las consecuencias de sus actividades y se comprometan a prevenir o mitigar posibles riesgos o daños ya causados, así como aquellos que puedan surgir en el futuro. La mayoría de las empresas encuestadas manifestó que optar por recursos como los diálogos restaurativos para abordar los daños producidos por una empresa o participar en procesos como los círculos restaurativos para resolver conflictos y evitar recurrir o atemperar la vía penal, no solo ofrece una alternativa al proceso penal tradicional, sino que, además, promueve la relación colaborativa entre las partes afectadas con el fin de llegar a un acuerdo pacífico y satisfactorio para ambas partes.

En relación con los programas de cumplimiento, se enfatiza el respeto por el principio de *ultima ratio*. Un *compliance* basado en principios de la justicia restaurativa incluye medidas preventivas que pueden ayudar a resolver conflictos de manera más eficaz. Esto supone que la tendencia a recurrir constantemente al proceso penal disminuya y, por consiguiente, surjan nuevos métodos para abordar conflictos, desde una perspectiva más preventiva y reparadora que punitivista, sin perjuicio de que esa perspectiva deba abarcar todo tipo de delitos y no solo los empresariales. Incorporar este tipo de medidas permite convertir

una relación de conflicto en una relación de alineamiento de intereses con la comunidad y el entorno afectado, siempre y cuando no se banalice ni privatice el daño y se respeten los estándares internacionales de justicia restaurativa.

Sin embargo, al implementar estas propuestas, parece que el entorno empresarial no está completamente preparado para adoptar nuevas prácticas que resultan, en la práctica, desconocidas y pueden alterar el modo de operar establecido hasta el momento. No todas las empresas manifestaron el mismo énfasis por incorporar efectivamente y de forma transformadora principios restaurativos en su régimen empresarial. Además, según los resultados obtenidos, existen compañías que rechazan o pasan por alto la inclusión de estas medidas, optando por el enfoque intimidatorio/defensivo, que consiste en que las compañías intensifiquen la supervisión y las sanciones internas de la entidad. Aunque no todas las compañías reconocen el valor y la eficacia de la justicia restaurativa, las asociaciones activistas, en cambio, comprenden plenamente el potencial de esta herramienta como un método para fomentar el aprendizaje moral y ético, dentro de sus principios activistas por los derechos humanos, los derechos de la naturaleza y de otros seres vivos, y la justicia social en general.

Respecto a la percepción de los participantes sobre la justicia restaurativa como elemento de la RSC, cabe decir que no se ha alcanzado unanimidad en las respuestas, un resultado inesperado dentro del contexto de este estudio. Si bien la crisis del cambio climático exige la implementación de nuevas medidas de responsabilidad empresarial, actualmente, el sector corporativo ya asume una amplia gama de responsabilidades. Integrar la justicia restaurativa implica asumir una nueva responsabilidad para la cual no todas las organizaciones están preparadas. Por otro lado, las asociaciones activistas consideran la justicia restaurativa como un valor añadido del que las empresas pueden beneficiarse para reforzar su compromiso con el medio ambiente. Este compromiso puede ayudar a atraer nuevos clientes, ya que las empresas que muestran su compromiso por la preservación del medio ambiente se perciben como más atractivas y cercanas al consumidor.

Explorar la opción de realizar círculos restaurativos con empresas involucradas en conflictos que afectan al medio ambiente o a los animales, como modalidad grupal más extensa de justicia restaurativa, ha evidenciado que, en opinión de algunas personas entrevistadas, podría no ser el enfoque más adecuado para abordar estas cuestiones. Un círculo restaurativo con agentes empresariales implica complejidades, ya que, debido a la necesidad de una cantidad de participantes, cuando se llevan a cabo en contextos empresariales, el número de involucrados tiende a aumentar, lo que convierte el proceso en un escenario que obstaculiza su progreso, si bien también puede asegurar que los resultados sean transformadores. Por tanto, a pesar de que se cuestione la idoneidad de los círculos restaurativos extensos, ya que se considera un meca-

nismo muy complejo que puede verse afectado por un exceso de participantes, una parte importante de las personas entrevistadas considera que la participación no debería limitarse únicamente a las empresas responsables del riesgo o daño, sino que debería involucrar a un amplio espectro de agentes. En este sentido, y sin negar las responsabilidades organizacionales o corporativas, existe la posibilidad de que participe, como representante de la compañía, el responsable directo del riesgo o daño causado, algo que aumentaría la eficacia de este tipo de procesos, sin perjuicio de un enfoque que permita apoyar a las personas (y otros agentes no humanos) para ser reparadas y para apoyar el cambio de la persona o empresa que se responsabiliza.

Otro de los resultados que se ha evidenciado hace referencia al compromiso de las empresas con el medio ambiente y el *greenwashing*. Este concepto se refiere a la estrategia de "comercializar una empresa u organización para que parezca más respetuosa con el medio ambiente o más ecológica (más natural, más sana, sin productos químicos, reciclable, menos derrochadora de recursos naturales…) cuando en la práctica sus actividades contaminan el medio ambiente" (Garrett, 2023, p. 2). En este contexto, las respuestas indican que muchas compañías adoptan políticas de responsabilidad social y medioambiental para fingir que realmente se preocupan por el impacto de sus actividades en el entorno natural. Para garantizar la eficacia de cualquier proceso restaurativo, será imprescindible que las empresas participen de forma completamente voluntaria y muestren interés por reparar el daño causado, en vez de aprovecharse del proceso para "limpiar su imagen", superar un *check-list*, obtener una certificación o cumplir con la legislación vigente. No obstante, esta estrategia puede ser una primera motivación de entrada para, después y con la interacción de otras personas afectadas, participar de forma más honesta y comprometida.

En definitiva, la disposición voluntaria de las empresas para participar en este tipo de procesos, así como la inclusión de principios restaurativos en su autorregulación, no solo es beneficiosa para establecer relaciones con organizaciones ecologistas y animalistas, sino que también repercute directamente en la reputación de la compañía. Una empresa que ofrece servicios y productos respetuosos con el medio ambiente atrae a más consumidores, a la vez que gana la confianza y el respeto de la comunidad en general.

6. CONCLUSIONES

En el presente trabajo se ha realizado un estudio exploratorio sobre la incorporación de la justicia restaurativa en el ámbito empresarial, enfocado en la resolución de conflictos derivados de las infracciones que perjudiquen el medio ambiente o el bienestar animal. Para ello se diseñó y trabajó con un cues-

tionario cuyo propósito era sondear la opinión de un grupo de empresas y de organizaciones ecologistas y animalistas, sin ánimo de generalización, pero sí de sistematización para un análisis de los temas más significativos, en línea con la bibliografía existente.

El resultado de la investigación es positivo, ya que, una vez consideradas las diferentes perspectivas, se evidencia un consenso entre los participantes respecto a la idoneidad de la justicia restaurativa para la resolución de conflictos medioambientales que involucren a empresas como responsables de los riesgos o daños causados.

En consecuencia, la investigación señala que la implementación de medidas restaurativas debe contemplar una amplia gama de aspectos dentro del entorno empresarial, que van desde el contacto con las comunidades donde se desarrollan sus actividades, la prevención, la evaluación de riesgos asociados a las actividades empresariales, la reacción inmediata cuando aparecen conflictos, la integración de medidas restaurativas como parte del *compliance* y, en general de la RSC de la empresa, así como la adopción de sanciones y dinámicas restaurativas de reparación.

En resumen, la investigación arroja las siguientes conclusiones. En primer lugar, para dejar atrás la tendencia punitivista y avanzar hacia un enfoque restaurativo, es crucial tener en cuenta la perspectiva de la comunidad científica en la creación y modificación de normativas, abordando así los conflictos desde una perspectiva multidisciplinar, sin olvidar tampoco otros saberes de los seres vivos más afectados. Este paso implicaría una legislación penal más racional, que contemple la integración de los principios fundamentales de la justicia restaurativa, como una opción más, en este caso voluntaria, en la resolución de controversias medioambientales.

En segundo lugar, las sanciones restaurativas, que incluyen medidas como los diálogos o círculos restaurativos, podrían resultar más eficaces que las sanciones retributivas si el objetivo es reparar el daño causado y asegurar que no volverá a ocurrir. No obstante, como ya se ha indicado, la realización de estas prácticas depende de la voluntariedad de las entidades empresariales. La realidad nos muestra que solo si las empresas tienen una implicación en la comunidad, por su tamaño, historia o relaciones en los municipios, esa voluntariedad será más probable. Si las empresas no manifiestan su disposición a incluir medidas restaurativas, la implementación de sanciones restaurativas podría enfrentar obstáculos significativos. Por lo tanto, es fundamental promover la conciencia y la comprensión de los beneficios de estas prácticas entre las organizaciones empresariales. Esto podría lograrse a través de campañas de sensibilización, capacitaciones y la promoción de casos de éxito donde las medidas restaurativas (de prevención, intervención y reparación) hayan demostrado ser efectivas, además de poner en valor la normativa más reciente europea.

En tercer lugar, en el contexto empresarial, la integración de medidas restaurativas desempeña un papel fundamental al cumplir una doble función preventiva-reaparadora que atempera miradas cortoplacistas. Una empresa que incorpora prácticas restaurativas dentro de su cumplimiento normativo, o como parte de su RSC, en general, no solo demuestra un compromiso con el cuidado del medio ambiente y el bienestar de los seres vivos que lo habitan, sino que también reconoce su responsabilidad en la reparación del daño causado, como forma de compromiso, aprendiendo de los errores y rectificando. Esto permite adoptar una perspectiva de aprendizaje conjunto para garantizar la no repetición y la prevención, en lugar de recurrir a la ocultación, falta de transparencia o litigación estratégica para evitar responsabilidades reputacionales, financieras o legales. En este sentido, la adopción de medidas restaurativas en el ámbito empresarial puede tener un impacto significativo en la reputación y la imagen de las empresas, siempre desde el principio de honestidad. Al comprometerse con la justicia restaurativa, las empresas no solo reflejan una ética responsable, sino que también fortalecen las relaciones con las comunidades locales, los *stakeholders* y los consumidores. Solo evaluaciones futuras sobre su aplicación podrán determinar si ese compromiso es sincero o mero *greenwashing*.

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LITIGACIÓN ESTRATÉGICA Y BIOÉTICA EN SISTEMAS MULTIPUERTAS DE JUSTICIA ECOLÓGICA Y ANIMAL: DEL ECOCIDIO A LA BASURALEZA[1]

Gema Varona Martínez

Verde que te quiero verde.
Bajo la luna gitana,
las cosas la están mirando
y ella no puede mirarlas.
Verde que te quiero verde

Federico García Lorca en *Sonámbulo*

1. INTRODUCCIÓN

Con base en trabajos empíricos previos[2], este análisis sociojurídico se construye desde un marco teórico intersdisciplinar que conjuga nociones pro-

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[1] Todos los capítulos de este libro se han desarrollado dentro del proyecto de investigación "Justicia restaurativa para delitos contra el medio ambiente y contra los animales: Diseño de programas de prevención, intervención y reparación en un marco globalizado", financiado por el Ministerio de Ciencia e Innovación (2021-2025, PID2020-114005GB-I00) (https://www.ehu.eus/es/web/ivac/laboratorio-de-teoria-y-practica-de-la-justicia-restaurativa/proyectos). La autora agradece al Foro Europeo de Justicia Restaurativa, en concreto al Grupo de Trabajo sobre Justicia Restaurativa Medioambiental, que ha tenido la responsabilidad de presidir en estos años, la posibilidad de haber intercambiado reflexiones sobre esta materia. Vid. su web en https://www.euforumrj.org/working-group-environmental-restorative-justice.

[2] Véanse en Varona (2023a y b; 2024). Cfr. el capítulo de Nagore Barrena en este libro que, en colaboración con el proyecto del Ministerio de la Ciencia, el Foro Europeo de Justicia Restaurativa y otras Universidades, incluye una encuesta exploratoria internacional sobre la justicia restaurativa corporativa y los peligros de un lavado verde restaurativo. Cfr. el capítulo de Pilar Farias.

cedentes de diversas perspectivas, en concreto, la Criminología y la Victimología verdes (Long, Stretesky y Lynch, 2024), la Victimología centrada en la victimización institucional y corporativa (Aertsen, Keenan, Mazzucato y Varona, 2025), la justicia restaurativa (Rossner y Taylor, 2024; Forsyth, Pali y Tepper, 2022), la Bioética, la Ética ecológica (Ray y Cooper, 2023), los estudios sobre paz positiva (Esho, 2024) y las teorías sobre la justicia interespecies (Johnson et al., 2024).

Desde la Criminología y la Victimología verdes se han puesto de relieve la invisibilidad y magnitud de los daños causados a los seres vivos y los ecosistemas, no siempre considerados como delitos, con víctimas "difíciles", al ser difusas por afectar a individuos y colectivos, presentes y futuros, en ocasiones de forma transnacional, y de diferentes especies, incluyendo no humanas. Al mismo tiempo, nos encontramos con dobles estándares y falta de responsabilidad por parte de estados que deben proteger los derechos humanos y los propios ecosistemas y bienestar animal, en tensión con intereses económicos y modos de vida que, en especial los de los países del Norte, terminan repercutiendo, de forma desigual, en todo el planeta. Así mismo, con un cambio de paradigma sobre la responsabilidad social, la diligencia debida y el deber de cuidado también afectan a empresas, particularmente las más contaminantes o dañinas, y a los mercados financieros (García, South y Varona, 2024).

Por su parte, la justicia restaurativa plantea, frente a la tradicional respuesta de mayor punición ante la percepción de impunidad, reconsiderar qué entendemos por injusticia, y a quién convoca en cuanto a sujetos implicados para la reparación conjunta y la responsabilización activa (Al-Alosi y Hamilton, 2021)[3]. Esa respuesta se centra en las posibilidades de diálogos o encuentros, más o menos indirectos, basados en la voluntariedad y honestidad, con fundamento en la ética, considerada aquí como Ética ecológica respecto a cómo debe orientarse la respuesta hacia la vida en peligro, sin causar mayores daños, pero ofreciendo alternativas constructivas a diferentes niveles, desde una óptica de paz positi-

[3] Como en otras victimizaciones donde existen mayores riesgos, se precisa una preparación específica para los procesos restaurativos, co-facilitación capacitada y con apoyo de otras disciplinas y colectivos, inclusión, supervisión y seguimiento de acuerdos. La responsabilización activa (*accountability*) implica, como ya se ha mencionado, sentirse obligado, como proceso muy diverso en sí mismo, en cuanto a su contexto (en su caso corporativo) y perfiles sociodemográficos de las personas involucradas. Wood y Suzuki (2024) han resaltado la falta de claridad en la literatura científica de la justicia restaurativa en cuanto a la definición, evaluación y realización de dicho proceso. Estos autores han tratado de sistematizar este concepto indicando que pueden identificarse tres fases, aunque no tienen por qué darse de forma secuencial.

Giving of account o dación de cuentas, en el sentido de reconocer o narrar los hechos cometidos y responder a posibles preguntas de las víctimas o la comunidad sobre los mismos.

Taking of accountability o hacerse responsable de algo ilícito o dañino, con una empatía y concienciación sobre su impacto concreto.

Making of accountability o concretar la responsabilización en una serie de obligaciones, en su caso, supervisadas.

va. Todas las consideraciones anteriores se ven traspasadas por la necesidad de una reconfiguración del Derecho, a la luz de todos los conocimientos científicos sobre los límites planetarios y la sintiencia animal e incluso vegetal (Ferrajoli, 2024). El Derecho siempre tendrá que utilizarse para resolver conflictos (Black, 1984), con la premisa de hacerlo de la forma menos violenta o dañina posible. Un Derecho (penal) ecológico puede posibilitar vías de entrada, en diferentes puntos, para un entendimiento restaurativo de la respuesta a los daños o riesgo de daños a ecosistemas y animales[4].

En la dimensión de la criminalización o definición de lo que es delito, la Criminología verde ha conseguido incluir, en la agenda de los estudios criminológicos, un cuestionamiento sobre lo que se entiende como daños relevantes, más allá de los daños a seres humanos más inmediatos o producidos por la violencia interpersonal. Además, dicho cuestionamiento se extiende a las dificultades y la desigualdad en la persecución de ese tipo de delitos[5] y en la medición de su realidad e impacto. En lo que respecta a la dimensión de la sanción o respuesta sancionadora, la Criminología verde se debate entre la crítica a la impunidad, y la injusticia social, y la propuesta de sanciones que contribuyan a ir a la raíz de los problemas y abordar su cambio, es decir, un replanteamiento progresivo de nuestros modos de vivir, producir y consumir en un mundo global muy desigual (Damus, 2024). Como se comentaba anteriormente, es en esta última dimensión, la de la sanción y sin perjuicio de enfoques preventivos culturales, donde la justicia restaurativa se ha insertado en los últimos tiempos para proponer otra forma de respuesta a los daños que no suponga una reacción dañina, en línea con los estudios sobre paz positiva o no violencia. Sin cuestionar, generalmente, la definición de los que es delito (algo que sí hace la Criminología verde), la justicia restaurativa se pregunta por la inadecuación del entendimiento del delito, como simple violación de unas normas abstractas, donde se articula un proceso legal que no permite ahondar en el impacto y participación de los seres más afectados cuyas reflexiones deberían tenerse en cuenta, finalmente, dentro las políticas penales y sociales orientadas hacia la reparación preventiva, en un sentido más integral.

Por su parte la Ética ecológica[6] incide en la necesidad de un derecho atento a las injusticias climáticas, medioambientales y hacia los animales, consi-

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[4] Véanse los podcasts divulgativos, vinculados al proyecto financiado por el Ministerio de la Ciencia, objeto de este libro, por parte de algunos de sus investigadores (Felicity Tepper, Ivo Aertsen, María José Bernuz, José Luis de la Cuesta y María Isabel Trespaderne), en https://www.ehu.eus/es/web/ivac/podcasts. Véase también el episodio de Gema Varona en https://www.fiadys.org/nuevo-episodio-de-dialogos-con-fiadys-3/.

[5] Sobre esas dificultades, particularmente a escala transnacional, véase el portal de *Ecosolve* en https://www.ecosolve.eco/.

[6] Fensterseifer y Morato Leite (2024) distinguen tres perspectivas en la ética ecológica: a) el patocentrismo -del griego páthein, sufrir- designa la concepción ética de que todos los seres

derando los principios de no abuso de poder, no maleficencia, beneficencia, autonomía y justicia, entre otros, con una renovada mirada de antropocentrismo reflexivo o crítico respecto de la preservación de los ecosistemas y la biodiversidad. Se trata de ir más allá de una Bioética aplicada a las ciencias de la salud, las ciencias naturales o tecnológicas, para reflexionar, entre otras cosas, sobre las implicaciones normativas y prácticas del concepto de la Organización Mundial de la Salud de *Una salud* o *Salud planetaria* (Ibáñez y South, 2024), sin perjuicio de considerar al individuo y no solo la especie, pero siempre en el sentido de interdependencia e interconexión. Precisamente, es también aquí, en relación con la participación de los seres y entidades más afectadas, donde se propone integrar el concepto de justicia interespecies, a la luz de los conocimientos científicos, tecnológicos (Rodríguez-Garavito, Gallant y Crow, 2024) y éticos, con una revisión de nuestras obligaciones hacia diferentes seres vivos. En uno plano ético, el enfoque de justicia interespecies, que respeta las formas de vida, al tiempo que reconoce diferencias significativas entre ellas, podría transformar la relación de los seres humanos con la naturaleza, incluyendo el derecho y la justicia. Así, dentro de la teoría de las capacidades de la filósofa Nussbaum (2023), resultan inseparables los principios de igualdad y bienestar. El bienestar de cada sujeto viene determinado, en parte, por las oportunidades que tiene de ser o hacer, siempre según sus capacidades específicas, y la comunidad humana es responsable de crear esas condiciones necesarias para esas oportunidades (Costa Cordella, 2023)[7].

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sintientes merecen consideración por derecho propio; b) el biocentrismo -del griego bíos, vida- se caracteriza por sostener que todos los seres vivos merecen consideración por derecho propio; y c) el ecocentrismo -también llamado ética holística o fisiocentrismo por algunos, del griego physis, que significa naturaleza- se basa en la premisa de que toda la naturaleza (versión holística) o todo en la naturaleza (versión individualista) merece consideración por derecho propio.

[7] Véanse en este libro el prólogo de Rob White y el epílogo de Nigel South, junto con los capítulos de María José Bernuz, Felicity Tepper e Isabel Trespaderne. Por su parte, según se resume su contenido, subrayando la pertinencia del existencialismo, a partir de la obra *El ser y la nada,* de Sartre, que implica aceptar la materialidad de nuestra condición y el vínculo entre contingencia y libertad, así como de indeterminación de sentido y responsabilidad, la filósofa Corine Pelluchon (2024) muestra que la ecología exige enriquecer la visión del existencialismo. Para ella, el existencialismo ecológico no se reduce al coexistencialismo, que simplemente certifica la evidencia de nuestra pertenencia a una comunidad de seres vivos. Según Pelluchon, un existencialismo ecológico implica romper con el imaginario terrestre y pensar al ser humano desde la perspectiva del mar, como ontología líquida, que quiebra la obsesión territorial detrás de las contradicciones del derecho internacional del mar, dividido entre el imperativo de preservar un ecosistema esencial para nuestra supervivencia y las rivalidades económicas y militares que conducen a su sobreexplotación, en ocasiones unidas a concepciones nacionalistas vinculadas más a la tierra, según apunta el filósofo Reyes Mate (2024). Frente a cualquier idea de arraigo, una fenomenología de la vida marina pone de relieve la fluidez del yo y concibe nuestra inmersión en el mundo común, que remite a la memoria y a lo inmemorial, a la madre mar concebida en su precedencia sobre la tierra, según Pelluchon. Estas ideas permiten conectar perspectivas de la oceanografía actual con algunas epistemología y saberes indígenas (Haluska, 2023). Cfr. el

En relación con todo ello, la pregunta clave que se plantea en este capítulo es si es posible y, en su caso, efectivo un activismo jurídico por el clima, los ecosistemas y los animales y una justicia verde que reivindiquen la justicia restaurativa en lugar del castigo frente a lo que se percibe como una realidad de impunidad. Esto parece algo a contracorriente ante las reclamaciones activistas hegemónicas y la tendencia legislativa más reciente, tanto a nivel internacional (por ejemplo, con la inclusión del ecocidio), como supranacional (Directivas sobre el medio ambiente y el bienestar animal), estatal (sobre la tipificación penal de los delitos y el incremento de las sanciones en este ámbito) e incluso local (con diversas ordenanzas sobre medio ambiente y protección animal en la línea de pedir "mano dura"[8]). Además, más allá del colectivo activista, muy diverso en sí mismo, las actitudes punitivas de la sociedad en general, incluyendo las generaciones jóvenes, tampoco permiten afirmar que asistamos a un giro restaurativo[9]. Por otra parte, la idea de litigación parece contraria a la de justicia restaurativa, que busca vías alternativas al derecho penal que favorezcan la participación inclusiva y la gestión de los conflictos por las personas más afectadas, generalmente no profesionales del derecho y, muchas veces, en situaciones de asimetría de poder respecto de los autores de los daños. Junto a ello, la justicia restaurativa, como el Derecho en general, todavía no ha integrado, en su lógica y práctica, un entendimiento no antropocéntrico de la vida en el planeta.

En esta constatación real se basa el interés de este capítulo que se estructura en cuatro partes fundamentales, tras esta breve contextualización, y considerando la bibliografía más reciente no citada en anteriores estudios, partiendo de la definición de litigación estratégica medioambiental y animal, no ceñida exclusivamente al ámbito penal. Posteriormente, se detendrá en las vías de inclusión de la justicia restaurativa dentro de la normativa internacional y supranacional. En tercer lugar, se analizarán las vías de entrada en la litigación relacionada con la normativa interna. En cuarto lugar, se explorarán algunas posibilidades en la normativa autonómica y local. En cada uno de esos apartados se considerará, junto con la normativa existente, propuestas de reforma,

capíulo de Esteban Morelle-Hungría en este libro. Además, en la noción de manejo, no tanto de identidades múltiples o complejas, sino de percepción de pertenencia (a la especie humana, al planeta, etc.), se basa ese diálogo interespecies. Cfr. Solomon (2024).

8 Sin perjuicio de la crítica de los partidos de extrema derecha, en ocasiones asociadas a la masculinidad y ridiculizando, de forma general, las pretensiones animalistas (Bernuz, 2024). En todo caso, pueden apreciarse contradicciones en diferentes países que variarán en virtud del animal y el contexto de la relación con los humanos (Backlund y Jungar, 2024).

9 Esta es una de las conclusiones de los talleres con escolares realizados sobre el vínculo entre la violencia hacia los ecosistemas y animales y la violencia interpersonal en la Semana de la Ciencia de 2024 (7-9 de noviembre de 2024 en Donostia/San Sebastián) y de las propias entrevistas a personas condenadas por este tipo de delitos en España, analizadas en Varona (2023a y b). Ambas actividades se insertaron dentro del desarrollo de proyecto financiado por el Ministerio de la Ciencia, objeto de este libro.

aludiendo al derecho comparado y a proyectos de investigación-acción en marcha. Además, se detallarán los beneficios y riesgos de la utilización de la justicia restaurativa, diferenciando diversos colectivos y niveles, y se abordará la minimización de riesgos. Finalmente, se terminará con unas conclusiones generales sobre la noción de la litigación estratégica restaurativa y la necesidad de comprender el cambio de rol de los diferentes operadores jurídicos ante este tipo de daños, como agentes de cambio en el sentido, al menos, de no provocar más daños ante la emergencia climática y el sufrimiento animal.

En definitiva, en este capítulo se introduce un aspecto novedoso al proponer la posibilidad de que la litigación estratégica contemple la justicia restaurativa dentro de su caja de herramientas (Robinson y Carlson, 2024), algo que implica, previamente, su integración en el ordenamiento sociojurídico y en la práctica profesional de los operadores jurídicos.

2. LA LITIGACIÓN ESTRATÉGICA MEDIOAMBIENTAL Y ANIMAL

2.1. *Nombrar, responsabilizar, reclamar*

En uno de los artículos sociojurídicos más citados (Olesen y Hammersleve, 2021), Felstiner, Abel y Sarat (1981) se referían a la transformación de los conflictos como un proceso dinámico, complejo, subjetivo, reactivo e incierto, que va desde su identificación o percepción (*naming*), pasando por la búsqueda de un responsable (*blaming*), hasta una reclamación (*claiming*), más o menos judicializada, donde los procesos de reclamación y responsabilización pueden no ser sucesivos. En todo caso, dentro de ese proceso, se puede renombrar el daño, repensar otras formas de responsabilización más activas (*accountability*) y conseguir poner en marcha mecanismos concretos de reparación o restauratividad. El sistema de justicia penal y otros sistemas reguladores responden, por supuesto, a las infracciones de las normas y la ley. Sin embargo, no se comprometen directamente con la experiencia vivida por las personas más afectadas por esos daños. Tienden a centrarse en el autor y a desatender a las víctimas. Les cuesta abordar las emociones que surgen de los daños y los conflictos. Además, el sistema no está diseñado para (re)construir relaciones sociales y cohesión, ni para permitir el entendimiento de diferentes culturas organizacionales o comunitarias, o para desarrollar un mayor sentido de respeto y obligaciones recíprocas entre los ciudadanos o entre las empresas y estados hacia la sociedad.

Se acude a los tribunales cuando ha fallado la prevención y no han funcionado otros mecanismos que, no basados en la justicia formal, permiten gestionar y resolver conflictos de derechos o intereses. En el ámbito que nos ocupa, en muchas ocasiones, esos mecanismos son el cumplimiento de la diligencia debida y el de-

ber de cuidado en el ámbito empresarial y estatal. El hecho de tener que recurrir a los tribunales implica mayor coste económico y humano, además de dilaciones de tiempo que conllevan retrasos en el inicio o continuación de proyectos, así como una afectación a la reputación y credibilidad de individuos, empresas y estados, en relación con múltiples temas conectados con daños o riesgos de daños a ecosistemas y al bienestar animal[10]. Así mismo, esos daños tienen un efecto en cadena y terminan repercutiendo en toda la sociedad, con diferente impacto, incluyendo el propio sistema social, económico, financiero y penal.

El Informe sobre Litigios Climáticos Mundiales de las Naciones Unidas (2023)[11] indica que las personas acuden cada vez más a los tribunales para combatir el impacto de la crisis climática y luchar por los derechos de la naturaleza[12] (Stone, 1972) y de los animales (Singer, 1987; McEwen, 2011; Mouzourakis, 2014; Dayton-Woods, 2023). Niños y jóvenes[13], ancianos, grupos de mujeres, comunidades locales e isleñas y pueblos indígenas[14], entre otros, intentan promover la

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[10] Cfr. la organización *Client Earth*. Véase, por ejemplo, la herramienta de seguimiento de los litigios de transición justa contra empresas o estados por autorizar una actividad empresarial específica vinculada a la minería de transición o al sector de las energías renovables, en los que se argumenta la vulneración de los derechos humanos y medioambientales. Se trata de casos que se basan total o parcialmente en argumentos de derechos humanos para cuestionar la distribución de los beneficios y las cargas de la transición desde los combustibles fósiles hacia las emisiones netas cero. Esta herramienta está alojada en https://www.business-humanrights.org/en/from-us/just-transition-litigation-tracking-tool/. Cfr. Heffron y Hazrati (2024).

[11] Véase en https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review Cfr. el Programa TERRA de la Facultad de Derecho de la Universidad de Nueva York que creó el R2HE, la primera base de datos que recoge y analiza la jurisprudencia más importante sobre el derecho al medio ambiente (https://www.r2heinfo.com/). Cfr. https://climate.law.columbia.edu/. Vid. Boyd, De Bona y Rodríguez-Garavito (2024).

[12] Véase la Alianza Global por los Derechos de la Naturaleza en https://www.garn.org/rights-of-nature/.

[13] Sobre litigación medio ambiental en relación con derechos de la infancia, vid. *Child Rights International Network* (2024). En diciembre de 2024, en el caso Held v. Montana, el Tribunal Supremo de Montana dictaminó, en una demanda promovida por jóvenes, que estos tienen derecho a un «sistema climático estable» y revocó una ley de ese estado que impedía a los reguladores tener en cuenta el impacto de las emisiones de gases de efecto invernadero a la hora de autorizar proyectos de combustibles fósiles. Implicó también el precedente judicial de reconocer que el cambio climático perjudica a los ciudadanos y eso viola sus protecciones constitucionales. Sobre las potencialidades de la justicia restaurativa con niños y adolescentes, vid. EFRJ (s.f.).

[14] En la Network for Greening the Financial System (2024), se citan casos de Australia (Cooper v National Offshore Petroleum Safety and Environmental Management Authority); Brasil (PSB et al. v. Brazil; Instituto Socioambiental et al. v. IBAMA and the Federal Union); Colombia (Centro de Estudios para la Justicia Social v. Presidente (caso Río Atrato Sentencia T-236/17)); Ecuador (Caso Nro. 1149-19-JP/21: Revisión de Sentencia de Acción de Protección Bosque Protector Los Cedros); EE.UU. (Caso del lobo Ojibwe); y Nueva Zelanda (Smith contra Fonterra). Cfr. la jurisprudencia de la Corte Interamericana de Derechos Humanos (Asociación Lhaka Honhat contra Argentina).

justicia y la reforma de la gobernanza o la manera en que regulamos diversas cuestiones que afectan a nuestro modo de vivir o sobrevivir. La litigación estratégica aspira a una redefinición de las responsabilidades de los estados, las organizaciones y las empresas, aunque también de los individuos. Supone la identificación y desarrollo de estrategias legales para abordar de forma más global una problemática, centrándose en un caso concreto con ánimo de transformar conciencias y, en su caso, cambiar la jurisprudencia o provocar cambios legislativos y prácticas, de cara al mañana, al tiempo que obtener reparaciones por daños cuyas consecuencias pueden continuar en el presente y el futuro.

Activistas y comunidades están acudiendo a la litigación climática estratégica no solo para pedir responsabilidad a los estados, sino también a las empresas, con base precisamente en la diligencia debida. Setzer y Higham (2024) consideran que los litigios climáticos estratégicos suelen tener demandantes del mundo del activismo, asesorados por expertos, frente a demandados que son, normalmente, empresas, estados o instituciones financieras. La idea de estrategia está presente en el sentido de que los litigios se utilizan para influir en la política y la justicia, así como en la sensibilización de la sociedad. Por ello, esos litigios suelen ir unidos a campañas y medidas de presión de carácter público (NGFS, 2024). La litigación climática general tiene también en las empresas un protagonista muy importante ya que estas pueden utilizarla para recurrir la denegación y retirada de licencias por parte del estado, así como las sanciones o, incluso, las prácticas de otras empresas.

La litigación estratégica, en la mayor parte de países, más allá de los temas animales o medioambientales, ha sido criticada con base en el principio de separación de poderes. En este sentido, los tribunales suelen resistirse a la movilización jurídica (Ghaleigh, 2010; Hilson, 2010) y los intentos de los litigantes de convertir a los tribunales en un lugar de formulación directa de políticas. No obstante, en los últimos tiempos, quizá por la condición de emergencia y una mayor sensibilización frente a la inacción gubernamental y empresarial, se advierten impactos de dicha litigación estratégica en el contenido de las políticas (Markell y Ruhl, 2012). Ahora bien, existe también una crítica etnocéntrica respecto de la llamada litigación climática actual, en el sentido de que la mayoría de los casos se han presentado principalmente, desde el Acuerdo de París de 2015, por este orden, en Europa, Norteamérica, Latinoamérica, Asia-Pacífico y África, en tribunales o ante organismos estatales, fundamentalmente, con un enfoque de derecho occidental frente al enfoque de litigación que considera "los derechos de todos" (Savaresi, 2022; Tigre, 2024) en conflicto, incluyendo comunidades indígenas y rurales, ambientalistas y animalistas, entre otros grupos.

En todo caso, dentro de la litigación estratégica, como se detalla a continuación, pueden distinguirse diversas perspectivas, objetos y perfiles de sujetos

demandados, abarcando diferentes niveles (locales, regionales, estatales e internacionales), así como distintos órdenes jurisdiccionales (generalmente no penales), que deben ser considerados en relación con las potencialidades de la justicia restaurativa, yendo esta más allá del sistema penal.

2.2. Perspectivas en la litigación medioambiental y animal

Frente a una visión tradicional antropocéntrica, sobre la salud o intereses humanos, en la litigación climática se aprecia, cada vez más, una visión biocultural y ecológica (Sea et al., 2024), con utilización del concepto de derechos de la naturaleza, en relación con los daños o riesgos para la biodiversidad, los ecosistemas y los ciclos ecológicos, considerando los límites planetarios, en particular de forma transnacional. Como prueba de este cambio trascendental, según un reciente informe (Network for Greening the Financial System, 2024), los litigios estratégicos relacionados con la naturaleza están llamando la atención del sistema financiero[15], ya que cabe esperar que generen riesgos financieros, del mismo modo que los litigios relacionados con el clima. Por ello, en el informe citado se recomienda que los bancos centrales, los supervisores y las instituciones financieras sigan de cerca la evolución de esta litigación estratégica. En la misma dirección, de acuerdo con el Centro de Derecho de la Tierra (s.f.)[16], en palabras de su Directora jurídica para América Latina, Constanza Prieto: "Los jueces han sido grandes aliados para adoptar una interpretación más progresista de la normativa existente, permitiendo el reconocimiento de los Derechos de la Naturaleza y la incorporación del valor intrínseco de la Naturaleza"[17]. Según dicha fuente, a nivel global, en más de 150 casos judiciales se han reconocido los derechos de la naturaleza. Entre ellos, se encuentran en Colombia, los casos del Río Atrato (2016) y la Amazonía (2017); en México, los casos de los ríos Salado y Atoyac (2019); en Perú, el caso del río Marañón (2024); así como, a escala transnacional más amplia, la Opinión Consultiva OC 23/17 (2017) en la Corte Interamericana de Derechos Humanos[18]. Esta Opinión determinó que los estados deben tomar medidas para evitar daños medioambientales significativos a las personas, dentro y fuera de su territorio. En

[15] Véase el capítulo de Pilar Farias en este libro.

[16] En la noción del Derecho de la Tierra o derecho ecológico está la idea de que los ecosistemas tienen derecho a existir, prosperar y evolucionar, y que la naturaleza debería poder defender sus derechos ante los tribunales, al igual que las personas. Otros movimientos específicos que se engloban en el Derecho de la Tierra son aquellos relativos a los derechos de los animales no humanos, la tipificación del ecocidio como delito y los derechos de los pueblos indígenas (Earth Law Center, s.f.). El concepto jurídico de derechos de la naturaleza ha sido criticado también por su carácter difuso y contradictorio, finalmente, antropocéntrico como todo lo humano, sin perjuicio de modulaciones y reflexividad (Zimmerman, 1985).

[17] Se conservan las mayúsculas utilizadas en la cita original.

[18] Opinión consultiva OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (nov. 15, 2017), http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf.

muchos de estos casos, los *amicus curiae*[19] han resultado cruciales, siendo redactados por dicho Centro de Derecho de la Tierra u otros organismos, y en los que, en línea con una propuesta de una mirada más restaurativa, podrían colaborar organismos de justicia restaurativa –como el Foro Europeo de Justicia Restaurativa (EFRJ, por sus siglas en inglés).

El derecho a un medio ambiente sano, en la litigación medioambiental, aunque no suele terminar con éxito para los activistas, está obligando a los gobiernos a proteger especies y ecosistemas en peligro, incluyendo no solo especies como grandes simios o cetáceos, sino también tiburones, lobos, bosques, manglares y selvas tropicales (Rodríguez-Garavito y Boyd, 2023). Los autores citados aluden al Tribunal de Apelación de Seychelles[20] que proclamó que el derecho a un medio ambiente sano constituye "el derecho más fundamental de un ser humano" porque "ninguno de los otros derechos fundamentales, incluidos los derechos civiles y políticos, puede ejercerse de manera significativa por un ser humano en ausencia de un medio ambiente limpio y sano que pueda sostener la vida".

Siendo un tema jurídico más específico, pero en relación con la perspectiva de los derechos de la naturaleza, de manera gradual, los tribunales, así como los gobiernos partiendo de iniciativas propias o populares[21], también están reconociendo la personalidad jurídica a ríos, capas freáticas, océanos, bosques, animales[22], y vida salvaje y ecosistemas enteros, concediéndoles un

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[19] Con origen en el Derecho romano y desarrollo en este campo con base en el principio décimo de la *Declaración de Río sobre el Medio Ambiente y el Desarrollo* de las Naciones Unidas (1992), se trata de informes técnicos especializados, dirigidos al tribunal (denominados *amici curiae* cuando se utiliza la expresión en plural). Más allá de los peritajes de parte o de oficio, se realizan desde diferentes disciplinas por personas que no son parte en el procedimiento, pero sí tienen conocimientos especializados. En estos escritos se hace referencia al derecho comparado, las normas científicas, las decisiones judiciales supranacionales y las recomendaciones de organizaciones internacionales para impulsar que los tribunales adopten una perspectiva preventiva y reconozcan el valor intrínseco de la naturaleza en la toma de decisiones medioambientales. En este sentido, el Centro de Derecho de la Tierra quiere dar voz a los ecosistemas en el ámbito judicial. Como demuestran casos climáticos como el de Urgenda, Shell y Neubauer, los tribunales están cada vez más dispuestos a examinar las fuentes científicas y a basarse en ellas para su razonamiento jurídico. En el caso Neubauer, el Tribunal Constitucional Federal alemán se centró en el concepto de puntos de inflexión globales, refiriéndose a los nueve límites planetarios dentro de los cuales la humanidad podría operar con seguridad en el sistema terrestre (Stockholm Resilience Center, 2023).

[20] Ministry of Environment, Energy and Climate Change & Others v Woodlands Holdings Limited & Anor (SCA CL 01/2023) [2023] (Arising in CP 04/2021) ((SCA CL 01/2023) [2023] (Arising in CP 04/2021)) [2023] SCCA 57 (18 December 2023).

[21] Considérese, en España, el caso del Mar Menor y, de forma no vinculante jurídicamente pero destacable en cuanto a constituir un proceso participativo intergeneracional, la protección municipal del río gallego Tins en la Sierra de Outes (Galicia).

[22] En España también se ha puesto en marcha una petición para el reconocimiento de los cetáceos como seres con personalidad jurídica. Al igual que los grandes simios, según indica Pozas (2024): "los denominados "grandes simios del océano" cuentan con cerebros altamente

derecho defendible a no sufrir daños y situándolos, en ocasiones, en el mismo plano jurídico que las empresas. Estos cambios permiten conjugar y articular la idea de participación inclusiva de la justicia restaurativa con la contradicción de que, quizá, se advierte un pensamiento biocultural y ecológico en la teoría y práctica del Derecho que no se aprecia, en igual medida, en la teoría y práctica restaurativas.

2.3. Objeto de responsabilidad/responsabilización y perfiles de demandados

Como ya se ha indicado, si bien lo habitual es encontrarnos con litigaciones estratégicas de grupos de activistas o ciudadanos contra estados y empresas, cada vez más, se observan litigaciones estratégicas de estados contra empresas y empresas contra empresas, así como de empresas contra estados, en cuanto a su desacuerdo sobre las normas de protección de ecosistemas y animales, generalmente por su posible afectación negativa a sus beneficios económicos.

Evidentemente, cuando nos encontramos con grupos o individuos demandando a estados o empresas, se trata de supuestos de asimetría de poder. Si bien ello presenta un reto para introducir prácticas restaurativas en estos procesos judiciales o administrativos, al mismo tiempo, de los párrafos anteriores y posteriores, podemos deducir una complejidad y conflictividad social que el derecho al uso no puede gestionar bien. La justicia restaurativa, basada en los daños relacionales, podría estar mejor equipada conceptual y procesalmente para abordarlos, con un giro bioecológico en su concepción y práctica y los recursos necesarios, partiendo siempre de la voluntariedad.

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desarrollados. Algunas investigaciones, como las publicadas en la revista *Proceedings of the National Academy of Sciences*, sugieren que su capacidad de autoconciencia y empatía es similar a la de los homínidos no humanos. Pero a pesar de sus características únicas y su papel crucial en el mantenimiento del equilibrio oceánico, su reconocimiento legal sigue siendo limitado. Es por eso que, a través de esta petición, buscamos el reconocimiento de los cetáceos como seres esenciales para nuestros océanos y con personalidad jurídica. Al reconocerlos legalmente, se parte de la premisa de que tienen derechos y, por consiguiente, merecen nuestra protección y respeto. Esto no solo ayudará a garantizar su supervivencia, sino también a preservar la rica biodiversidad de nuestros océanos. En la India, los delfines han sido considerados por su Gobierno como personas no humanas y se ha prohibido su utilización comercial en espectáculos circenses como los delfinarios. Bélgica se ha convertido en el cuarto país de Europa y el séptimo del mundo que prohíbe los delfinarios. La mayoría de los miembros del Comité Internacional del Corredor Biológico Mundial, han firmado el Manifiesto y sus aportaciones han enriquecido la petición de este llamamiento universal. Esta petición también está enmarcada dentro de Cetáceo Libre del Proyecto Gran Simio (GAP/PGS-España) (https://proyectogransimio.org/)". Cfr. Bryant (2007) y Staker (2017).

2.3.1. Demandas contra estados

En el caso de las demandas contra estados por parte de activistas y grupos de ciudadanos, con base en la normativa internacional e interna sobre derechos humanos[23], pero también con base en un emergente Derecho ecológico (Fensterseifer y Morato Leite, 2024; Dancer et al., 2024; Morelle-Hungría, 2024) que incluye los derechos de la naturaleza y los animales[24], la litigación estratégica

[23] Cfr. la Resolución 48/13, adoptada por el Consejo de Derechos Humanos de las Naciones Unidas, el 8 de octubre de 2021, sobre el derecho humano a un medio ambiente limpio, sano y sostenible, una expresión que encuentra sus precedentes en el desarrollo del derecho estatal y subestatal desde los años setenta. Dentro de los ejemplos citados en la Network for Greening the Financial System (2024), sin ánimo de exhaustividad pero con ese carácter de litigación estratégica contra estados, en relación con el derecho a un medio ambiente sano, se encuentran casos en Colombia (Castilla Salazar v. Colombia; Centro de Estudios para la Justicia Social v. Presidente, caso del Río Atrato); en Costa Rica (Asociación Costarricense de Naturales de Costa Rica c. Ministerio de Ambiente y Energía; Flórez-Estrada c. Ministerio de Agricultura y Ganadería; Federación para la Conservación del Ambiente c. Ministerio de Ambiente y Energía); en México (Amparo en revisión 307/2016); en Finlandia (Asociación Finlandesa para la Conservación del Ambiente c. Ministerio de Ambiente y Energía; Asociación Finlandesa para la Conservación de la Naturaleza y Greenpeace vs. Finlandia); en Noruega (Asociación Nórdica Greenpeace c. Ministerio de Petróleo y Energía (People c. Arctic Oil); en Pakistán (Sheikh Asim Farooq c. Pakistán); en Filipinas (Oposa c. Factoran; Animales marinos residentes del paisaje marino protegido Estrecho de Tañón v. Reyes); y en Sudáfrica (Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others). La Network for Greening the Financial System (2024) también cita la alegación del derecho a un medio ambiente sano como base en casos históricos sobre el clima, así en Portugal (Associação Último Recurso et al. contra el Estado portugués) y en EE.UU. (Held contra el Estado de Montana). Considérese también la Opinión Consultiva OC-23/17, ya citada, de la Corte Interamericana de Derechos Humanos, que reconoce un derecho a un medio ambiente sano, incluida la diversidad biológica. Cfr. los casos Asociación Lhaka Honhat c. Argentina y Comunidad de La Oroya c. Perú. En el Tribunal Europeo de Derechos Humanos, vid. Greenpeace Nordic and Others v. Norway; y en el Tribunal de Justicia de África Oriental, vid. Center for Food and Adequate Living Rights v. Uganda [EACOP Case].

[24] En la Network for Greening the Financial System (2024), se indica que en EE.UU, diversos municipios han establecido estructuras jurídicas que reconocen los derechos de la naturaleza, así el Código de Pittsburgh (2010); la Carta de Derechos Climáticos de Lafayette (2017); y el Código del Condado de Orange (2017), además de leyes y resoluciones nacionales tribales, como la tribu de indios ponca de Oklahoma (2018), con la Resolución sobre la preexistente ley tribal Ponca de la naturaleza (revisada en 2019); la White Earth Band of Ojibwe (2018), Derechos de Manoomin; la tribu Yurok (2019), con la Resolución del Consejo Tribal Yurok; la tribu Nez Perce (2020); y la tribu Menominee de Wisconsin (2020), con la Resolución N° 19-52 de reconocimiento de los derechos del río Menominee. También, incluyendo diferentes escalas más allá de la local, en Bolivia (Ley N° 071 - 21 de diciembre de 2010); Brasil (Ley Paudalho de Derechos de la Naturaleza); Canadá (Municipalidad Regional del Condado de Minganie); Ecuador (Artículos 71 a 74 de la Constitución de Ecuador); México (Constitución de la Ciudad de México); Nueva Zelanda (Te Urewera Act; Te Awa Tupua (Whanganui River Claims Settlement); Panamá (Ley N° 287 de 2022); España (Ley 19/2022 por la que se otorga al Mar Menor y su cuenca el estatuto de persona jurídica); Uganda (Parte I, 4 de la National Environment Act); Reino Unido (Irlanda del Norte, moción aprobada por el Derry City and Strabane District Council; Fermanagh and Omagh District

busca que se cumplan las obligaciones estatales que pueden ser de dos tipos, según la literatura especializada (Duvic-Paoli, 2019):

a. Sustantivas –ya sean negativas (no causar daño o abstenerse de realizar actividades dañinas[25]) o positivas (adoptar legislación y políticas y ejecutarlas).
b. Procesales (garantizar el acceso a la información, la participación y la justicia, incluyendo el acceso a remedios efectivos[26]).

En el caso de España, cuatro años después de acudir al Tribunal Supremo, el cual dio la razón al Gobierno en julio de 2023 (Planelles y Brunet, 2024), en diciembre de 2024, la Sección Cuarta del Tribunal Constitucional admitió a trámite un recurso de amparo de un grupo de ONG (Greenpeace, Ecologistas en Acción, Oxfam Intermón y la Coordinadora de Organizaciones para el Desarrollo, esta última sumada más tarde) por la falta de ambición en la lucha contra el calentamiento del Gobierno de España, plasmada en el Plan Nacional Integrado de Energía y Clima. El Tribunal Constitucional indicó que concurría "una especial trascendencia constitucional porque el recurso plantea un problema o afecta a una faceta de un derecho fundamental sobre el que no hay doctrina". Ante los

Council). Cfr., específicamente sobre litigación estratégica en los tribunales, en Ecuador (Caso Nro. 1149-19-JP/21: Revisión de Sentencia de Acción de Protección Bosque Protector Los Cedros; Caso Nro. 253-20-JH/22, Estrellita Caso del Mono); Colombia (Centro de Estudios para la Justicia Social vs. Presidente, Caso Río Atrato; Generaciones Futuras vs. Ministerio del Medio Ambiente); India (Centre for Environmental Law v. Union of India; Mohd. Salim v. State of Uttarakhand and Others; Lalit Miglani v. State of Uttarakhand and Others; Madras High Court W.P. (MD) Nos 18636 of 2013 y 3070 of 2020; M. K. Ranjitsinh and Others v. Union of India and Others); Pakistan (Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad); Perú (caso del río Marañón); y EE.UU. (Colorado River Ecosystem v. State of Colorado).

[25] Aquí se incluye el llamado principio de no regresión que consiste en la prohibición a los poderes públicos, de disminuir o afectar de manera significativa el nivel de protección ambiental alcanzado, salvo que esté absoluta y debidamente justificado. Vid. Němec y Damohorský (2024) y Theunis (2024).

[26] El Convenio de Aarhus (1998) fue ratificado por España el 15 de diciembre de 2004. Se refiere al acceso a la información, participación pública en la toma de decisiones y acceso a la justicia en materia de medio ambiente. Cfr. la normativa europea y estatal derivada del mismo en https://www.miteco.gob.es/es/ministerio/servicios/informacion/informacion-ambiental.html. En el ámbito americano, en el caso de La Oroya (Perú), con daños causados por las actividades industriales del Complejo Metalúrgico de La Oroya (CMLO), tras diversas peticiones, la Comisión Interamericana de Derechos Humanos, pidió la adopción de medidas cautelares y presentó el caso ante la Corte Interamericana de Derechos Humanos. En su decisión de 2023, la Corte hizo hincapié en la obligación del Estado de prevenir las violaciones de derechos por parte de entidades públicas y privadas, garantizando la transparencia y la participación pública en los procesos de toma de decisiones medioambientales. Se ordenó a Perú que investigara y enjuiciara los casos de acoso a defensores del medio ambiente, aumentara la transparencia y la participación pública, realizara evaluaciones de la contaminación, proporcionara atención médica gratuita y aplicara medidas preventivas para evitar daños futuros.

efectos del cambio climático, el recurso implica la necesidad de analizar cómo se ven afectados derechos fundamentales y preservarlos, principalmente la vida y la intimidad personal y familiar, salud y libertad, de generaciones presentes y futuras. En este recurso ante el Tribunal Constitucional se menciona que, en abril de 2024, el Tribunal Europeo de Derechos Humanos (TEDH) condenó al Gobierno suizo por incumplir sus propios objetivos de reducción de emisiones de efecto invernadero (Sentencia de la Gran Sala del Tribunal Europeo de Derechos Humanos de 9 de abril de 2024, Verein KlimaSeniorinnen Schweiz y Otros c. Suiza (Application 53600/20)). El TEDH basó su decisión en que Suiza había violado los artículos 8 del Convenio Europeo de Derechos Humanos, que protege el derecho a la vida privada y familiar, y el 6, que consagra el derecho a un proceso judicial equitativo, tras no atenderse las demandas en la justicia interna. demandas en la justicia interna. El TC deberá considerar también el caso Cannavacciuolo y Otros c. Italia (2025) donde, de forma pionera, se alude al artículo 2.

Previamente, en el contexto del Tribunal Europeo de Derechos Humanos, en el caso Duarte Agostinho y Otros c. Portugal y otros 31 estados, en el que seis personas jóvenes portuguesas demandaron conjuntamente a los 27 Estados de la Unión Europea, además de Reino Unido, Suiza, Noruega, Rusia y Turquía, por la violación de varios derechos humanos, durante las olas de calor y los incendios de bosques que obligaron a cerrar sus centros escolares y pusieron en peligro su salud, la demanda fue inadmitida por falta de agotamiento de los recursos internos nacionales (art. 35.1 del CEDH) y por la "considerable falta de claridad en cuanto a la situación individual de los demandantes, que dificultó el examen del cumplimiento de los criterios de la condición de víctima". Asimismo, el caso Damien Carême c. Francia, en el que el exalcalde de Grande-Synthe, población situada en la periferia de Dunkerque, en el norte de Francia, demandó al gobierno francés por incumplimiento de su obligación de proteger la vida, al no tomar medidas suficientes para prevenir el cambio climático y, por tanto, elevar el riesgo de futuras inundaciones en la zona, fue también inadmitido por no cumplir los criterios de condición de víctima por cuanto "el demandante no tenía vínculos relevantes con Grande-Synthe y que, además, no vivía actualmente en Francia". El Tribunal consideró que, a efectos del artículo 8 (vida privada, vida familiar o domicilio), el demandante no podía pretender tener la condición de víctima en virtud del artículo 34 del Convenio (Doreste y Moreno-Cervera, 2024)[27].

[27] Además, una serie de casos basados en los derechos de la naturaleza se han centrado en el nexo entre clima y naturaleza, en ocasiones con tensiones entre diversos objetivos verdes, así según la Network for Greening the Financial System (2024), pueden citarse, en Brasil, los casos Instituto Socioambiental et al. contra IBAMA y la Unión Federal; PSB et al. contra Brasil (sobre el Fondo Amazonia); PSB et al. contra Brasil (sobre el Fondo Clima); PSB et al. contra Brasil (sobre deforestación y derechos humanos); en Finlandia, el caso Finnish Association for Nature Conservation y Greenpeace contra Finlandia; y en Pakistán, el caso Sheikh Asim Farooq contra Pakistán. Por otra parte, en 2024 el Tribunal Supremo de la India reconoció el derecho

A nivel de tribunales internacionales, el 13 de diciembre de 2024 concluyeron las audiencias públicas, en relación a las obligaciones de reparación de los estados en materia de cambio climático, particularmente respecto de los pequeños estados insulares en desarrollo, liderados por la república de Vanuatu[28]. Estos estados son especialmente vulnerables a los efectos del cambio climático, conforme a la solicitud de dictamen consultivo de la Corte Internacional de Justicia (Buszman, 2024)[29].

Estamos ante reclamaciones de reparaciones históricas por parte de estados (que parten de reivindicaciones de grupos de individuos y ONG), donde, al igual que en injusticias relacionadas con la colonización o la esclavitud, pueden adoptarse procesos y respuestas restaurativas (y también transicionales), no vinculadas a tribunales penales. En este sentido, Vanuatu es uno de los países del mundo con mayor riesgo de sufrir catástrofes naturales inducidas por el cambio climático. Ralph Regenvanu, enviado para el Clima, en representación de la República de Vanuatu, se dirigió a la Corte Internacional de Justicia de la siguiente manera (Robinson, 2024, pfo. 6 y ss.)[30]:

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de los ciudadanos a ser protegidos contra los efectos adversos del cambio climático como un derecho fundamental vinculado al derecho a la vida y al derecho a la igualdad. El caso se refería a la protección de dos especies raras de aves y a la necesidad de encontrar un equilibrio entre su conservación y los compromisos climáticos del país (M. K. Ranjitsinh y otros contra Unión de la India y otros). Además, en los Tribunales de Brasil también se ha indicado la necesidad de equilibrar los objetivos climáticos y salvaguardar a los sectores más vulnerables de la población, como las mujeres y las comunidades indígenas, sin sacrificar indebidamente la biodiversidad. En el caso citado del Instituto de Estudios Amazónicos contra Brasil, basado en los artículos 225 y 5 de la Constitución Federal brasileña (principio de la dignidad humana y derecho a la vida), así como en la Política Nacional de Cambio Climático, que fue modificada para incluir los objetivos de París. Finalmente, cabe aludir a un caso estadounidense (Save Long Beach Island contra el Departamento de Comercio de EE.UU.), que se refería al impacto de un proyecto de energía eólica marina sobre las ballenas del Atlántico Norte y las ballenas jorobadas, en relación con la biodiversidad (Network for Greening the Financial System, 2024).

[28] Ya en 1991 la Alianza de Pequeños Estados Insulares solicitó la necesidad de garantías frente a los daños causados por la subida del nivel del mar. Sin embargo, hubo que esperar hasta la 27ª Conferencia de las Partes de la Convención Marco de las Naciones Unidas sobre el Cambio Climático (COP27), de 2022, cuando se acordó establecer un fondo para este propósito denominado Fondo de Respuesta ante Pérdidas y Daños. Vid. en https://unfccc.int/loss-and-damage-fund-joint-interim-secretariat. Cfr. las posibilidades de la respuesta alternativa en este campo, en Robinson y Carlson (2024).

[29] En 2021, Vanuatu anunció que el gobierno solicitaría una opinión consultiva a la Corte. Después de que Vanuatu formara una gran coalición de Estados para apoyar la iniciativa, el 29 de marzo de 2023 la Asamblea General de la ONU adoptó la Resolución 77/276, por la que se remitía el procedimiento a la CIJ.

[30] Cfr. sobre las audiencias de este caso, la documentación de la Corte Internacional de Justicia en https://www.icj-cij.org/case/187. El 21 de mayo de 2024, el Tribunal Internacional de Derecho de Mar establecido por la Convención del Derecho del Mar, con sede en Hamburgo, dictaminó, en un fallo consultivo y no vinculante promovido por estados pequeños insulares, tras una petición de que se pronunciara sobre si las emisiones de dióxido de carbono absorbidas por

> El resultado de este proceso repercutirá durante generaciones, determinando el destino de naciones como la mía y el futuro de nuestro planeta.
>
> Vanuatu es una nación de islas y pueblos isleños. Nuestros pueblos han construido culturas y tradiciones vibrantes a lo largo de milenios que están íntimamente entrelazadas con nuestras tierras y mares ancestrales. Sin embargo, hoy nos encontramos en primera línea de una crisis que no hemos creado, una crisis que amenaza nuestra propia existencia y la de tantos otros pueblos que han acudido en un número sin precedentes para ser escuchados por este Tribunal.
>
> No se puede exagerar la importancia de las cuestiones que se plantean ante este Tribunal. Lo que está en juego en este caso es la legalidad, en virtud de todo el corpus del derecho internacional, de una determinada conducta, desplegada por Estados específicos a lo largo del tiempo, que ha interferido con el sistema climático hasta un punto que ya ha causado un daño significativo a Vanuatu y que amenaza la supervivencia de mi pueblo y de la humanidad en su conjunto (...).
>
> Para muchos pueblos, incluido el de Vanuatu, el fracaso prolongado y sistémico del proceso de la COP les ha costado su bienestar, sus culturas e incluso sus vidas. Hay una necesidad urgente de una respuesta colectiva al cambio climático basada no en la conveniencia política, sino en el derecho internacional.
>
> La Corte, como principal órgano judicial de las Naciones Unidas, se encuentra en una posición única para proporcionar orientación autorizada en virtud de todo el corpus del derecho internacional. Esperamos que la Corte reconozca que la conducta que ya ha causado un daño inmenso a mi pueblo y a tantos otros es ilegal, que debe cesar y que sus consecuencias deben repararse.

2.3.2. Demandas contra empresas

En los litigios contra empresas también encontramos demandas referidas al incumplimiento de obligaciones sustantivas (incluyendo obligaciones hacia in-

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los océanos pueden considerarse contaminación y, en caso afirmativo, qué obligaciones tienen los países para hacer frente al problema. La Convención de la ONU sobre el Derecho del Mar obliga a los países signatarios a prevenir la contaminación de los océanos, definida como la introducción de "sustancias" que perjudican la vida marina. Sin embargo, no incluye las emisiones de carbono entre los contaminantes específicos, y los demandantes argumentaron que estas emisiones deben entenderse incluidas. Véase la documentación de este caso en https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. Cfr. Banco Europeo de Inversiones (s.f.). Sobre las implicaciones históricas coloniales, vid. Nemeth y Mertz-Lerman (2024).

versores, accionistas y la sociedad), en relación con la diligencia debida y el deber de cuidado, ya que deben abstenerse de contaminar o utilizar determinados materiales o métodos, y, por otra parte, deben cumplir con la normativa y las políticas existentes, en su caso, reduciendo emisiones o ciertas actividades. Sobre aspectos procedimentales, la litigación estratégica contra empresas es más escasa hasta la actualidad y puede destacarse la dirigida respecto de la falta de consulta a posibles partes afectadas, así como la carencia de información y acceso a procedimientos de queja o reclamación (Savaresi, 2022; Savaresi, Alabrese y Scott, 2022).

De nuevo, la Network for Greening the Financial System (2024), cita, en Francia, en relación con la legislación sobre diligencia debida en materia de sostenibilidad empresarial, tres casos relacionados con la naturaleza, basados en la legislación medioambiental y de derechos humanos. En primer lugar, está el caso de una cadena de supermercados, demandada por considerar que su plan de diligencia debida no tiene en cuenta las obligaciones medioambientales y de derechos humanos, en relación con la deforestación del Amazonas, incluyendo los derechos de las comunidades indígenas (Envol Vert contra Casino). En segundo lugar, se encuentra una institución de crédito francés que ha sido cuestionada por los vínculos comerciales con los productores de carne de vacuno (Comisso Pastoral da Terra y Notre Affaire à Tous contra BNP Paribas). Por último, se ha presentado una reclamación contra un importante productor de alimentos, alegando que la empresa no está abordando adecuadamente los riesgos asociados a la producción de plástico en su cadena de suministro (ClientEarth, Surfrider Foundation Europe y Zero Waste France contra Danone).

Dentro del *derecho de daños*[31], bajo el principio de "quien contamina paga", en Brasil, existen casos que buscan responsabilizar a algunas empresa siderúrgicas y sus gerentes por promover la deforestación ilegal, así como por daños climáticos causados por las emisiones de gases de efecto invernadero derivadas de la deforestación ilegal (Federal Environmental Agency v. Siderúrgica São Luiz Ltd. and Martins). El argumento jurídico se centra en la falta de diligencia debida adecuada en la cadena de suministro en virtud de la legislación medioambiental. En relación con ello, como ya se ha indicado, en diversos países, algunas empresas cárnicas están siendo demandadas por contribuir a la deforestación y la degradación de la naturaleza al comprar ganado criado ilegalmente en zonas protegidas del Amazonas (Rondonia State v. JBS) (Network for Greening the Financial System, 2024).

[31] Este derecho de daños, en lo que se refiere al cambio climático, incluyendo los llamados desastres ambientales, debe reinterpretarse dentro del conjunto de un orden público ecológico como principio del Estado de Derecho (Martínez y Pedro, 2023), que pone de relieve los conceptos de corresponsabilización, prevención y reparación o compensación, conceptos clave en la literatura sobre justicia restaurativa.

En litigación contra empresas, siguiendo el ejemplo de Liuya v RWE, en 2022, se inició otra demanda transnacional en la que habitantes del hemisferio sur reclaman a una empresa, con sede en el hemisferio norte, por su contribución a la crisis climática. En esta ocasión, cuatro habitantes de una isla cercana a Jakarta, denominada Pari, con la ayuda de tres ONG –de Indonesia, Suiza y Alemania, respectivamente-, demandaron en Suiza a la compañía cementera Holcim, con base en dicho país, la cual se estima como una de las compañías que más ha contribuido a los gases de efecto invernadero desde el siglo XIX[32]. Se le solicita que reduzca sus emisiones, contribuya con medidas de adaptación al clima en la isla y repare los daños. En definitiva, de forma novedosa, se pide una respuesta simultánea de mitigación, adaptación y compensación por pérdidas y daños[33]. En este sentido, la justicia restaurativa puede ampliar las posibilidades de que las voces de las personas más afectadas sean escuchadas y se establezca una responsabilidad seguida de una responsabilización activa que comprenda también reparaciones históricas.

En el marco de los derechos de los accionistas, en Australia, un accionista de la matriz cotizada de un grupo financiero, que incluye banca, ha solicitado permiso al tribunal para acceder a documentos internos de gestión de riesgos, alegando que el banco del grupo no está gestionando adecuadamente la doble crisis del cambio climático y la pérdida de biodiversidad (Rossiter v ANZ Group Holdings Limited).

Finalmente, dentro de la *legislación contra el blanqueo de capitales*, en Francia, la ONG Sherpa presentó una denuncia penal ante la Fiscalía Financiera contra tres bancos franceses y un gran grupo asegurador. La denuncia se basa en cargos de blanqueo de capitales y receptación de bienes robados (Sherpa v. BNP Paribas, Crédit Agricole and Others). Se alega que, al poseer bonos emitidos por empresas que se benefician de delitos contra el medio ambiente, están

[32] En julio de 2022, presentaron una solicitud de conciliación ante el Juzgado de Paz del Cantón de Zug (Suiza). Se trata de un paso necesario exigido por la Ley de Enjuiciamiento Civil suiza. El 1 de febrero de 2023, tras una Audiencia de Conciliación ante el Juzgado de Paz en octubre de 2022 en la que no se llegó a un acuerdo, las ONG que apoyan a los demandantes anunciaron que éstos habían presentado formalmente una demanda contra Holcim ante el Tribunal Cantonal de Zug (Kantonsgericht Zug). La base jurídica en la que se apoyan los demandantes es el artículo 28 del Código Civil suizo (vulneración de los derechos de la persona) y el artículo 41 del Código de Obligaciones (reparación del daño injusto). En cuanto a las emisiones históricas de Holcim, los demandantes se basan en un estudio de Richard Heede promovido por *Climate Accountability Institute* (climateaccountability.org). Cfr. Heede (2022). Vid. https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/.

[33] Aunque anteriormente el Tribunal del Distrito de La Haya, en el caso Milieudefensie v Shell, obligó a la empresa Shell a reducir sus emisiones presentes y futuras de CO2. Esa decisión fue revocada por el Tribunal de Apelación que, en todo caso, confirmó la obligación de reducir las emisiones, si bien declaraba que no podía establecerse el porcentaje exacto de reducción (Mockel y Wendland, 2024).

contribuyendo a reintroducir el producto de estos delitos en el circuito legal, cuando los bonos se reembolsan con el producto derivado de la deforestación ilegal. Por otra parte, en el Reino Unido, se ha presentado una demanda ante el Tribunal Superior del Reino Unido, afirmando que la Bolsa de Metales de Londres permite el comercio de «metales sucios» procedentes de la provincia indonesia de Papúa Occidental (GLAN and London Metal Network v. London Metal Exchange) (Network for Greening the Financial System, 2024).

3. LAS DIFERENCIAS ENTRE LA MEDIACIÓN MEDIOAMBIENTAL (Y ANIMAL) Y LA JUSTICIA RESTAURATIVA EN LA LITIGACIÓN ESTRATÉGICA

La descripción y enumeración de los casos anteriores busca evidenciar la complejidad de los temas en los que podría introducirse, al menos parcialmente, la vía de la justicia restaurativa. Sobre una base eco-ética, así como de principios e intereses relacionados entre el derecho y la justicia medioambiental, climática e interespecies[34], la justicia restaurativa en este campo implica que los agentes que promueven la litigación estratégica planteen a los tribunales y agentes implicados la vía de la justicia restaurativa, donde el foco no se encuentra en la responsabilidad impuesta, sino en la responsabilización activa y preventiva, partiendo de la voluntariedad y el compromiso dialogado por todos los agentes afectados. En este sentido, la justicia restaurativa puede entrar en juego en conexión con el cumplimiento de las obligaciones sustantivas o procedimentales mencionadas, tanto contra estados como contra empresas, y puede hacerlo dentro de la misma litigación estratégica, según cada contexto. Ello podría ser posible con una con-

[34] Cfr. los principios de la UE que rigen toda política medioambiental (Kurrer y Petit, 2024): no discriminación, precaución, prevención, corrección de la contaminación en su fuente y "quien contamina paga", pudiendo entenderse que, en justicia restaurativa, puede pagarse más allá del dinero. En el ámbito del bienestar animal, si bien en el Tratado de Lisboa se reconoce la sintiencia animal, la política europea se ciñe al bienestar animal referido a los animales de granja en las explotaciones, durante el transporte y en el sacrificio. Así, la política de la UE refleja en este ámbito las cinco libertades contenidas en el Convenio europeo de protección de los animales en explotaciones ganaderas (libertad de hambre y de sed; libres de molestias; libres de dolor, heridas y enfermedades; libertad de expresar un comportamiento normal; y libertad de miedo y angustia). Vid. en https://eur-lex.europa.eu/ES/legal-content/glossary/animal-welfare.html. En relación con los animales de compañía, no existe normativa comunitaria en la Unión Europea. En España, y sin perjuicio de la regulación estatal penal y la regulación autonómica y local, con referencia a los animales de compañía y silvestres en cautividad, la Ley 7/2023, de 28 de marzo, de protección de los derechos y el bienestar de los animales, identifica como derechos de los animales su derecho al buen trato, respeto y protección, inherentes y derivados de su naturaleza de seres sintientes, y con las obligaciones que el ordenamiento jurídico impone a las personas, en particular a aquéllas que mantienen contacto o relación con ellos (art. 1. 2). Vid. https://www.dsca.gob.es/es/derechos-sociales/derechos-animales/normativa.

cepción amplia de "tribunal multipuertas"[35] (Cosas Williams, 2024; Viñas et al., 2024; INSTA, 2024; European Forum for Restorative Justice, 2025), siempre con una mirada no antropocéntrica occidental y de consideración de reequilibrio de poder. En definitiva, se incidiría en replantear la regulación actual en general, y la justicia restaurativa en particular, desde un enfoque de biofilia o bioecológico, con el principio de *in dubio pro natura*, con origen en la jurisprudencia constitucional de Costa Rica, con el sentido de, sin menoscabo de las garantías irrenunciables, defender a la parte más débil en la relación jurídica[36].

Para ello es preciso diferenciar la mediación de la justicia restaurativa. Conviene recordar que la mediación, así como el arbitraje[37], han existido en este campo desde hace décadas, con distintas perspectivas sobre los actores, dinámicas y objetivos. Ahora bien, no se trata de proclamar las bondades o ventajas apriorísticas de la justicia restaurativa frente a la mediación o de negar su relación (de Oliveira, 2022; Loke, 2017; Neto y Pamplona, 2023; Associação dos Juízes Federais do Brasil, 2024)[38], pero sí pueden establecerse las siguientes seis diferencias, ilustradas con algunos ejemplos.

1. *El concepto de daño*

La justicia restaurativa maneja un concepto de daño material e inmaterial, más allá de lo compensable en términos jurídicos. Por ejemplo, un río no es

[35] La noción de "tribunal multipuertas" procede de una conferencia, en 1976, del Profesor de la Facultad de Derecho de Harvard, Frank Sander (1979). Sin referencia a la justicia restaurativa, que se encontraba en sus orígenes en ese año en Norteamérica, el marco teórico principal de los tribunales multipuertas eran los sistemas alternativos de resolución de litigios (ADR) (Sander y Hernández Crespo, 2008). La idea era encaminar los casos judiciales entrantes hacia los métodos más adecuados de resolución de conflictos, para una respuesta más adaptada, que ahorrase esfuerzos y costes, de todo tipo, resultando más adecuada y eficiente para cada caso, sin perjuicio de la necesidad de coordinación y complementariedad entre dichas puertas o vías. Cfr. la Ley de Eficiencia del Servicio Público de Justicia, aprobada en España en diciembre de 2024, la cual menciona la justicia restaurativa en relación con el sistema penal, introduciéndose una modificación en la LECrim, si bien la Ley de Eficiencia del Servicio Público de Justicia y la referencia a métodos alternativos o adecuados de solución de controversias se refiere a temas disponibles para las partes, fuera de los penales. En todo caso, adviértase la confusión sobre la justicia restaurativa que no significa privatización ni la posibilidad de disponer sobre temas penales de interés público (en relación con la idea apuntada anteriormente de orden público ecológico), sino que significa la posibilidad de que esos tribunales multipuertas también existan en el ámbito penal, con todas las garantías y protección del interés público, para responder de forma más adecuada e individualizada, considerando la evidencia científica y la práctica procesal, sin merma de garantías jurídicas.

[36] Vid. la sentencia de la Sala Constitucional de la Corte Suprema de Costa Rica, nr. 05893, del 27 octubre de 1995, https://vlex.co.cr/vid/-497344562 (Fontanella, 2024).

[37] Véase la página web el Tribunal de Arbitraje Permanente, en lo relativo a asuntos medioambientales entre sujetos estatales y no estatales, en https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/.

[38] Véase el capítulo de Samira de Oliveira en este libro.

solo un espacio o lugar, tiene un valor afectivo, emocional e incluso cultural o espiritual para algunas comunidades. La valoración de dicho daño solo puede hacerse escuchando a los seres más afectados y la compensación no tiene que ser simplemente económica. Además, cuando se trata de ataques graves contra los ecosistemas y animales, con afectación, quizá, a seres humanos, independientemente de su criminalización, resulta fundamental entender la asimetría ética que existe en el sentido de que, sin perjuicio de contextualizaciones y del principio de responsabilidad compartida, lo cierto es que un individuo, grupo de individuos, estado o empresa responsable ha provocado un daño inmerecido o sufrimiento a otros seres vivos que conlleva la necesidad de hacerse cargo del mismo, siempre con respecto de las garantías jurídicas.

2. *El concepto de agente implicado*

Por todo lo anterior, en justicia restaurativa no puede hablarse de partes, como en la mediación, sino de participantes activos en un proceso *ad hoc*. Aunque se siga dirimiendo en los tribunales con esta terminología, a nadie se le escapa que los casos *Prestige* o Aznalcóllar, por ejemplo, no son solo una cuestión de "partes" legitimadas para intervenir en un tribunal. Ahora bien, conviene indicar que los operadores jurídicos siguen teniendo un papel muy relevante en supuestos en los que se opte por la justicia restaurativa. Abogados, fiscales y jueces conservan un papel de garantes, aunque los procesos restaurativos sean diferentes a los clásicos judiciales porque tienen otros objetivos, participantes, dinámicas y principios.

3. *El concepto de comunidad*

La comunidad es un *locus* de conflicto, pero también de restauración. Entre los participantes de procesos restaurativos siempre tiene que haber representantes de la comunidad más afectada, precisamente para concretar la complejidad de la dimensión pública, es decir, la relevancia de lo social y público, y esto solo puede hacerse mediante el principio de inclusión de personas, verdades y saberes diversos. Aunque en la justicia restaurativa también rige el principio de confidencialidad que asegura las garantías, la honestidad y el compromiso, es preciso que el resultado trascienda públicamente de una forma general. Así, en justicia restaurativa, un acuerdo de reparación debe realizarse también con la colaboración de la comunidad afectada y no de forma secreta en un despacho de abogados, sin perjuicio de su participación, así como la de otros técnicos.

4. *El concepto de justicia*

La justicia restaurativa no es solo una cuestión estratégica o una práctica de ahorro de tiempo o costes, es fundamentalmente justicia entendida como responsabilización preventiva a través del diálogo. Puede rechazarse la injusticia

(en su caso entendida como impunidad), sin esencializar a las víctimas (los victimarios también son parte de la comunidad o sociedad). Por ello, las personas facilitadoras no pueden definirse como mediadores imparciales porque no pueden ser parciales ante el daño que convoca a la responsabilización de algunas personas. Los facilitadores se rigen, entre otros, bajo los principios de multiparcialidad en el sentido de que son imparciales con la dignidad de las personas; y de confianza en el cambio (personal, cultural, organizacional y social). Ello es posible trabajando con el diálogo y la imaginación ética, importante en cuanto a la perspectiva intergeneracional y la consideración del poder como relación, para cuestionar sus asimetrías.

5. *Diferentes modalidades de justicia restaurativa*

La intervención de la comunidad en la justicia restaurativa solo es posible en modalidades grupales de diálogo, más allá de la mediación bilateral al uso. Da pie a talleres, conferencias, círculos, paneles, recorridos grupales… o cualquier otro formato que se cree *ex profeso* para cada victimización. Para poder visualizarlo, podemos pensar en círculos donde participan más de cuatro personas, además de los facilitadores (Varona, 2024a).

6. *El concepto de restauración*

La justicia restaurativa no maneja el concepto estrecho de reparación jurídica porque parte de la base de múltiples relaciones afectadas. Además, hay daños irreparables que solo pueden responderse mediante memoria restaurativa u otros mecanismos preventivos. La restauración implica transformación de las condiciones injustas (de Jong, 2023). Ahora bien, los principios de respeto a la dignidad y a la voluntariedad son los límites y las potencialidades de la justicia restaurativa, también en este campo.

En definitiva, el término restauratividad (*restorativeness*) es diferente de la reparación en términos jurídicos y lo es porque supone una implicación comunitaria, unos cuidados colectivos, además de cuestionar la separación entre prevención y reparación. Por ejemplo, una forma de reparación que piden muchas víctimas son las garantías de no repetición, el "nunca más contra nadie más". Así mismo, se trata de una reparación que aspira a ser individualizada y personalizada, en línea con los estándares internacionales victimológicos, de forma que permite la flexibilidad y la creatividad para poder proponer formas de reparación conjunta, de forma no impuesta, es decir, promoviendo procesos de responsabilización activa, donde pueden cruzarse los itinerarios de desvictimización y de reintegración a la comunidad, con aspectos colectivos. Además, la restauratividad implica la reconstrucción compartida de relaciones desde la asunción de daños tangibles e intangibles, como puede ser la traición de la confianza (estatal/corporativa/social) o la sensación de insegu-

ridad. El conflicto es más que el caso jurídico y en el espacio restaurativo no se parte de la búsqueda de un culpable para simplemente castigarlo, sino de las necesidades múltiples que generan los daños producidos, precisamente para no causar más daños o para no derivarlos. Por todo ello, la restauratividad pasa del monólogo al diálogo, para que las personas puedan ser participantes activas, no solo partes. Ello puede permitir un reconocimiento mutuo, evitando una actitud defensiva que impide la escucha del otro y el entendimiento del impacto de lo sucedido. Permite también que las personas pasen de tener una obligación, normalmente impuesta, a sentirse obligadas (Calvo, 2023) y, por tanto, trascender la lógica del pasado, lleno de resentimiento o miedo, hacia una lógica del futuro, desde el aprendizaje de lo que se ha hecho mal o se podía haber evitado.

A continuación, y de forma breve porque ya se ha tratado en otros capítulos de este libro, pasamos a comentar algunas líneas relevantes donde puede introducirse la justicia restaurativa, en relación con la litigación estratégica, en diferentes escalas de acceso a la justicia en los tribunales u otros órganos, más allá del ámbito penal.

4. LA JUSTICIA RESTAURATIVA DENTRO DE LA LITIGACIÓN ESTRATÉGICA PARA RESPONDER AL ECOCIDIO Y DELITOS GRAVES, MEDIOAMBIENTALES Y CONTRA EL BIENESTAR ANIMAL, EN LA NORMATIVA INTERNACIONAL Y EUROPEA

La justicia penal internacional ha sido criticada por no ofrecer una verdadera vía de entrada a las víctimas, por un trato discriminatorio respecto de determinados países y por tener un efecto meramente simbólico. En este sentido, promover la introducción de la justicia restaurativa en una regulación sobre el ecocidio[39] puede parecer también algo meramente simbólico. Sin embargo, puede pensarse en introducir los principios restaurativos dentro de la Secretaría del Fondo Fiduciario en beneficio de las víctimas (FFV) de delitos de la competencia de la Corte Penal Internacional (CPI). Las contribuciones, además de proceder de multas y decomisos a personas condenadas, son voluntarias por parte de los países, organizaciones, corporaciones y particulares. Con dichos fondos se pueden realizar pagos simbólicos, medidas de rehabilitación, así como otras medidas simbólicas y de satisfacción que podrían interpretarse en un sentido restaurativo. Uno de los principios de actuación de este fondo, además del apoyo psicosocial en general, es el de la participación de las víctimas y la implicación comunitaria[40].

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39 Véase el capítulo de José Luis de la Cuesta en este libro.

40 Vid. su página web en https://www.trustfundforvictims.org/.

Por otra parte, cabe valorar y secundar la propuesta del Grupo de Trabajo en Justicia Restaurativa Medioambiental del Foro Europeo de Justicia Restaurativa (European Forum for Restorative Justice, 2022), el cual, contactado por el Instituto de Derecho Europeo, contribuyó en su Estudio de Viabilidad sobre Ecocidio, en particular, sobre la posibilidad de incluir la justicia restaurativa como parte de una respuesta al delito de ecocidio, algo que implica una legislación estatal, considerando la transposición de una Directiva, si bien ello daría pie a una posible intervención del Tribunal de Justicia de la UE en casos de incumplimientos o resolución de cuestiones prejudiciales. Esta propuesta podría aplicarse tanto para el ámbito internacional como europeo, donde el EFRJ también hizo llegar su opinión, en 2021, respecto de la reforma de la Directiva 2008/99/CE.

En este sentido, como ya se ha mencionado, la Directiva (UE) 2024/1203 del Parlamento Europeo y del Consejo, de 11 de abril de 2024 relativa a la protección del medio ambiente mediante el Derecho penal y por la que se sustituyen las Directivas 2008/99/CE y 2009/123/CE, contiene una referencia expresa al ecocidio en el considerando 21 que une con la expresión de "irreversabilidad". Aunque ello parece imposibilitar las posibilidades de restauración, realmente cabe la noción de restauratividad para daños irreparables, quizá, en forma de memoria restaurativa.

La propuesta del Foro Europeo (2022) se centraba en cuestionar lo que puede entenderse como sanciones efectivas y disuasorias, considerando que la evidencia muestra que el derecho penal no lo ha sido hasta ahora, y abogaba por introducir una mención a la aplicación de los principios restaurativos:

> La justicia restaurativa, refrendada en Europa por la Directiva 2012/29/UE relativa a las víctimas y diversos instrumentos del Consejo de Europa, ofrece un nuevo y poderoso marco basado en la implicación y la participación de todos los agentes interesados. Este enfoque encaja en la concepción actual de la justicia en las sociedades democráticas, en las que se anima a los ciudadanos y a sus organismos, ya sean los perjudicados o las entidades perjudicadas, a desempeñar un papel positivo en la resolución del daño y a trabajar por el restablecimiento de los equilibrios alterados, siempre bajo el imperio de la ley. Esto significa que la incitación a la responsabilidad y las acciones reparadoras constituyen el núcleo de la justicia penal, y no deben reducirse a un estatus de sanciones «accesorias».

Dentro de esta propuesta, sin perjuicio del carácter voluntario de la justicia restaurativa, el Foro no rechazaba la posibilidad de imponer sanciones con carácter restaurativo[41] que, además, considerasen el posible carácter trans-

[41] La nueva Directiva de 2024 habla en su considerando 39, sin limitaciones, de que los estados puedan proponer medidas alternativas a la prisión para contribuir a la restauración, si bien en el 42 se refiere solo a aquellos daños reversibles. Por lo demás, la restauración parece entenderse más como medida o sanción accesoria (art. 5. 3 a) i); art. 7. 2 a) i)); y circunstancia

nacional de hechos graves, sin minusvalorar la necesidad de complementar respuestas más formales en los tribunales con otras informales en las propias comunidades locales afectadas.

Finalmente, en el marco del Tribunal Europeo de Derechos Humanos y de la Corte de Justicia de la Unión Europea, considerando los casos citados anteriormente, los colectivos activistas podrían introducir, con base en la Directiva de derechos de las víctimas, una perspectiva restaurativa en sus demandas.

5. LA JUSTICIA RESTAURATIVA DENTRO DE LA LITIGACIÓN ESTRATÉGICA EN LA NORMATIVA INTERNA

Además del juego que puede dar la nueva Directiva, reinterpretada en clave restaurativa, e insistiendo en que la litigación estratégica en temas de ecología y bienestar animal puede llevarse a cabo en diferentes ámbitos jurisdiccionales, a modo ilustrativo, se alude ahora a las posibilidades en tres ámbitos internos.

En primer lugar, en el ámbito de la intermediación del Ministerio de Economía en relación con la responsabilidad social corporativa y la diligencia debida de las empresas[42], pueden reiterarse las posibilidades de introducción de la justicia restaurativa en los Puntos Nacionales de Contacto de la OCDE, en concreto en el español, en relación con las quejas relativas a las Directrices de la OCDE

atenuante (art. 9). En cuanto a la posibilidad de sanciones adaptadas al hecho sancionado, con referencia al Derecho penal, pero también al administrativo (Faure, 2024), el art. 5 se refiere, entre otras cosas, a las siguientes sanciones para las personas físicas: obligación de restaurar el medio ambiente en un plazo determinado si el daño es reversible; obligación de pagar una indemnización por los daños causados al medio ambiente si el daño es irreversible o el infractor no está en condiciones de llevar a cabo dicha restauración; exclusión del acceso a la financiación pública, incluidos los procedimientos de licitación, subvenciones, concesiones y licencias; inhabilitación para ocupar, en el seno de una persona jurídica, un cargo directivo del mismo tipo utilizado para cometer el delito; retirada de permisos y autorizaciones para ejercer la actividad que dio lugar a la infracción penal correspondiente; y prohibición temporal de presentarse a cargos públicos. El art. 7 también incluye una lista de posibles penas para las personas jurídicas, algunas de las cuales son similares a las de las personas físicas, pero entre las que también se incluyen las siguientes: retirada de los permisos y autorizaciones para llevar a cabo las actividades que dieron lugar a la infracción penal correspondiente; puesta bajo supervisión judicial; liquidación judicial; cierre de los establecimientos utilizados para cometer el delito; y obligación de establecer sistemas de diligencia debida para mejorar el cumplimiento de las normas medioambientales. El art. 10 contiene una disposición sobre embargo preventivo y decomiso y establece que los Estados miembros adoptarán las medidas necesarias para permitir el seguimiento, la identificación, el embargo preventivo y el decomiso de los instrumentos y productos de las infracciones penales contempladas en los arts. 3 y 4. Cfr. Olsen (2024) indicando las diferencias de legislación interna en cuento a la consideración del valor de la especie y el individuo (animal) y los costes sociales, poniendo de relieve un Derecho que no considera aspectos bioculturales y ecológicos.

42 Véanse los capítulos de Pilar Farias y Nagore Barrena en esta publicación.

para Empresas Multinacionales sobre Conducta Empresarial Responsable (OECD, 2024). Aunque los casos no entran siempre en la definición tradicional de litigio, en relación con la mediación, los Puntos Nacionales de Contacto (PNC) de la OCDE han sido creados por los gobiernos como mecanismos no judiciales para tratar los casos de incumplimiento de las Líneas Directrices de la OCDE para Empresas Multinacionales sobre Conducta Empresarial Responsable[43] (Aristova et al., 2024) que, en todo caso, no son vinculantes. En dichos puntos, podría incluirse la perspectiva de justicia restaurativa, más allá de la mediación[44].

Por ejemplo, en los puntos de diversos países se han presentado quejas contra empresas alimentarias debido a sus presuntos incumplimientos en el sistema de diligencia debida en materia ambiental y de derechos humanos en relación con sus operaciones de soja en Brasil. También se ha hecho, en el mismo sentido, contra empresas comerciantes de materias primas agrícolas, en relación con plantaciones de aceite de palma en Perú, y su impacto sobre la deforestación y los derechos indígenas; o contra empresas que suministran cuero a fabricantes de automóviles que compran en ganaderías que supuestamente ocupan y deforestan ilegalmente el territorio de las últimas tribus indígenas de Paraguay[45].

Así mismo, nos encontramos con denuncias contra instituciones financieras, incluyendo fondos de pensiones, relacionadas con la diligencia debida corporativa relativa a inversiones en aceite de palma, oleoductos, etcétera, con afectación a ecosistemas, donde, en ocasiones, se han llegado a acuerdos que podrían tener un carácter más restaurativo. Las quejas se refieren a las estrategias de inversión que no respetan las Directrices de la OCDE, a fin de abordar cualquier impacto adverso sobre el medio ambiente, el clima o los derechos humanos relacionados con sus inversiones en su cadena de valor, y con la inexistencia de mecanismos de reclamación que permita a las partes interesadas informar sobre cuestiones relacionadas con la sostenibilidad (Network for Greening the Financial System, 2024).

En segundo lugar, dada la numerosa regulación en la jurisdicción administrativa y contencioso-administrativa, cabe aludir a la aplicación de la justicia restaurativa en este campo concreto (GEMME, 2024). Precisamente, aquí pueden tener un papel muy relevante las Defensorías del Pueblo, estatal y autonómicas[46].

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[43] Estas Directrices de la OCDE son recomendaciones no vinculantes dirigidas conjuntamente por los gobiernos a las empresas multinacionales en relación con la contribución de las empresas al desarrollo sostenible y los impactos adversos sobre las personas, el planeta y la sociedad. La OCDE también ha publicado orientaciones adaptadas para el sector financiero.

[44] Véase la web del Punto español, con detalle de los casos tratados y alusión a la mediación, dentro del Ministerio de Economía: https://comercio.gob.es/es-es/inversiones_exteriores/pncld/Paginas/default.aspx.

[45] Véase la base de datos de *OECD Watch*.

[46] También participaron en el taller restaurativo, de mayo de 2023, realizado con fondos del proyecto del Ministerio de la Ciencia, dos representantes de la Defensoría vasca que se

Además, en la Ley estatal 26/2007, de 23 de octubre, de Responsabilidad Medioambiental, se prevé la posibilidad de intervención del Ministerio Fiscal en procedimientos contencioso-administrativos y puede explorarse incoar diligencias de investigación en relación con la responsabilidad medioambiental de la administración, lo cual tiene un efecto preventivo antes de ejercer la acción, todo ello con un enfoque restaurativo, aunque existan ciertas dudas jurídicas sobre la extensión del papel de la fiscalía. Cabe recordar que, en el preámbulo de dicha Ley, se dice expresamente: "Al poner el énfasis en la restauración total de los recursos naturales y de los servicios que prestan, se prima el valor medioambiental, el cual no se entiende satisfecho con una mera indemnización dineraria". En este sentido, debe considerarse el concepto de medida reparadora de los art. 2. 16 y 20.

En tercer lugar, en el ámbito penal, además de las posibilidades similares en la jurisdicción de menores, la Ley de Eficiencia del Servicio del Público de Justicia, aprobada en diciembre de 2024, además de promover los llamados Medios Adecuados o Alternativos de Resolución de Controversias (MASC) para materias disponibles en otros órdenes jurisdiccionales diferentes del penal[47], permite fundamentar la introducción de la justicia restaurativa para daños a ecosistemas, flora y animales, con implicaciones penales. En concreto, debe interpretarse la nueva normativa sobre justicia restaurativa con su regulación paralela en el Estatuto de la Víctima (a pesar de que se refiere únicamente a personas físicas). La Ley de Eficiencia ha incluido una disposición adicional novena en la Ley de Enjuiciamiento Criminal que reproducimos literalmente, dada su novedad y pertinencia para la aplicación de las conclusiones del workshop del equipo de investigación de mayo de 2023 (Varona, 2024a), del proyecto objeto de este libro. Con una regulación pensada fundamentalmente para las fases de instrucción, enjuiciamiento y suspensión de la ejecución de la pena, sin perjuicio de los múltiples programas desarrollados con fondos públicos en el ámbito penitenciario[48], se dice lo siguiente:

> 1. La justicia restaurativa se sujetará a los principios de voluntariedad, gratuidad, oficialidad y confidencialidad.
>
> 2. Las partes que se sometan a un procedimiento de justicia restaurativa, antes de prestar su consentimiento, serán informadas de sus derechos,

encuentran desarrollando esta perspectiva por la que la Defensoría apuesta, de forma general, según su Informe anual relativo a dicho año.

[47] En el preámbulo de la ley parece recordarse el principio dispositivo, inexistente en el ámbito penal, aunque en él sí existe, según se dice expresamente en dicho preámbulo, el "derecho de las víctimas a acceder a servicios de justicia restaurativa con la finalidad de obtener una adecuada reparación material y moral de los perjuicios derivados del delito cuando se cumplan los requisitos establecidos legalmente".

[48] Donde se mencionan expresamente los programas para personas condenadas por delitos contra el medio ambiente o los animales. Vid. Varona (2023a y b).

de la naturaleza de este y de las consecuencias posibles de la decisión de someterse al mismo.

3. La justicia restaurativa es voluntaria. Ninguna parte podrá ser obligada a someterse a un procedimiento de justicia restaurativa, pudiendo, en cualquier momento, revocar el consentimiento y apartarse del mismo. La negativa de las partes a someterse a un procedimiento de justicia restaurativa, o el abandono del ya iniciado, no implicará consecuencia alguna en el proceso penal.

4. Se garantizará la confidencialidad de la información que se obtenga del procedimiento de justicia restaurativa. Las informaciones vertidas en el marco del procedimiento restaurativo no podrán utilizarse posteriormente, salvo que expresamente lo acuerden las partes afectadas. El juez o el Tribunal no tendrán conocimiento del desarrollo del procedimiento de justicia restaurativa hasta que este haya finalizado, en su caso, mediante la remisión del acta de reparación.

5. El juez o el Tribunal, valorando las circunstancias del hecho, de la persona investigada, acusada o condenada y de la víctima, podrá, de oficio o a instancia de parte, remitir a las partes a un procedimiento restaurativo, salvo en los casos excluidos por ley. El inicio del procedimiento restaurativo en fase de instrucción no eximirá de la práctica de las diligencias indispensables

para la comprobación de delito. El sometimiento a justicia restaurativa en el proceso por delitos leves interrumpirá el plazo de prescripción de la correspondiente infracción penal.

6. La resolución que acuerde la remisión a los servicios de justicia restaurativa fijará un plazo máximo para su desarrollo, que no podrá exceder de tres meses prorrogables por un plazo igual. Acordada la remisión, el órgano judicial facilitará el acceso al contenido del procedimiento por parte del equipo de justicia restaurativa.

7. De no consentir las partes en someterse a un procedimiento restaurativo, los servicios restaurativos pondrán inmediatamente esta circunstancia en conocimiento del órgano judicial, que continuará la tramitación del procedimiento penal.

8. Concluido el procedimiento restaurativo, los servicios emitirán un informe sobre el resultado positivo o negativo de la actividad realizada, acompañando, en caso positivo, el acta de reparación con los acuerdos a los que las partes hayan llegado, que estará firmado por las partes personalmente y por sus letrados, si los hubiera. El informe, del que se entregará copia a las partes del procedimiento restaurativo, no debe revelar el contenido de las comunicaciones mantenidas entre las partes ni expresar opinión, valoración o juicio sobre el comportamiento de las mismas durante el desarrollo del procedimiento de justicia restaurativa.

9. En caso de existir acuerdo, el órgano judicial, previa audiencia del Ministerio Fiscal, de las partes personadas y de la víctima del delito, por

término de tres días, valorando los acuerdos a los que las partes hayan llegado, las circunstancias concurrentes y el estado del procedimiento, podrá:

a) Si se tratase de un delito leve, decretar el archivo, a la vista del cumplimiento de los acuerdos alcanzados, de conformidad con lo establecido en el artículo 963 de la Ley de Enjuiciamiento Criminal.

b) Si la causa se siguiera por un delito privado o un delito en el que el perdón extingue la responsabilidad criminal, acordar el sobreseimiento del procedimiento y su archivo, dejando sin efecto las medidas cautelares que se hubieren acordado en su caso.

c) Si la causa estuviera en el órgano de instrucción, acordará la conclusión de la misma y la remisión de la causa al órgano competente para la celebración del juicio de conformidad en los términos de los artículos 655 y 787 ter de la Ley de Enjuiciamiento Criminal.

d) Si la causa estuviese en el órgano de enjuiciamiento, se seguirá por los trámites del juicio de conformidad. La sentencia de conformidad incluirá los acuerdos alcanzados por las partes.

e) Resolver sobre la suspensión de la ejecución de la pena privativa de libertad, valorando el resultado del procedimiento restaurativo para el establecimiento de las condiciones, medidas u obligaciones de la suspensión; o, en su caso, sobre el contenido de los trabajos en beneficio de la comunidad.

Así mismo, cabe destacar que la Comunidad Autónoma de Navarra ha desarrollado la primera ley autonómica transversal en esta materia[49], incluyendo un Reglamento, que puede impulsar la justicia restaurativa medioambiental y animal. De hecho, el Instituto Vasco de Criminología (IVAC/KREI), en colaboración con el servicio público de justicia restaurativa para adultos de esta Comunidad, está realizando un seguimiento de un caso sobre maltrato animal, iniciado en 2024. Una de las personas facilitadoras en este caso participó en el taller de mayo de 2023, ya mencionado (Varona, 2024a), con facilitadores de otras Comunidades Autónomas. Así mismo, el IVAC/KREI está participando en el diseño de evaluaciones de programas de tratamiento e intervención restaurativas, basados en la relación entre animales y personas condenadas y en exclusión[50].

Por último, cabe aludir a las posibilidades existentes en el ámbito del derecho penal y administrativo sancionador comparado (Nieto y Calvo, 2023), donde existen diálogos restaurativos vinculados a figuras como:

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[49] Ley Foral 4/2023, de 9 de marzo, de justicia restaurativa, mediación y prácticas restaurativas comunitarias. En la actualidad, Cataluña y el País Vasco están planteando también sus propias leyes, y Navarra el Reglamento de desarrollo, enfocado, principalmente, en la regulación de la figura de la persona facilitadora.

[50] Así como en situación de exclusión o con alguna discapacidad.

a. Los compromisos entre agencias reguladoras e infractores, llamados *enforceable undertakings*. Suponen compromisos o acuerdos entre la agencia reguladora e infractores que tienen un carácter voluntario, pero pueden llegar a ser ejecutables (Hamilton, 2024; Forsyth y Tepper, 2024; van Stokkom, 2024; White, 2024a). Dentro de las fases de concesión, aprobación o renovación de licencias, inspección y sanción (Pali, 2024), estos acuerdos se entienden con un carácter comunitario o de bien común, como mecanismos alternativos en asuntos civiles y penales -distintos de las llamadas órdenes restaurativas impuestas judicialmente-. En Australia estos compromisos se han realizado, en ocasiones, vinculados con conferencias restaurativas y, en su caso, con proyectos medioambientales complementarios. Pueden implicar una mitigación de la contaminación o polución, protección y restauración medioambiental o desarrollo de tecnologías innovadoras en salud y seguridad. Actúan como alternativa o reducción de la sanción y requieren un entendimiento de los mismos, no solo motivados por razones de ahorro de una multa o costes económicos. Si no se cumplen, ello supone la reactivación del proceso o de la imposición de la sanción.
b. Órdenes de servicio a la comunidad para empresas, donde los responsables pueden ostentar diferente nivel dentro de las mismas.
c. Fondos de equidad que no implican un pago directo a las víctimas, aunque sus beneficios pueden llegar finalmente a estas.
d. Contribuciones a entidades sin ánimos de lucro o de utilidad social.
e. Embargo o decomiso de recursos para financiar actividades restaurativas.
f. Publicación de sanciones en medios públicos, si bien, en un enfoque restaurativo, ello conlleva una finalidad de vergüenza reintegrativa, no de estigmatización.
g. Petición de disculpas corporativas, más allá de lo interpersonal, como reparación simbólica.

En relación con la justicia terapéutica, estas posibilidades se desarrollan mejor con operadores jurídicos formados e instituciones con medios y coordinación adecuados, como es el caso de tribunales especializados en daños a ecosistemas y animales. Además, ello permite una concienciación sobre una normativa muy compleja en un campo con constantes avances en la evidencia empírica sobre los riesgos y los daños a otros seres vivos, sobre los que conocemos cada vez más en relación con su sintiencia, conciencia e, incluso, inteligencia, por lo que Rob White (2024b) habla de una "verdad en aproximación" donde se necesitan diferentes visiones y disciplinas. En este tipo de tribunales especializados, pero

no solo, se podría considerar el uso restaurativo (no punitivo) de las llamados *victim impact statements* (declaraciones de impacto victimal por las víctimas -en un sentido no sólo de daños tangibles o monetarizables- o representantes de las víctimas). En Hong Kong, Sudáfrica[51] y Zambia, ya se utilizan en relación con la protección de animales y ecosistemas salvajes.

6. LA JUSTICIA RESTAURATIVA DENTRO LA LITIGACIÓN ESTRATÉGICA EN LA NORMATIVA AUTONÓMICA Y LOCAL

Como ejemplo específico, puede aludirse a la posibilidad de que en la Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca, las tres figuras que concretan su representación y gobernanza (Comité de Representantes, Comisión de Seguimiento y Comité Científico), consideren el uso de la justicia restaurativa en sus diferentes cometidos[52].

Por su parte, en la Ley 10/2021, de 9 de diciembre, de Administración Ambiental de Euskadi se contempla la prestación ambiental sustitutoria de las sanciones consistentes en la imposición de multas, que podrá consistir en acciones de restauración, conservación o mejora que redunden en beneficio del medio ambiente, en las condiciones y términos que el órgano que imponga la sanción determine (art. 119). En relación con posibles casos de basuraleza, conectados con el consumo de drogas y ocio, el Gobierno Vasco aprobó un decreto que permite sustituir las sanciones por incumplimiento de la Ley de adicciones y drogodependencias por medidas alternativas educativas y reparadoras (Consejo de Gobierno 12-7-2022). Precisamente, dentro del proyecto del Ministerio de la Ciencia, el IVAC/KREI colabora con la organización *Libera* para poder desarrollar un proyecto relativo a la basuraleza, en relación con el ocio y el uso de

[51] Véase el capítulo de Robert Peacock en este libro, así como el prólogo de Rob White y el capítulo de Michael O'Connell.

[52] Vid. el proyecto "Verde que te quiero verde" presentado por el IVAC/KREI, con colaboración de Jorge Ollero, en 2024, en relación con la justicia restaurativa al hilo del reconocimiento de personalidad jurídica al Mar Menor, con propuestas de actividades de sensibilización y difusión que cuestionan la concepción jurídica más clásica de dominio público. Este proyecto sigue las directrices de la guía *Hacia una comunicación inclusiva de la ciencia: Reflexiones y acciones de éxito*, de la FECYT, siendo los círculos de diálogo una metodología alineada con las tertulias dialógicas, consideradas "actuaciones basadas en evidencias científicas que han demostrado tener impacto social y generar éxito educativo y mejoras en la convivencia en una gran diversidad de contextos", según la página 52 de dicha guía. En este proyecto "Verde que te quiero verde" también se tienen en cuenta planteamientos de la Criminología sensorial (McClanahan, 2024), con alusiones a la justicia restaurativa "al aire libre", "tocando suelo", "patas arriba", "boca abajo", "en el barro", "navegando" o "iluminando ángulos oscuros".

espacios públicos en los municipios[53] que permita una responsabilización activa y participativa con un carácter de mayor pedagogía social frente al enfoque punitivo de las ordenanzas.

También en la propia Universidad, y dentro de las líneas de sostenibilidad, dichos proyectos sobre respuestas restaurativas a la conflictividad por basuraleza o uso de espacios naturales, vinculada a contextos de ocio y consumo de tóxicos, puede desarrollarse con base en la actuación restaurativa de las defensorías universitarias, la Ley 3/2022 de convivencia y la LOSU (Giménez-Salinas et al., 2024).

7. RECAPITULACIÓN: ¿LITIGACIÓN ESTRATÉGICA RESTAURATIVA?

El lenguaje del derecho, con su base occidental, es un lenguaje de poder utilizado por profesionales, incluidos los *amicus curiae* y los expertos comprometidos. Si bien es entendible el uso del mismo desde el activismo, resulta insuficiente para hacer escuchar y no está pensado principalmente para la participación de las personas más afectadas. Además, puede provocar una victimización secundaria. Sin embargo, reiteramos, necesitamos el uso del derecho y de la litigación climática porque el marco normativo también constituye una base para cambiar un *statu quo* injusto. Este capítulo aboga por combinar lo mejor de varias estrategias, en diferentes procesos y niveles.

El acceso a la justicia en temas medioambientales y animales supone, a la vez, utilizar el derecho como espada y escudo (Malby, 2024) o, si se quiere, remedio y enfermedad, como el término griego *pharmakon* (Resta, 1995). Implica la noción del derecho como fuerza estabilizadora de convivencia, en su caso interespecies, pero también de transformación social frente al abuso de poder y la injusticia. Sin embargo, hoy por hoy, el derecho a aplicar es profundamente antropocéntrico y, en su aplicación, particularmente el derecho penal, discriminatorio y dañino. La justicia restaurativa, con todas sus limitaciones, puede paliar ciertas cuestiones dentro de la litigación climática y el mundo del activismo, también dentro del movimiento de la responsabilidad social corporativa por parte de inversores y accionistas realmente comprometidos. Puede acudirse a los tribunales para pedir la aplicación de la justicia restaurativa para una mejor responsabilización. A nivel teórico, la justicia restaurativa permite que entren agentes que no tienen la consideración de tales en un juicio o proceso

[53] Se está explorando también el contacto con Eudel y diferentes municipios vascos, una colaboración que puede extenderse no solo a casos de basuraleza, sino también de cumplimiento de tareas o trabajos en beneficio a la comunidad vinculados a infracciones al medio ambiente o al bienestar animal por parte de personas menores y adultas, tanto en el ámbito administrativo como penal.

al uso, ello incluye a comunidades rurales, indígenas, representantes de generaciones futuras (White, 2024b)[54], seres vivos fuera de los humanos, etcétera. Como proceso, se basa en la inclusión, participación y corresponsabilización, de una forma adaptada a las necesidades de las víctimas o sus representantes, particularmente las víctimas más dañadas para que puedan expresar el impacto del daño y las posibilidades de respuesta al mismo, considerando su forma de ser y (sobre)vivir, al tiempo que pueden cuestionarse las condiciones sistémicas que han provocado el daño.

Cervera y Martínez-Zarzoso (2024) ponen de relieve la eficacia, particularmente en países del norte, de la litigación climática para reducir emisiones. La justicia restaurativa también ha de demostrar su eficiencia en este campo con estudios mixtos, no solo cuantitativos. A nivel general, según el Foro Europeo de Justicia Restaurativa, la justicia restaurativa ha demostrado su eficacia para abordar las causas subyacentes y generar soluciones a muchos problemas sociales contemporáneos; construir y reparar relaciones sociales, generar entendimiento mutuo entre individuos o grupos antagónicos; y reforzar la responsabilidad personal, respetando los sentimientos, necesidades y valores de otros seres vivos. No obstante, cuando nos encontramos con falta de voluntariedad, sencillamente, la justicia restaurativa no es aplicable, sin perjuicio de marcos normativos que puedan promoverla, asegurando que no se produzca victimización secundaria o falta de garantías, como establece la normativa internacional e interna.

Durante la litigación pueden abrirse posibilidades o puntos de entrada para la justicia restaurativa. Incluso si, finalmente, no existe la voluntariedad o las condiciones para su desarrollo, el hecho de informar sobre la posibilidad de la justicia restaurativa, e iniciarla, puede resultar de interés. En todo caso, en el proceso de búsqueda de responsables (*blaming*), en justicia restaurativa no se busa la imposición final de un mero castigo, sino que sale del juego de la culpa y la proporcionalidad de la pena (¿qué pena proporcional hay para un ecocidio?, ¿por qué seguimos creyendo que los delitos cotra los animales y el medio ambiente persisten porque necesitamos más derecho penal?

[54] En octubre de 2021, reconociendo la importancia de volver a comprometerse con la solidaridad intergeneracional y de abordar seriamente las cuestiones de equidad, el Comité de Alto Nivel sobre Programas (HLCP) de la Junta de Jefes Ejecutivos del Sistema de las Naciones Unidas para la Coordinación (CEB) identificó los "deberes para con el futuro", respecto de las obligaciones para con las generaciones posteriores, hayan nacido o no, y considerando las limitaciones en las previsiones humanas, como una de sus tres áreas temáticas de atención. El trabajo sobre este tema ha sido impulsado por un Grupo Básico de 19 entidades del sistema de las Naciones Unidas, codirigido por el Programa de las Naciones Unidas para el Medio Ambiente (PNUMA), la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO), el Fondo de las Naciones Unidas para la Infancia (UNICEF) y la Universidad de las Naciones Unidas (UNU).

A pesar de los obstáculos a los que se enfrenta la justicia restaurativa, estudios realizados recientemente, tanto en el ámbito jurídico (Nieto y Calvo, 2023), como criminológico y victimológico (Aertsen, 2022), advierten sobre puntos de entrada normativos para otro tipo de respuesta más allá de la punitiva ante la necesidad real de sanciones más efectivas y menos dañinas respecto de los daños a ecosistemas y animales. Este capítulo se une a esos estudios con una serie de ejemplos de vías de introducción de procesos restaurativos a diferentes escalas. La justicia restaurartiva busca una respuesta reparadora justa a la injusticia sufrida y trabajar en su prevención a través de la responsabilización. Ahora bien, debe darse a conocer con el desarrollo de proyectos prácticos internacionales, regionales, estatales y locales, apoyados institucional y socialmente, al tiempo que debe adaptar su terminología, valores, principios, dinámicas y formatos de conversación o encuentro, así como de capacitación de facilitadores, a la intervención en casos de daños a ecosistemas y animales, aprendiendo también de aspectos más técnicos y bioecológicos de la litigación en este campo y valorando el rol, diferente en el campo restaurativo, de diversas profesiones jurídicas, sin perder por ello su valor transformador.

Reiterando la idea ya indicada, no se trata de que la justicia restaurativa se erija en referente moral inalcanzable, desde un enfoque de superioridad, sino de que, en su desarrollo teórico y práctico, se trabaje desde otras perspectivas, ofreciendo diferentes alternativas, y que el movimiento y la práctica de la justicia restaurativa aprendan también de los logros y entendimientos del propio activismo y de la litigación estratégica, así como del incipiente Derecho ecológico (Montalván-Zambrano, 2024) y la justicia medioambiental y climática (Meyer, 2024), sin olvidar el Derecho animal (Giménez-Candela, 2024). La justicia restaurativa tiene que expandir en este ámbito su vocabulario en relación con algunas de sus nociones centrales, por ejemplo, comunicación no violenta, diálogo, escucha, empatía, conexión, humanidad, necesidades, valores, voz, compromiso, espacio seguro, relaciones seguras, reparación, perdón, derechos, justicia, curación, aprendizaje, recuperación, bienestar o seguridad. Al mismo tiempo, tienen que ensanchar sus valores hacia una visión de ética ecológica, siendo fundamental la justicia y la rendición de cuentas, pero resultando insuficientes, aunque indispensables, los valores de respeto por la dignidad humana; solidaridad; responsabilidad hacia los demás; y verdad a través del diálogo porque solo se refieren a seres humanos. Al mismo tiempo, cabe repensar, desde esa ética, los principios clásicos de la justicia restaurativa: voluntariedad, inclusión, participación, compromiso y confidencialidad.

En definitiva, la litigación climática, entendida desde el derecho humano a un medio ambiente saludable o los derechos de la naturaleza y los animales no humanos, ha experimentado un crecimiento notable y, si bien, los resultados prácticos son limitados, ha conseguido que dichos conceptos entren dentro de la agenda

pública de empresas y estados, empujados por movimientos activistas por los derechos humanos de diferentes colectivos, pero también las concepciones indígenas y el activismo no antropocéntrico. La justicia restaurativa medioambiental y animal se ve por dicho activismo con cierto recelo como posible banalización e impunidad. Sin embargo, podrían confluir ambas visiones: el activismo legal y la posibilidad de plantear alternativas restaurativas, una vez que los casos estén abiertos en fase de instrucción, de juicio o de ejecución de la sanción.

La justicia restaurativa puede ofrecer una visión de reparación preventiva y hacer reales los principios de cuidado debido, participación, etcétera. Para ello el movimiento de justicia restaurativa tiene que seguir trabajando con legisladores (grupos políticos para que mejoren la legislación de forma que se prevenga la litigación o se den alternativas más adecuadas), jueces, fiscales, activistas y comunidades. Ya tenemos varias guías prácticas (EFRJ, 2025; INSTA, 2024; Varona, 2024). Ahora se necesita una práctica de esas y otras guías que respeten los contextos socioculturales en los que se inserten para que tenga sentido para visibilizar y tomarse en serio los daños (con su responsabilización activa); para evitar una aplicación discriminatoria; por coherencia como confluencia de movimientos emancipatorios frente abusos de poder; para ir más allá de miradas científicas sobre la sintiencia animal y jurídico-positivistas sobre los sujetos pasivos del delito; para repensar el concepto de responsabilización como un proceso de transformación colectiva, organizacional e institucional dentro de un marco internivel (de profesionales, disciplinas, conocimientos) y sociobioecológico; para un acceso a la justicia interespecies a través de la justicia restaurativa adaptada a la complejidad de este tipo de daños, en toda su diversidad y escalas; o para permitir a las empresas y estados demostrar su compromiso con un orden público ecológico, aunque sea utópico ofrecer diálogo para la reparación ante una violencia tan profunda, con el riesgo de un lavado verde o animalista restaurativo.

En todo caso, en línea con el conocido poema que abre este capítulo, quizá la mayor aportación de la justicia restaurativa sea cuestionar nuestra forma de mirar, sin ver, una realidad compleja y crítica, que exige cambios profundos y globales en la economía, el derecho, la justicia y la sociedad, entedida en un sentido mucho más amplio.

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ENFOQUE EN GENERACIONES JÓVENES/
FOCUS ON YOUNG GENERATIONS

PARECIDOS QUE VICTIMIZAN. SOBRE LOS PRIMATES COMO VÍCTIMAS DE ENTRETENIMIENTO EN INTERNET[1]

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1. PUNTO DE PARTIDA: ANIMALES EN LAS CULTURAS DE ENTRETENIMIENTO

De acuerdo con los modernos parámetros victimológicos, las modernas exigencias de respeto al animal en su interacciones con seres humanos no descansan pasivamente en la sola abstención de causar daños sino en un mantenimiento activo de la vida animal en su mejor integración y armonía con la naturaleza. (Yeates, 2022; Stumpf *et al,* 2024) La evitación o minimización de daños, exigencia material inexcusable para el bienestar animal, precisa el flanqueo inmaterial de una cultura relacional respetuosa, construida en el marco de sentido de valores, sensibilidades y narrativas favorables a la dignidad animal.

En esta pugna cultural, la expresividad prima sobre la coherencia argumental; así, se descarta, por artificiosa la construcción del animal como sujeto de derechos, pero no parece haber mayor problema en la fetichización de un animal ritualizado, guionizado, y, ciertamente, mercantilizado. El artificio no es menor en el segundo caso que en el primero; sin embargo, mientras se niega subjetividad jurídica al animal, por serle ajeno el contexto del Derecho, se le introduce, sin consideración alguna a lo que le sea o no propio, en el humanizado contexto de las representaciones de cultura, diversión y espectáculo.

[1] Trabajo realizado en el marco de los Proyectos *Justicia restaurativa para delitos medioambientales y contra los animales: diseño de programas preventivos, de intervención y reparación en un marco globalizado* (JRDM), Ministerio de Ciencia e Innovación, Convocatoria 2020 y el *Proyecto Andaluz de Excelencia ProyExcel_00621. Criminalidad en contextos digitales de ocio desviado: alternativas posibles contra una economía de consumo deshumanizada,* Universidad de Sevilla

A la "mística" de la caza deportiva, la cuidada estética de las corridas taurinas o la amenidad de las tramas de películas y series, se suma hoy el desenfado con que en Internet se perpetran "desternillantes" abusos animales para gratificar al consumidor de vídeos de entretenimiento.

Especial consideración merece la instrumentación de animales en las culturas cinematográficas. Ciertamente, la victimización de animales en rodajes de películas goza de triste veteranía. Tan temprano como en 1903, Edison hizo filmar la electrocución de *Topy*, (elefanta de un Parque animal que había matado a un espectador durante cierto número en que se le daba a consumir un cigarro encendido. El científico pensó que la muerte por instrumentos de alto voltaje sería más digna que el ahorcamiento (Geary, 2019). En todo caso, la grabación fue comercializada con fines de entretenimiento con gran éxito de público. En la industria estadounidense clásica, películas como *Ben-Hur* (1925) o *La carga de la caballería ligera* (1936), que dejaron su respectivo rastro de caballos reventados, fueron, entre otras, detonantes para la creación de unas *Guías* para el uso seguro de animales en películas (1940), que incluía la monitorización y certificado de autenticidad sobre indemnidad animal en los créditos con el célebre lema "No animal were harmed". Pese a todo, sospechas no esclarecidas de violencia sobre sobre animales han acompañado a películas como *El hobbit* (2012), *La vida de Pi* (2013) (Geary, 2019; Castro, y Montes 2018, p 446) o más recientemente, *Gladiator 2*[2] (2024), todas ellas de éxito popular. Si miramos a España, en *Furtivos* (1975) el tremendismo rural de Jose Luis Borau introdujo el apaleamiento de un perro hasta la muerte[3]; por su parte, en *Hable con ella* (2002) de Pedro Almodóvar se lidiaban seis toros para las cámaras, en una escena de muy cuestionable legalidad[4].

Aunque no siempre se infieran grandes daños, los nuevos medios digitales amplifican la relevancia cultural de los abusos. Así se comprueba en el incidente acaecido en torno a la serie digital tailandesa de Netflix *La emperatriz de Ayodhasa*. Su guión incluía el incidente de un gato que "moría" envenenado

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[2] Película rodada con animales auténticos, como caballos con pesadas equipaciones soportando altas temperaturas o macacos expuestos a contextos estresantes. https://www.latimes.com/entertainment-arts/movies/story/2023-07-18/gladiator-2-peta-letter-animals-ridley-scott-pedro-pascal

[3] Película hoy de culto, tras la polémica inicial, el episodio de crueldad parece haber sido condonado, mientras la crítica no repara sino en sus aspectos simbólicos (Vargas llosa, 1983) y expresivos; para el profesor Roberto Cueto, «el hecho de matar animales ante cámara era más habitual de lo que se piensa en ciertas películas de la época», y era precisamente esa furia «la forma de expresarse». https://www.elnortedecastilla.es/20130812/cultura/rinde-homenaje-borau-201308122108.html, visitado el 3 de diciembre de 2024

[4] No se trataba de una corrida reglada, sino de un rodaje. Ya en la normativa entonces vigente, el artículo 6 de la Ley 1/1990 de Protección de los Animales Domésticos de la Comunidad de Madrid prescribía el uso de simulación a efectos de representar escenas que conllevaran crueldad, maltrato o sufrimiento animal.

al catar el alimento de la emperatriz, personaje protagonista: para su rodaje, se aplicó anestesia a un genuíno gato-performador que, en efecto, cayó al suelo puntualmente entre espasmos más que verosímiles. Desde las redes sociales, el activismo denunció sufrimiento animal y las instituciones hubieron de abrir una investigación. Al ser investigado, el director de la obra, a modo de disculpa o mitigación, aportó fotos para garantizar el estado de salud y vitalidad del actor no humano.

Este sería solo un ejemplo pero significativo. En efecto, no se trató, con mucho, del supuesto más cruento de maltrato animal, pero, inserto en un tecno-relato de entretenimiento popular, conlleva el riesgo de fortalecer para masivas audiencias digitales una imagen del despojada de alteridad significante: en aras de su condición infra-humana y pautable, el animal solo cuenta para desplomarse y convulsionar en el momento adecuado al guión.

En España, la Ley 7/2023, de 28 de marzo, de Protección de los derechos y el bienestar de los animales en su Artículo 63. establece que para las escenas de maltrato simulado en filmaciones y las artes escénicas se aplicarán recursos artificiales, no pudiendo suponer situaciones de estrés extremo ni de esfuerzo físico desmedido para los animales y sin que los productos y los medios utilizados provoquen perjuicio alguno al animal.

A pesar de esta y otras normativas, hoy un *habitus digital* globalizado goza de considerable potencial para contradecir las normas y convenciones. De ahí que sea importante identificar y problematizar aquellos activos expresivos que desmientan o desacrediten en el masivo Internet las narrativas de respeto jurídico a la dignidad animal.

2. EL PRIMATE EN EL PUNTO DE MIRA DIGITAL

El presente trabajo se ocupará de revisar y detectar manifestaciones victimizantes y potencial de daño a primates, ejemplificativos de la regular instrumentación de animales en claves de entretenimiento digital. El primate es, en efecto, uno de los grandes protagonistas de los *videos divertidos*, que circulan en línea con gran éxito popular y visionados billonarios. Destacan como involuntarios figurantes, entre otros, orangutanes, lémures, macacos, babuinos o loris, en general reconducidos a la categoría lega de *monos divertidos.* En efecto, la referencia popular a los monos suele ser ajena al orden biológico de los primates, que comprende y diferencia entre prosimios, monos y simios, entre ellos los seres humanos.[5]

[5] A los efectos de alinearnos con la apelación digital, los primates serán aquí a menudo aludidos como *monos.*

En este sentido la selección del tratamiento de primates en los vídeos lúdicos de Internet se justifica en función de su especial implicación descontextualizada, su intenso valor performativo y la evidencia de su potencial victimizante.

En cuanto a lo primero, los primates se ofrecen en Internet en los términos de una recurrente "mascotización". Los abundantes vídeos de primates típicamente subidos por pro-sumidores dueños de los animales suelen representar a aquellos involucrados en contextos y situaciones domésticas muy artificiales y poco adaptadas a sus necesidades de especie, siendo ofrecidos rara vez en zoológicos o en sus hábitats silvestres de origen. A diferencia de otros animales en entornos domésticos cuyo visionado se dirige tendencialmente a inspirar ternura y calidez, como gatos o perros, fascinación, en el caso de los insectos o temor, como el que a veces suscitan los reptiles, los *monos* suelen ser ofrecidos al usuario en una intensiva y sostenida tesitura cómica; con enorme frecuencia, se presentan antropomorfizados y sometidos a simulacros de conducta humana, como fumar, jugar a las cartas o beber alcohol (implicación más que veterana que, por lo demás ya incluía Teniers en sus célebres *Monos fumadores y bebedores, hacia 1*660 y que ha sido consustancial al rol circense del primate). Incluso si no suponen una puesta en peligro física de concretos animales, (así, si se emplean técnicas de simulacro mediante IA) los primatólogos advierten que la exposición de primates sostenida en marcos mediáticos de entretenimiento puede distorsionar la percepción social del status de riesgo de determinadas especies e interferir en los objetivos preservacionistas (Ross *et al.*, 2008 p. 1487) En las dos últimas décadas, las diversiones con primates ha llegado a configurar todo un género de específicos videoclips. De este modo, la expresión *vídeos de monitos graciosos -funny monkey videos*, constituye un criterio de búsqueda consolidado en plataformas de entretenimiento.

Los *monos graciosos*, en su rol de payasos digitales, se hacen objeto de bromas pesadas, cachetes, chascos, sustos, ataduras, vendajes y distintas variantes de hostigamiento que los irritan o exasperan para delicia del espectador: por intensidad o por frecuencia, estas conductas pueden impactar sobre el bienestar y salud psíquica del animal; por añadido, la promoción, directa o indirecta, de primates como mascotas se proyecta típicamente sobre especies en situación vulnerable o en riesgo de extinción lo que suma al sufrimiento individual del animal el daño a la bio-diversidad de especie, en especial mediante la aprehensión de crías en entornos naturales y cría en condiciones domésticas a los efectos de protagonizar vídeos. Por último, a partir de una escalada violenta en la demanda, se ha revelado toda una red internacional de grabación de torturas sobre crías de monos y distribución comercial entre usuarios primato-fóbicos. La dimensión que parece haber alcanzado esta preferencia sádica recomienda una consideración especial a las dinámicas de escalada, desde el visionado de vídeos estándar de *monitos* al consumo de praxis de indecible tortura.

En esta coyuntura, resulta crítico abordar la desviación del rol del consumidor responsable. El usuario de grandes plataformas de consumo no solo opera como destinatario, sino desempeña una función cívica esencial en la detección y denuncia de contenidos. En este sentido, la desvirtuación del consumo no solo es trascendente por cuanto aporta a la mayor demanda y producción, sino por todo lo que sustrae al rol decisivo de custodio eficaz de la víctima. En el esquema de *actividades rutinarias* (Cohen y Felson, 1979) aplicado a Internet, la eclosión de vídeos desviados de primates no solo depende del interés del victimario y la indefensión de la víctima, sino de la existencia de un usuario desentendido, seducido, ciego a las evidencias y solo embebido en sus propias gratificaciones.

La reacción de los usuarios y preferencias de consumo son determinantes para modelar y sostener una oferta que se rige por estrictos criterios de *customización* o satisfacción personalizada del destinatario. De otra parte, la desviación del consumidor se refunde muchas veces en la del productor, ya que, Internet no persigue audiencias pasivas sino auspicia y desencadena la pro-sumición (Herrera Moreno, 2020). Ello incluye refuerzo, colaboración, difusión y, eventualmente, imitación de modelos. El éxito digital de la diversión victimizante con primates no solo aporta incrementos en la demanda de estas producciones, sino colabora a la generación de cadenas de videos caseros perturbadores que reproducen los patrones de victimización observados.

Son básicos, a este respecto, los pioneros estudios de Surette sobre criminogenia por efecto normativo e imitativo (*copy-cat* crime, o crimen *imita-monos*[6]), que incluye la reproducción de guiones narrativos, creencias de base y esquemas de acción (Surette, 2002). Es cierto, de otra parte, que todo este proceso reproductivo se acelera y globaliza en nuestros días en el nuevo anfiteatro tecnológico; en este sentido se puede hablar de factorialidad mediático-imitativa. Resulta de interés especial, por lo demás, la comprobación de que la tecnología no causa tanto como modela y cataliza el proceso (Helfgot, 2023 p. 55). En nuestros días, como vamos a abordar, el caso internacional de una red de tortura ha conducido en Gran Bretaña a dos recientes condenas penales de consumidores como inductores de la producción de los vídeos de diversión sádica con primates.

Sin embargo, la dimensión socio-expresiva del Derecho penal no resulta competitiva ante la fortaleza, inmediación y recursos estéticos propios de la comunicación digital (Surette, 2020). Música, hedonismo, humor, sociabilidad y viralidad moldean formidables corrientes de consumo allí donde la industria del entretenimiento coadyuva a satisfacer las demandas insaciables de un *imperativo categórico de divertirse* (Žižek, 1991*)*. Más allá de los aspectos punitivos,

[6] Mucho menor, por cierto, la referencia española, ya que, en efecto, tenemos en común con otros primates esa capacidad de aprendizaje mediante copia. Vid. Velasco (2021).

el fomento de actitudes victimológicas ante el consumo de vídeos populares resulta decisivo a la hora de resistir con eficacia las inercias mediáticas, así de consumo y demanda como de auto-producción.

3. EL CONSUMO DESVIADO DE DIVERSIONES DIGITALES CON PRIMATES

Desde un punto de vista biológico, la situación que atraviesan los primates en la era antropocena da para pocas alegrías. Ya en la tercera década del siglo XXI, aproximadamente un 60% de las especies de primates están amenazadas de extinción y aproximadamente en un 75 por ciento de estas su población disminuye (Fuentes 2023, p. v). La industria del entretenimiento digital va por libre, sin embargo y ha asignado a estas especies el dudoso privilegio de la especialidad cómica: por lo demás, un privilegio de rancio arraigo.

La instrumentación del mono a la performación cómica conecta íntimamente con las mismas razones que explican la risa humana. Conocidamente, Bergson entiende que la risa se suscita a tenor una *rigidez mecánica instalada entre los entresijos libres y flexibles de la vida* (Bergson, 1976. Simón Viñas, 2015). Se trata esta de una atinada formulación, dejando a salvo su sello antropocéntrico: lo que el sujeto riente percibe como *rigidez mecánica* del animal responde a la expresión biológica de su especie, y la *vida* de la que Bergson habla es, inequívocamente, vida humana. En todo caso, acierta: como causa risa el sujeto que, distraído, no se adapta al contexto circundante y choca con la farola, lo mismo ocurre con el *mono,* "distraídamente" empeñado en su ser y reacciones de animal, demasiado torpe para reconocer el marco de sentido humano en el que se debate.

Toda comicidad está impregnada de un necesario elemento humano que evoca de forma imperfecta el primate. Siguiendo a Bergson (1973, pp. 13 ss), de un animal nos reiremos únicamente por cuanto habremos descubierto en él una actitud de hombre o una expresión humana. En este sentido, el primate protagoniza un reclamo cultural de lo humano, a nivel morfológico y gestual; por lo demás, reclamo inevitablemente fallido, siendo esa discordancia el origen de la comicidad.

Como bien se ha observado (Weitz, 2016) en la era digital, Internet preserva los principios esenciales del humor al propio tiempo que moldea tecnológicamente las formas de comicidad. A propósito de los *monos digitales* esta hibridación deviene un idóneo caldo de cultivo que favorece la desviación/victimización. A esos efectos, podemos apreciar tres dimensiones, cultural, moral y comunicativa.

-Dimensión cultural: En cuanto a lo primero, entendida la diversión como el disfrute de la incongruencia (Morreal, 1983), la popularidad de los monos gra-

ciosos gana enteros en un entorno digital saturado de absurdos y discordancias, sede favorita de lo anómalo y lo grotesco que se vale de oportunidades humorísticas para involucrar al usuario (Nijholt, 2015). Sin duda pocas discordancias como las que representa el primate, evocativo de humanidad, a la vista pública de su incapacidad para satisfacer el canon de lo humano. A pesar de su apariencia humanoide, el primate no alcanza clamorosamente el estándar de estética o aptitud humanas. El primate no es solo parecido a los humanos: representa la caricatura y contra-hechura deforme de estos. Tampoco logra obrar exitosamente en el contexto cívico de lo humano.

En efecto, juntamente con la idea de incongruencia, el humor implica asimismo una perspectiva superioridad (Lintott, 2016). La percepción *risible* del primate se hermana así a la que suscita la risa suscitada por el ser humano como *incapaz.* No por casualidad, la arrogancia *capacitista* y la *especista* (Weber, 2024, Arathoon, 2024, pp 2001 y ss) generan discursos paralelos: en ambos casos se incurre en la devaluación de humanidades pseudo-deficitarias, por insatisfactorias e improductivas Significativamente, la conexión humorística podría ser clave para entender la sinergia victimogénica y verdadera continuidad discursiva entre ambas posiciones. Siguiendo a Bergson, la risa es de suyo ventajista: ríe aquel que cree gozar o goza de mejor perspectiva y consciencia. En este sentido, ciertas dinámicas de humor desviado nutren culturas supremacistas o abusivas de poder sobre identidades minusválidas y risibles.

-Dimensión moral. Los procesos de suspensión de la moralidad tienen un peso decisivo a efectos de desviación trascendente del consumo (*Deviant customer behavior*) (Sigala, 2017). Como planteara famosamente Bergson, el humor acarrea una efímera insensibilidad o anestesia del corazón. Ese distanciamiento, anestesia empática del sujeto riente, no integra en sí mismo amoralidad pero sí remite a una indiferencia que, asociada a concretos factores, disminuye el auto-control.

Uno de esos factores de desviación por risa tiene que ver con la indiferencia antropocéntrica del masivo usuario que visiona los contenidos. Por vía de ejemplo el primate puede emitir signos faciales parecidos a la sonrisa o la risa humana, aunque, la significación gestual de especie, las muecas no tengan esa significación risueña. Así, se llegará a la negación del daño, técnica de neutralización de un victimario convencido de que el objeto de la humorada se divierte con él y disfruta de las situaciones opresivas a las que es sometido (así, una amplia "sonrisa" asumida por el consumidor como señal de placer o alegría cuando en realidad denota miedo o profunda sumisión en muchas especies de primates (Informe *Asia for Animals,* 2024). El auto-engaño inducido por el modo festivo y una extendida auto-referencialidad especista explican igualmente la preferencia por vídeos domésticos de primates en los que estos

manifiestan un ostensible malestar, ansiedad, exasperación o profundo desasosiego (Quarles *et al*. 2016, pp. 5 y ss.)

En el mismo sentido, una estable suspensión de la empatía, o, por ceñirnos a los términos de Bandura (1990), el definitivo desenganche moral puede producirse ante la exposición sostenida y normalizadora de este tipo de consumos, con efectos de mayor trascendencia que la de una puntual suspensión de la empatía.

-Dimensión social. La comicidad es una manifestación de lo humano, así como un poderoso conductor de lo social. En la especie humana, el humor desempeñó un rol decisivo en la configuración, control y sostenimiento del grupo social (Dunbar, 2022) Así, en la arraigada preferencia hacia el contenido humorístico parece imbricarse el intenso apremio humano a favor de las vinculaciones sociales. No es ajeno a esta avidez social que la masiva capacidad de circulación del *meme* tenga en el humor (y, ciertamente en la incongruencia) su ingrediente comunicativo esencial (Tanaka *et. al*., 2022). Más aún, podría decirse que la mayúscula popularidad de los clips, memes y vídeos divertidos que se comentan, comparten y compilan no tengan otra base que sociabilidad. En contrapartida, el humor es también un potenciador de contenidos desviados.

Al rol comunicativo del humor se añade la prestación tecnológica de hiper-conexión social de los usuarios, que encuentran en los contenidos motivos para la interacción social y consolidación de nichos de consumo. Estas dinámicas de promoción y mutuo refuerzo pueden conducir, ciertamente de la hiper-conexión a la transgresión (Wood, 2017). En efecto, el filtrado de contenidos por el sistema de recomendación no solo implica la fidelización de la demanda de consumo, sino la creación de comunidades homofílicas (Kaiser y Rauchfleisch, 2020) donde prejuicios o distorsiones incipientes se consolidan y las actitudes se aproximan tanto que no solo perpetúan sino intensifican comunitariamente la predilección desviada.

4. MANIFESTACIONES DE DE VICTIMIZACIÓN

A continuación, hacemos seguimiento de la particular fenomenología victimológica en torno a la grabaciones de primates con fines de entretenimiento digital.

4.1. Pérdida de contexto

Conocidamente Goffman (1959) destacó la relevancia del modo en que la identidad se manifiesta. Ciertamente, el sociólogo se refería a una identidad subjetiva, pero no sería impertinente entender que los *vídeos divertidos* anu-

lan en los primates la capacidad de performar su especificidad de especie en favor de una identidad performática impuesta y dirigida. En este sentido, el estudio de Quarles *et*. al (2023) aplica eficazmente el concepto psicológico de descontextualización para aludir a una de las dimensiones más recurrentes en estas formas de afectación. Con esta referencia se alude al modo en que se involucra al primate en un contexto antropogénico extraño al hábitat silvestre de la especie. En este estudio, la presentación de primates propia de este género se brinda descontextualizada. Los autores analizan una muestra de 100 vídeos de *YouTube*, *TikTok,* y *Giphy* que incluyen a especies de loris perezosos y pigmeos; un 77% presentaba condiciones de elevada descontextualización. No es sorprendente que, siguiendo a estos autores, sea precisamente el grado de descontextualización lo que decide la popularidad de los vídeos, siendo así que los loris presentados fuera de su contexto natural son los que reciben mayor número de *likes* y comentarios de agrado (p. 06 y ss.). El estudio de Carstens, (2022), cuya muestra se extrae de vídeos de primates subidos a *TikTok,* coincide en esta misma línea, concluyendo que son las representaciones con crías las que, con mucho, reciben mayoritariamente *likes* y comentarios de aprobación, lo que suma potencial dañino, ya que priva al animal de un entorno de adaptación en los momentos más críticos para su desarrollo biológico.

La indefensión es la nota dominante: plataformas como *MySpace, Twitter, Facebook* y *YouTube* han contribuido a naturalizar un espacio ajeno, desconocido y sembrado de amenazas, para el que el primate no le sirven las defensas y adaptaciones con las que nace equipado (Aldrich *et al,* 2023).

A la recurrente introducción del primates en escenarios antropogénicos, hay que sumar la profusión de risueños *selfies,* fotográficos o video-gráficos con primates en entornos turistificados promovidos como atracción. En estos casos, está en juego no solo la perturbación del hábitat de especie por la interferencia humana, sino la propia salud e integridad de las personas. La interacción de turistas con primates implicará en estos casos no solo el riesgo de reacciones agresivas de estos contra los primeros, sino hará posible la transmisión de enfermedades a personas por la transferencia de agentes zoonóticos y antropozoonóticos. La *instagramización* de estos imaginarios, en especial cuando vienen protagonizados por celebridades añade carga a las culturas antropocéntricas y promueve la continuidad de estas “alegres” prácticas.

4.2. Monitos cuquis: estéticas victimizantes

Internet ha dado a la cultura la versión más acabada y personal del fenómeno trans-estéticista post-moderno, que Lipovesky y Serroy (2015) advierten. Una de estas vertientes trans-estéticas proviene de la consagración digital de lo *mono* (aludido también como lo *cuqui)* en redes sociales. Simon May (2019) habla en

términos reveladores del imperio digital de *la monería* (*cuteness*), que implica el culto de lo adorable, pequeño, delicado y profundamente indefenso. Inspirador de ternura, lo *mono* funciona como un alivio compensatorio de las incertidumbres cotidianas y el alivio de las vivencias de precariedad; abandera también una estética de la fragilidad ubicada entre lo bello y lo sublime. Significativamente, el ensayista advierte una marcada dimensión de antropomorfismo *cuqui*, en cuyo vértice no dudemos que habría de situarse a las crías de primate, vestidas de bebés, con pañales y cofias, alimentadas con biberón y captadas haciendo graciosas muecas. El animal-monada en suma, comporta un valor totémico cuyo culto se puede comparar al de un *Tamagotchi viviente* objetivado como artículo de consumo sentimental (Krylova, 2024, p. 7). Artículo, en efecto. Pues, sin duda, el auge de lo *mono* no safisface únicamente demandas de economía afectiva sin responder, al propio tiempo, a deliberados esquemas industriales (Maddox, 2021) .

a. *Celebridades primates* El patético atractivo de *lo mono* ha suscitado una fenómenos de entronización y *fandom* primate (Aldrich *et. al* 2023, pp.317). Alcanzan el estrellato *monitos* con cuentas de seguidores y "creación" de contenidos que monetizan sus dueños a través de la publicidad que flanquea los contenidos. En *TiTtok* se residencian canales como *Heresyourmonkeycontent*, o *Mojothemonkey*, *Monkeykeer*, con cifras millonarias de seguimientos consagradas a primates con nombres personales cuyas peripecias juegos y crecimiento son captadas cotidianamente. No siempre el fenómeno es de índole comercial. Las penurias y posterior adaptación de la macaca *Heidi* a la vida en un centro de rescate se divulgan en principio con fines activistas por *Monkey Widlife*, pero sus vídeos han entusiasmado a seguidores globales convirtiendo a la monita adorable en una celebridad. Más allá del activismo, el filón melodramático de *Heidi* ha sido explotado en otras grabaciones que aplican rentablemente el nombre de la popular *monita.*

De todos los casos de celebridad primate, probablemente el más siniestro sea el de la mona *Mini,* entronizada como *star-victim* por seguidores adictos a vídeos de sadismo sobre primates. Desde su nacimiento en Indonesia, *Mini* llegó a soportar más de un año de tortura sostenida y de creciente intensidad. Muy probablemente, lo lucrativo de este execrable estrellato preservó su vida, a diferencia de lo que ocurrió con otras crías, sacrificadas en aras de la atroz performación.

La mona capuchina *Crystal* ilustra un caso especial de *pet-fluencer,* con un nutrido historial de intervenciones películas y amplio seguimiento en *facebook, Instagram* y *youtube.* Además de actriz, *Crystal* es *creadora de contenidos*. La figura del *pet-fluencer* integra, en efecto, un prometedor recurso que explota la fascinación y encanto suscitado por lo *cuqui* para orientarlo a la promoción de artículos de consumo (Myers, 2024) Estos fenómenos, como veremos, tienen un impacto que perjudica la mirada sensible hacia primates objetivamente

explotados, sometidos a un impertinente régimen de *kitch* pseudo-parental e inmersos en una hiperrealidad dañina.

b. *Ternuras victimizantes.* Se comprueba que el consumo y seguimiento de vídeos de monitos graciosos conlleva una doble victimización. La primera es intrínseca y de afectación individual; la segunda, indirecta, impacta sobre la especie al abonar culturalmente el terreno al tráfico ilegal de especies silvestres en vías de extinción.

Podermos hablar, en primer lugar, de una genuina "victimización por carantoñas". En este primer caso, los primatólogos vienen denunciando la praxis y divulgación online de maltrato sostenido a primates en medios domésticos que los usuarios no aciertan a detectar como inapropiados. Es muy conocido a este respecto el estudio de Nekaris *et al* (2016) quienes observaron dichas praxis sobre *loris perezosos en* a lo largo de meses, en 2014. En el material analizado detectaron la presencia de cinco condiciones existenciales adversas a la especie: contacto con humanos, (57%), exposición a la luz (se trata de una especie nocturna) (87%), signos de stress/mala salud (53%), entorno artificial (91%) y falta de contactos con miembros de la misma especie (77%). De los vídeos analizados, el 100% contiene al menos un elemento ligado a condiciones victimizantes Un tercio de los vídeos cumplía el total de las condiciones: en relación con ellos, 12,411 comentarios describían el animal como *mono* o expresaban el deseo de poseer un ejemplar como mascota. Es más que anecdótico que las reacciones del animal a determinadas carantoñas de sus amos suscitaran delicias entre el público, divertido y ajeno al efecto de persistente irritación y stress que la práctica acarreaba. Cuanto más furioso y desquiciado se evidenciara el animal, más cundía el regocijo y los comentarios de usuarios complacidos. La investigación, en suma, observa hasta qué punto esta inadecuación integral -nutricional, física, psicológica y de entorno- pasa desapercibida por un consumidor alienado, atento solo a las gracias exóticas del *e-monito.*

El informe de la Coalición internacional (*Social Media Animal Cruelty Coalition*) *La crueldad que no ves,* (SMACC, 2023) advierte el potencial desinformativo de representaciones de esta dócil interacción y la sumisión risueña entre *monitos* y seres humanos, dando fuelle a la convicción de la domesticación es tan posible como grata. Sin embargo, esa docilidad es imaginaria: muchos de los ejemplares son drogados para un mejor manejo, y las supuestas actitudes de complicidad con el amo son, en muchos casos, verdaderos signos de amenaza defensiva o advertencia (Informe SMACC, 2023, p. 26). El criterio científico no tiene vuelta de hoja: la tenencia doméstica es contraria al bienestar y desarrollo de especies de primates y comporta en sí misma una victimización integral

En segundo lugar, y al nivel de especie, estos videos incorporan un notable victimógeno al promover falsas creencias sobre la aptitud mascotizable de los primates y encubrir el precario estado de conservación que atañe a estas especies (Schroepfer *et. al.,* 2021). Así, las ciber-monadas cunden y modelan viralmente una creciente demanda, muy en especial cuando personas famosas se *Instagramizan* posando con fondo narcisista de primates o en desenfadada interacción con ellos (Kitson y Nekaris, 2017).

Hay indicios sobrados de esta conexión entre popularidad y demanda de mascotas. Clarke *et al,* (2019) analizan un vídeo viral cuyo protagonista es un lemur humanizado como *Sefo*, hallando una correlación inmediata entre el número de comentarios entusiastas sobre el vídeo y la manifestación de deseos de posesión de un ejemplar igual como mascota. La organization europea de rescate de primates y mamíferos exóticos AAP (*Animal Advocacy and Protection*) ha contabilizado en España más de 1.800 búsquedas mensuales relacionadas con el precio de monis titís bajo el criterio «*mono tití precio*». No existe en el demandante una sistemática intención dañina: durante el mismo periodo se registraron una media de 260 búsquedas mensuales del término «*comprar mono tití con papeles*». Estos anhelos posesivos informan un total de 2.100 búsquedas de intención de compra, solo sobre la especie de primate representada. Al nivel global, el informe antes citado de SMACC, *La tortura que no ves* (SMACC, 2023, p. 62 y ss) registra en torno a los macacos parecidas apetencias, a tenor de comentarios e iconos sobre 1266 materiales de entretenimiento analizados que recibieron más de 12 billones de visionados. Se trata de un efecto indirecto de naturaleza cultural: en estos estudios no son ciertamente mayoritarios los comentarios de consumidores que declaran deseos o intenciones de poseer un primate. Sin embargo, incluso moderados porcentajes pueden ser críticos para especies en precario por cuanto generan ciclos algorítmicos que aportará decisivamente a generar alzas en la demanda desviada (Nunes, *et. a.,* 2023. En este sentido, la popularidad de estos vídeos funciona en la práctica como un primer escalón publicitario en el comercio ilegal de primates, así internacional como en los países de origen, que hoy se desarrolla fundamentalmente en Internet (Nijman, *et al*, 2023, p. 12). En el contexto de una caótica heterogeneidad normativa en torno al comercio de especies silvestres (pp. 10 y ss.) el espacio virtual allanará el trayecto impulsivo que discurre entre dar un "me gusta" a un inocuo vídeo recreativo y cursar una orden de compra.

4.3. El género del *falso rescate*

El seductor *arco narrativo de rescate* es uno de los más populares presentes en los vídeos recreativos con animales. Se narran en ellos historias de salvamento de ejemplares en peligro, el posterior cuidado y recuperación de estos

y, eventualmente, su liberación o adopción. Entroncando con la estructura del cuento popular, estas video-narrativas pueden entenderse como versiones del arquetipo tradicional conocido como "los animales agradecidos" (Kugel, 2006). Conforme al esquema tradicional, ciertos animales en contextos dañinos reciben ayuda esencial de un rescatador y ellos, a su vez, recompensan a este con su lealtad y apoyo. Este es sin duda parte del "encanto", si bien, para lograr el enganche y mayor conmoción del público, los modernos *cuentos* ponen en juego recursos de amplificación populista que marcan profundas diferencias entre la opresión de inicio y la liberación que subsigue (Homolar, 2021)

SMACC *(Social Media Animal Cruelty Coalition)* ha realizado una extensiva exploración de estos contenidos, recogidos en el informe *Detecta el fraude: el desenmascarado de los simulacros de rescate animal* (octubre de 2024), con múltiples ejemplos de salvamento de crías de primate. Del 9 al de marzo al 9 de mayo 2024, el estudio identifica 1,022 enlaces asociables a esta narrativa, de los cuales los investigadores se centran en 605. Se trata de grabaciones de animales silvestres o domésticos, en *Facebook, TikTok* y *YouTube*, cuya puesta en riesgo es pre-ordenada a los efectos de la producción, lo cual ni mucho menos implica que sea inocua para los falsos rescatados (2024, pp. 31 y ss). Por vía de ejemplo, estos son enfrentados a depredadores (estos también eventualmente dañados en el proceso de *rescate*), heridos por cepos, medio ahogados, enterrados vivos o "abandonados". Junto a ello, es frecuente la perturbación del entorno y rutinas de animales silvestres en riesgo de extinción.

Las políticas de admisión y control de las plataformas recreativas tampoco son eficaces, al descansar básicamente en la colaboración ciudadana. *YouTube* cuenta con políticas generales contra contenidos violentos y, en relación con el abuso a animales, sus nuevas *Guías* (2021) prohiben contenidos que muestren rescates escenificados de animales y expongan a los animales a escenarios peligrosos. En 2023, *Meta* incluye asimismo esta prohibición mientras *Tik Tok* carece de prohibición expresa sobre esta praxis, solo incardinable en la genérica prohibición de contenidos sobre maltrato animal. En todo caso, los vídeos de rescate se consumen masivamente con escaso estorbo de movilización o denuncias, base fundamental de la activación del control de las plataformas. El citado Informe de *Detecta el fraude*… (2024, p. 12) aprecia apenas un 22,8% de vídeos de rescate retirados. En efecto, esta estirpe narrativa parece suscitar en el consumidor actitudes frías e indiferentes ante impactos que este no discierne o bien descarta por entenderlos ficcionales (Harrington *et al,* 2023). En el estudio sobre las reacciones a vídeos de falsos rescates Harrington *et al* (2023, pp. 113-14) hallaron contados usuarios que apreciaran crueldad, pero aun en esos casos, la envoltura recreativa resultaba engañosa. La visión de los espectadores se ve distorsionada por el carácter entretenido o el juego performático de la representación (Stumpf, *et. al.* 2024). En realidad, estamos ante una de las formas contemporáneas del *si-*

mulacro de Baudrilard (2015), en donde el contenido realista y el real se refunden en un imaginario hiperreal. Finalmente, incluso los usuarios bienintencionados contribuyen a hacer circular los contenidos, en la creencia de estar realizando una divulgación compasiva. La rentabilidad mediática de estos vídeos se optimiza en los casos (un 21%, en el Informe Detecta el fraude..., SMACC 2024, p. 16) en que, además de la monetización a través de los anuncios. los productores estafan al público sensible, solicitando y obteniendo donaciones, de ahí que pueda hablarse de doble fraude, tanto emocional como financiero.

El rescate de primates une el atractivo de la narrativa a la seducción del *monito* protagonista. En el Informe *Detecta el fraude*… (SMACC 2024, pp. y ss.), los primates siguen a los gatos en el protagonismo de vídeos de rescate. Un segundo puesto no desdeñable, teniendo en cuenta la menor accesibilidad y precariedad de las poblaciones de primates. Se trata, de forma predominante, de sub-especies de macacos en riesgo de extinción o vulnerables. En la selección de animales de estas sub-especies, de pequeño tamaño se aprecia la seducción de una *víctima ideal*, (Christie,1986) vulnerable, pasiva, indefensa ante un desmesurado peligro. A ello se unen necesidades de amplificación melodramática antes citadas, que conducen a que típicamente se opere con crías indefensas, separadas de sus madres, o bien ejemplares muy jóvenes.

Estas grabaciones exponen a los ejemplares a escenarios que suman daños reales al riesgo performático supuestamente "bajo control"; el estudio de casos del Informe incluye supuestos tales como la exposición de la cría de macaco a una boa *constrictor* y su liberación (*Detectar el fraude*, 2024, pp 40-41) la infestación del ejemplar deliberada y dolorosa con parásitos para luego ser sometido a tratamiento (p. 47) o el caso espectacular y enteramente artificioso de un macaco apresado entre las fauces de un cocodrilo (p. 51).

La liberación tiene lugar de forma deliberadamente lenta y dilatada para crear suspense y trocear rentablemente la narrativa con partes I y II, con el consiguiente aumento de la angustia de las víctimas (p. 48, 51). Si bien los vídeos se centran la supuesta acción compasiva sobre los monos, además de los rescatados, puede haber actores secundarios dañados por la acción. Con frecuencia es el caso de los depredadores contra los que actúa el rescatador. En uno de los falsos rescates de primate (con 2.690 visualizaciones) se presenta un mono "casualmente" encastrado en el hueco de un árbol. La generosa acción liberadora pasa por la completa tala del árbol a cargo del esforzado salvador.

Por último, es común la domesticación subsiguiente de los *monitos* rescatados, que recompensan a su salvador con amor y fidelidad[1], dándose así el pernicioso fomento mediático del potencial "mascotizable" de un primate y el de su "graciosa" antropomorfización. Pero el esquema tradicional del arquetipo "animales agradecidos" puede ofrecer una versión más clamorosa y reveladora.

Así, por vía de ejemplo, *Youtube*[7] puede localizarse el enlace al vídeo "Rescate de un mono agradecido". La narrativa se centra menos en la situación de peligro despachada como "hallazgo de un monito atrapado";[8] El riesgo genuino viene dado por la rehabilitación y el "agradecimiento. *Un hombre encuentra a un monito atrapado, tras criarlo,el mono recompensa su bondad de formas sorprendentes,* resume la narradora. Así, el rescatador lleva a casa a la cría, a la que baña, seca y alimenta. Según se relata, *el pequeño mono se duerme en los brazos del hombre* y *cuando se despierta, ayuda al hombre a limpiar la casa. El hombre queda maravillado y prepara más alimento para el animal. Bajo el cuidado del hombre, el monito crece y asume tareas domésticas, incluyendo distribuir alimento a los pollos y perros. Un día ayudó incluso a liberar a un perro atrapado. El hombre fue consciente de todo ello y recompensó al mono con un teléfono móvil. Para su sorpresa, el mono se aficiona al anime y trabajará aún más duramente en la casa.* Finalmente, será presentado a una atildada pareja con la que tendrá crías. La estupidez *naif* de la historia deja al usuario un completo surtido imágenes antropomórficas del animal vestido con pijamas, ropas deportivas y colores brillantes o visionando contenidos de ficción. El mono se ofrece al usuario como *humano de menor valor:* de un lado se alza sobre los animales, a los que cuida y supervisa; de otro, se presenta sometido, convertido en un inopinado sirviente que carga brazas de leña o pesados barreños.

5. *LEÑA AL MONO*: MALTRATO RECREATIVO EN CLAVES DE ODIO

Ahora bien, Internet registra algo más que carantoñas exacerbantes o falsos rescates de primates. A tenor del informe de SMACC *La crueldad que no ves* (2023) los vídeos de macacos han protagonizan los clips divertidos de *Facebook, Instagram, TikTok* y muy destacadamente *YouTube,* según los informadores evidenciaron entre septiembre de 2021 y marzo de 2023. De entre los 1,266 enlaces a incidentes de crueldad detectados, un 13 % fueron de tortura psicológica deliberada, un 12 %, de tortura física deliberada, y un 9% de uso de animales como diversión. De las especies de macacos implicadas, un 35% eran vulnerables y un 53% estaban en riesgo de extinción, según la lista CITES de la Unión Internacional para la Conservación de la Naturaleza. Típicamente cautivados y grabados en Asia, los videos fueron visionados hasta 12,054,378,907 billones de veces.

La sinergía entre grandes plataformas y comunidades de usuarios de preferencia sádica puede llegar aún más lejos. En 2023, investigadores de la BBC sacan a la luz un reportaje y un audiovisual *The Monkey Haters,* sobre el llamado círculo global de tortura de monos, en cuya investigación han desempeñado

[7] https://www.youtube.com/shorts/TnmchgpyCXw, visitado el 15 de diciembre de 2024
[8] https://www.youtube.com/shorts/TnmchgpyCXw, visitado el 15 de diciembre de 2024

un papel crucial ONGs como la británica *Action for Primates* (AFP) y *Lady Freethinker*, en EEUU. La investigación aborda una compleja trama de *abuso animal en línea,* donde se demandan y distribuyen crueldades a animales así gratuitamente como a cambio de pagos.

El caso partía de una línea de vídeos divertidos de procedencia indonesia y tailandesa donde, siguiendo un guión normalizado se gastaban bromas pesadas a crías de macaco para arrancarles *graciosas* reacciones. Sin embargo, el humor, siempre en estrecha conexión estética con la liminalidad, fue virando hacia el género extremo de *sublime lúdico* que hoy medra en Internet (Herrera Moreno, 2020). El fenómeno se verificó como proceso de escalada violenta, discurriendo desde contenidos de victimización mediática legitimada hasta vídeos de explícito maltrato sádico: ciertos usuarios, impacientes, unidos por una aversión que descubrían compartir, demandaban acciones de mayor contundencia sobre los *monitos*. Los seguidores monófóbicos (*monkey haters*) recabaron entonces el perfecto anonimato de *Telegram;* solo mediante infiltración de activistas pudo llegarse a captar la terrible praxis promovida desde una de la más activas, *La jaula del simio* (*Ape´s cage)* con 400 seguidores globales que compartían sus expansiones y pagaban por el visionado de ahogamiento, mutilación o decapitación de macacos por un precio medio de 200 dólares. Los usuarios modelaban la oferta con sus comentarios y elegían mediante encuestas el tipo de tortura predilecta. Finalmente, los infiltrados pudieron reunir evidencias para identificar autores y promover las condenas en distintos países: Indonesia, en el caso de dos torturadores de origen, Gran Bretaña, con la condena a dos voraces consumidoras y EEUU país donde se ha condenado a al "rey de la tortura", quien monetizó los vídeos desde *YouTube*. La índole de los materiales resultó tan perturbadora como la revelación de tan amplia demanda para producciones semejantes.

5.1. ¿Por qué torturar/ver torturar a los monos?

Como puede observarse, estamos un diseño de victimización retroalimentado, que implica, de un lado, a victimarios captores de crías en el entorno de origen que graban y monetizan en Internet las torturas, como, del lado de la demanda, a usuarios que participan y conforman la acción con sus ruegos e instrucciones explícitas.

1. En el primer caso, estamos ante delincuentes racionales motivados por el lucro y seducidos por las ganancias substanciosas que esta cadena tecnológica reserva para ellos, con escaso riesgo. Asociado con este lucro personal, el régimen de economía atencional dominante en Internet explica por qué los traficantes habrían virado a contenidos de abuso animal cada vez más bizarros y radicales para robustecer su

oferta y lograr la supervivencia mediática de sus imágenes en la feroz competición, (Herrera Moreno, 2020).

2. De forma acaso más compleja, para explicar la desviación consumidora cabe acudir a la hipótesis de una probable sinergia de factores que pasamos a identificar.

   a. Tesis de reforzamiento (*enhancement*), (Gatti *et al*, 2005, pp 117 y ss) La agrupación de consumidores orientados al abuso animal se explica de un modo muy plausible a partir del efecto híbrido de *refuerzo* que explica la peligrosidad de la banda antisocial: a partir de una moderada aproximación de predispuestos (efecto selectivo, esto es, los afines se atraen), la agrupación ulterior aporta facilidades que disparan el potencial dañino de los miembros. En el caso de los *monkey haters*, las facilidades son sobresalientes ya que no es un simple grupo ilícito: se trata de un grupo *online.*

      Siguiendo este esquema, y en cuanto a las personalidades proclives a gratificarse por la tortura animal, hay que mencionar la dimensión malsana del maltrato sádico a animales, formando este rasgo uno de los elementos de la *tríada oscura* o *tríada Mc Donald* que enlaza con el perfil psicopático (Kavanagh, *et al*, 2013). En el sentido facilitador, del mismo modo que se ha observado con otros predadores o grupos de odio, cabe pensar que el típico rol vinculante de Internet haya convocado a usuarios globales dotados de un común perfil, facilitando para ellos identidades comunitarias y suministrando oportunidades para satisfacer sus preferencias (Helm *et. al.* 2024, Bjelajac y Filipovic, 2020, pp. 36-37). La concurrencia de una moderada selección y una fuerte facilitación permite explicar la fortaleza de esta feroz comunidad.

   b. Procesos tecno-generativos. De modo no incompatible con el proceso de refuerzo es preciso considerar el llamado *algoritmo amplificador* (Wood, 2017) así como las dinámicas persuasivas de Internet (González Tapia, 2025), propias en especial, de los sistemas de recomendación de plataformas como Youtube o *Tik Tok*. Partiendo de una incursión eventual en materiales de hostigamiento recreativo de *monitos*, los usuarios terminarían adquiriendo crecientes avideces de consumo que pronto no podrían ser satisfechas por suministros habituales. De este modo no de forma intencional sino en función de su propio régimen operativo (Wood *et al,* 2013, pp. 1397 y ss.), la tecnología habría amplificado un primer antagonismo hasta hacerlo más intensa y violenta, en

tanto la escalada de demanda seguiría una línea de crecimiento similar a la propia de las adicciones.

Con todo, que estas comunidades estén integradas por sujetos de orientación sádica que acceden a nuevas oportunidades de desviación, no explicaría la repugnancia inicial contra el *monito* y que, según relato de los hechos, habría sido un factor determinante en el circuito de tortura y tráfico. Procede pues considerar qué puede haber detrás de este irracional sadismo comunitario que parece tomar al primate, selectivamente, como objeto penoso de repulsa.

5.2. ¿Por qué odiar al mono?

En ocasiones, Internet ofrece evidencias tan directas y expresivas que no pueden dejarse a un lado en la exploración de los fenómenos de ciber-desviación. En este caso, es posible recabar del mismo usuario respuestas directas y esclarecedoras sobre la existencia y motivos de esta aversión.

Hablan los usuarios: En efecto, la popular web *Quora*[2] abre para sus seguidores precisamente esta misma pregunta ¿Por qué hay quienes odian a los monos?. Lo hace en agosto de 2018, y se anticipa con años de antelación a la revelación periodística del caso y sin que la expresión *odio al mono* hubiera adquirido la actual connotación delictiva. Los usuarios crean una cadena de respuestas significativas expresándose con elocuencia y espontaneidad, ignorantes del horror que estaba aún por revelarse.

De la serie de textos encadenados, hemos seleccionado 7 textos significativos. En estos casos, la profesión de odio es personal, esto es, no se ofrece una posible explicación abstracta y general, sino se declaran sentimientos particulares de repugnancia. Así, en estas respuestas, a menudo colmadas de prejuicio, domina la expresión visceral sobre la explicación racional que, en principio demanda la pregunta de la web. Aunque cierta ironía asoma eventualmente, apenas hay respuestas son humorísticas, antes bien, los suscriptores parecen explayarse sobre aspectos que les afectan vivamente. En efecto, los textos se refieren a los *monos* empleando términos vinculables al campo semántico del odio, con dispensa de epítetos tales como *horribles, asquerosos, molestos, ofensivos, feos, patéticos, ratas, mierdecillas, demonios con pañales* y otros.

Los usuarios admiten haber incurrido en fantasías destructivas o satisfacciones sádicas, que saben explicitar con detalle. Así, la respuesta 1[9], incurre en

[9] *Abused is what they are in the wild. Let me have that obnoxious diaper goblin for a few minutes. I'll show you abuse on a scale that would scare the shit out a serial killer. Better yet, let me have it for 10 seconds. It would be the longest 10 seconds of its miserable, useless life. (...) I daresay that the only satisfaction I get from the whole thing, is watching their owners abandon them when*

feroces ideaciones de abuso a monos. El suscriptor dice gozar cuando los ejemplares son abandonados al crecer y dejan de ser *cuquis,* sin recibir ya comida de calidad o alimento alguno, ropas y cuidados. En esos momentos, los monos padecen aquello que "merecen": desnudos, hambientos, fríos y asustados.

En la respuesta 2 se afirma odiar a las crías de mono. Una parte del confidente sueña con agarrarlos por el cuello y estamparlos contra la pared. Nunca dañaría a un mono inocente, se trata de un sentimiento visceral. *Una mezcla de asco y miedo unidos hasta lo revulsivo*.

Por su parte, la respuesta 3 expresa los fuertes deseos del usuario de ver a una hembra de macaco maltratando a su cría; y aunque a la a la vista del maltrato de cualquier animal, este usuario saldría en su enérgica defensa, no cree que interviniera si se tratara de *uno de esos repulsivos macacos*.

Las respuestas reflejan visiones del *doppelgänger* o, en términos de René Girard (2005), del *doble monstruoso* Son muy significativos los sentimientos de miedo ante sujetos parecidos a ellos, percibidos como rivales deformes e invasores en potencia. El típico rol narrativo del temido *doppelgänger* o rival mimético, competitivo y usurpatorio, no es otro sino el de desplazar y suplantar al original. Girard (2005, pp.170 y ss.) basa el rechazo en la desconfianza que produce su insegura y desconcertante filiación.

Se trata de un parecido que produce grima (y recordemos que la *grima* es un concepto originado en el campo de lo espectral): para el usuario de la respuesta 4 resulta *ofensivo lo similares a humanos que son, y sin embargo lo feos y patéticos.* Así, la ya citada respuesta 1 ejemplifica pormenorizadamente el modo en que los monos estarían ocupando (de modo enteramente usurpatorio) un ámbito propio de los humanos. En concreto, según argumenta, las crías de mono se pueden contemplar alimentadas con comida para bebés, usan ropas bonitas y de marca, son mimados, se les dispensa cariño y protección, duermen en camas y hasta reciben masajes. Mientras los monos llevan un lujoso estilo de vida -aquí, la comparativa de contraste- la infancia local se alimentaría de comida barata, extranjera y de supervivencia. Y todo ello porque *algunos idiotas juegan a las casitas con un condenado mono, en lugar de adoptar un niño real*[10]. Ahora bien, señalado el ser humano como responsable

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they are no longer small and considered cute. Then these rats get a course course in reality. No more quality food. Or any other food for that matter. No more clothes and comfort. No more warm bed. No more goddamn Louis Vuitton! Now they are right where they deserve to be. Naked, hungry, cold and sca red. Fuck those little shits!

[10] *They will steal baby monkeys from their mother instead of adopting a child. They are then fed expensive baby formula. Human babies are doing without and morons are bottle feeding monkeys baby formula.They get nice clothes to wear and are pampered both literally, and given love and comfort. They are fed quality food and protected while sleeping in beds dressed in fucking Louis Vuitton. I should note that I have also witnessed people massaging these little diaper goblins.Meanwhile, while these*

de la situación, son los monos los verdaderos usurpadores, aquellos que han de ser punidos por suscitar el temor y la revulsión.

Entre las respuestas cunde la personificación denigratoria. Los monos son versionados como *asesinos ladrones, perversos, agresores sexuales de mujeres, secuestradores y homicidas de bebés humanos*[11]. La respuesta 5 contiene una explicación a esta tendencia: los monos son tan iguales a nosotros que cuando los vemos incurrir en barrabasadas normales en cualquier otro animal, los juzgamos según patrones normativos humanos[12]. Nos apresuramos a atribuirles capacidad de culpabilidad en función de evidencias fútiles: así, a tenor de la respuesta 1, cuando roban, se dan a la fuga, por tanto, no serían inocentes[13].

En el fondo de este rechazo, puede subyacer buena razón de envidia: en la respuesta 6, los monos equivalen a hombres desinhibidos y anómicos, "personas" libérrimas no sujetas a las normas que controlan al resto de humanos[14].

Una conclusión provisional se abre paso: el temor y repugnancia compartidos (*I don't like apes. I am glad I am not alone)* suscitado por los monos (y sus vídeos) no viene asociado a las diferencias sino a las similitudes. En estos términos, los primates son iguales a los seres humanos, pero no lo suficiente. Así, la cuasi-humanidad o promesa de humanidad no cumplida deviene simbólicamente verdadera amenaza de usurpación.

La respuesta 7, analítica y extensa, extiende plausiblemente la tesis del *valle siniestro* al caso del rechazo al mono. Parte de observar que esta repugnancia no tiene como objeto a personas u otros animales no humanos, sean mamíferos o de otro tipo. Es más, quienes responden se declaran amantes de los animales o veganos, con esa concentrada salvedad; muchos admiten lo irracional e impulsivo de su rechazo como de sus deseos de infligir daños a los monos. La situación guardaría, entonces, equivalencia a la que se verifica en el rechazo hu-

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rats are living a lavish lifestyle, actual human children in that very town, are riding foreign cock and sucking dick at $10 a pop just to survive. They do not even get to keep the money. All because some idiots want to play house with a damn monkey instead of adopting a real child.

11 *They are thieving, little perverts who will steal your belongings, then barter them back for food. They will sexually assault human women.They destroy your property.They will kidnap human babies (though there does seem to be a certain justified irony there), and most of the time, kill them by trying to treat them like monkeys.*

12 *Because they're so similar in appearance and behavior to humans that when we see them do gross things that would be normal for any other animal, we judge that behavior using human norms rather than animal norms.*

13 *When they steal, they run, indicating that they obviously they know that what they did was wrong. If they didn't know better, they would be innocent. But they obviously do know better making them guilty as fuck.*

14 *We are jealous of them they have no rules and they do whatever they want and we dont. Monkeys dont have hate like we do, they dont have families and we do they dont earn money and we do, humans and monkeys are similar.*

mano a los robots o autómatas, conocida como *de valle siniestro*[15]. Cuando los robots no se parecen a los seres humanos, no nos causan temor. En cambio causan rechazo los androides que reproducen ciertos caracteres humanos, si bien su condición extra-humana se revela en múltiples detalles que causan repugnancia. Es la repugnancia que se produce algunas prótesis, o ante los cadáveres, zombis u otras criaturas *de propias películas de horror.*

5.3. De la selva a un *valle siniestro*

Fue el robotista Mori (2012, pp.99-100) quien describió por primera vez el efecto de *valle siniestro* como declive de la línea gráfica de aceptación social ante el autómata. Elevada cuando su otredad es manifiesta, la línea cae en un abismo plano cuando el prototipo exhibe apariencias humanas sin constituir una réplica acabada. Así, una marioneta no produce la repugnancia que una pierna ortopédica de imperfecta factura. La primera es un artículo, portavoz simbólico de humanidad, la segunda querría hacerse pasar por humana en términos físicos y funcionales. Para Mori, la única salida del *valle siniestro* es un diseño optimo y una perfecta réplica, como ya ocurre con la ortopedia de última generación.

Como bien se ha destacado, (Rando, 2023) la aproximación a los androides, *aliens* y fantasmas ofrece oportunidades novedosas a los estudiosos del mundo animal. La existencia de prejuicios de rechazo a los primates (Rádlová, *et al* 2018, 11-13) se puede asociar en efecto, a la del *valle siniestro*. Para Grinbaun, (2015, p.150) los robots, los monos, se perciben como imitadores de lo humano, pudiendo provocar una rivalidad mimética precisamente en aras de esta indiferenciación. Por su parte, Woods, V., y Hare (2019) aluden al *valle siniestro de los simios*. El menosprecio a lo simiesco se hermana al que suscitan los "últimos de los iguales", sentimiento en la base de la larga historia de esclavización de poblaciones negras.

Este rechazo encuentra perfecto fuelle en el visionado de "vídeos divertidos" que con frecuencia exhiben a monitos vestidos con ropas infantiles, bebiendo biberones o montados en carritos de bebés. Así, las crías de primates son ilícitamente arrancadas de sus poblaciones y hábitats naturales para performar como inviables humanos, siendo luego abismadas en *valles siniestros* sin posible

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15 *The Uncanny Valley is a phenomenon usually used to describe the effect of lifelike robots on how humans perceive them with horror and repulsion. If a thing is not like a human at all, but has some human traits, we think it is adorable. Like a dog shaking hands, or a teddy bear or doll with huge eyes. However the closer it gets to being like a real human, a valley develops, really a cliff in terms of the line on a chart , where if it is lifelike there are still micro ways it is different that we may not even realize we see but makes us feel it us creepy. Some prosthetics get this reaction too. At extremes, this is corpses and zombies or such in horror films*

escape. No repugnan a estos consumidores las diferencias en sí mismas, que se toleran de forma no problemática en otros animales, sino el hecho de percibirse estas diferencias como fracasos sociales o intentos fallidos de alcanzar lo humano. Lo problemático en este caso reside en la atribución simbólica al robot, o al mono, de un *status* de humanidad simulatoria mucho más que en la otredad o extrañeza ontológica (Grinbaun, 2015, p.150).

Y ciertamente, a diferencia del robot, un producto de fabricación artificial, el primate no puede salir del *valle siniestro* por la vía de incrementar forzadamente su parecido con lo humano. Esa aceleración lo destruiría y haría de él una copia trágica.

6. PUNTO DE LLEGADA: DEL *MONO GRAMÁTICO* AL *MONO INSTAGRAMÁTICO;* ENCLAVES RESTAURATIVOS PARA ATAJAR INERCIAS DE PERSONIFICACIÓN DAÑINA.

El parentesco que venimos destacando ha hecho imposible acercarse a la realidad del primate desde ópticas no falaces y personificadoras. Sobre los primates recae una considerable carga metafórica en este sentido: en el mejor de los casos, el primate ha sido causa histórica de veneración, paradigma de la mejor humanidad, como ocurría con *el señor de los monos*, el legendario Hánuman del *Ramayana* al que Octavio Paz aludió como *mono gramático* en la obra del mismo título (1970). Pero ese mono, erudito y versado, como, en general, el primate en fábulas y representaciones amables viene revestido de valores y atributos humanos que no le pertenecen más que, los *tutús*, pijamas y pañales a los monitos performadores de *Instagram, Tiktok* y *Youtube.*

De forma bien intencionada y a veces, grandilocuente, en declaraciones protectoras de los Grandes Simios, como la impulsada pioneramente por Cavalieri y Singer, 1995), se enfatizan los entronques y parecidos, como si el parentesco con lo humano fuera un salvoconducto que permitiera al animal transitar a un espacio seguro. Pero, tal como hemos visto, la victimización recreativa descansa en una similitud percibida, que precisamente no crea hermandad sino es fuente de explotación. En el caso del primate, el menosprecio se parece peligrosamente al que concurre en otras formas capacitismo o racismo: en este caso el abuso no opera por exclusión de la civilidad sino precisamente por una impertinente adscripción "cívica" que a la postre resulta opresiva y esclavizante. Hay parecidos que matan o victimizan y hay prejuicios de base que remiten a una actitud especista centrada menos en la distancia que en la proximidad, menos en la exclusión de lo humano que una grotesca extensión de la humanidad.

Las políticas de control de contenidos de las plataformas recreativas han evidenciado su fracaso ante la heterogeneidad de las regulaciones mundiales y la

risueña capacidad del humor de esquivar los filtros algorítmicos o disolver la alarma del usuario sensible. Por ende, no basta con una mera retirada de contenidos, es precisa una más inmediata pedagogía comunitaria basada en respeto, reparación y dignificación. Medidas de tutela al abrigo de la Ley de Servicios Digitales (*Digital Services Act*, EU, 2022) podrían consolidar, así, una praxis restaurativa que abriera en Internet espacios de diálogo y praxis de identificación de daños y de discusión sobre contenidos perjudiciales entre los mismos usuarios. Por que la moderación de contenidos no debería desansar unilateralmente en denuncia, control y represión de contenidos ni, en tantos casos, tampoco en la sola acción del Derecho penal; más productiva se presenta la comprensión comunitaria del daño identificado, para que su causación deje de ser in negocio masivo. Las dificultades de una acción restaurativa *online* y el hecho de que la DSA tenga como inmediatos referentes de tutela a los niños o personas vulnerables no pueden ser obstáculos insuperables. La justicia restaurativa abre espacios orientados al reconocimiento de la alteridad (Varona Martínez, 2021) como puede abrirlos al respeto de un parentesco no explotable. Lo restaurativo es fuente de riquezas por contraste: contra el capacitismo de especie, recapacitar, contra la falsedad de un performático "alter ego humano", la revelación de la identidad biológica dañada. Una restauración, así, desmarcada de personificaciones improcedentes, podrá poner el acento en los alcances de reír u odiar ante parecidos imperfectos.

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IMPULSAR LA JUSTICIA RESTAURATIVA AMBIENTAL EN CATALUÑA: POTENCIALIDADES Y RETOS

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1. INTRODUCCIÓN[1]

En el marco del proyecto "Diálogo ambiental por el futuro de todas"[2], con el objetivo de explorar las potencialidades y los desafíos de la justicia restaurativa ambiental en Cataluña, a partir de la experiencia de este enfoque en otros

[1] Este capítulo recoge un resumen de la relatoría del *workshop*, realizado el 8 de mayo de 2024, titulado "Impulsamos la Justicia Restaurativa Ambiental en Cataluña: Potencialidades y retos", organizado por INSTA, en colaboración del Síndic de Greuges de Cataluña y Tésera Mediación, esta última a cargo de la dinamización. Puede verse la grabación en https://www.youtube.com/watch?v=V52iG6e8D_Y&t=10s. En dicho *workshop* participaron tres integrantes del proyecto del Ministerio de la Ciencia, objeto de este libro.

[2] Proyecto financiado dentro del marco de proyectos singulares del cooperativismo, creación de cooperativas y proyectos de apoyo a las cooperativas y entidades de la economía social y solidaria, regulados en la Orden EMT/167/2021, de 2 de agosto, y financiado por el departamento de Empresa y Trabajo de la Generalidad de Cataluña.

ámbitos, se han podido extraer una serie de conclusiones relativas al *workshop* o taller realizado en mayo de 2024. La sesión del taller se organizó en dos partes: el primer panel se enfocó, de forma general, en la justicia restaurativa en Cataluña; y el segundo abordó más concretamente la justicia restaurativa ambiental dentro y fuera de Cataluña. Posteriormente, se abrió un diálogo final entre las y los panelistas y el público asistente, donde se reflexionó sobre las posibilidades, retos y desafíos de la aplicación del enfoque restaurativo en asuntos ambientales en el territorio. El taller se celebró de forma presencial en la Sala de actos del Síndic de Greuges de Cataluña (Barcelona) y participaron panelistas expertos y expertas en el enfoque restaurativo, en diferentes ámbitos, incluido el ambiental, así como varias personas asistentes de los sectores de la administración, la academia, entidades y organizaciones de la sociedad civil.

2. DESARROLLO DEL *WORKSHOP*

2.1. Presentación

Esther Giménez-Salinas y Colomer (Síndica de Greuges de Cataluña) expuso su primer contacto con la justicia restaurativa, en Alemania, hace treinta y cuatro años. El Síndic se entiende como garante de la protección de los derechos individuales de las personas y también de sus derechos ambientales. En este sentido la justicia restaurativa, aunque surge en el campo penal, se ha ido extendiendo a otros ámbitos como la administración pública y el campo educativo.

Por su parte, Aida C. Rodríguez señaló que la experiencia y formación de la nueva Síndica, contribuyó a impulsar la justicia restaurativa en el mismo Síndic, con un área de trabajo propia. En esta nueva etapa, se reconoce la importancia de divulgar las ideas y sensibilizar sobre la justicia restaurativa, estableciendo alianzas y realizando convenios y publicaciones en el ámbito restaurativo. En este sentido, el Síndic de Greuges de Cataluña trabaja con síndicos locales y universidades.

Finalmente, Jordi Recordà Cos (INSTA) mencionó que cada vez hay más personas, en la casa de la justicia restaurativa, de procedencia distinta. En el caso de INSTA, su originalidad es la de apostar por la justicia restaurativa ambiental. En INSTA se protege el ambiente desde la normativa, pero también desde el diálogo. De esta forma, cuando hay un daño ambiental no sólo es importante restaurar la funcionalidad del sistema ecológico, sino también velar por las personas afectadas y tener en cuenta como la situación ha afectado su vínculo. Para INSTA, tener en cuenta las relaciones humanas es una forma de proteger al medio ambiente. Esta es la idea vital que tiene la cooperativa y que impulsa me-

diante el proyecto[3] en el que se enmarca este *workshop*. Dicho proyecto consta de una fase reflexiva y de comprensión del diálogo y la justicia restaurativa; y de una fase formativa, con creación de herramientas, como guías. Así mismo, se prevé una prueba piloto con un caso real.

3. JUSTICIA RESTAURATIVA EN CATALUÑA

Para Albert Rodríguez (Fundación AGI) la justicia restaurativa incide en cómo se organizan las comunidades para afrontar los conflictos que causan daños a las personas y a las propias comunidades. Desde la reflexión de su experiencia práctica, observa la necesidad recurrente de las personas implicadas en que se "haga justicia." Hay personas que basan sus expectativas en los procedimientos judiciales para que "salga la verdad", cuando lo cierto es que no existe una única verdad. También indica que, cuando un sistema utiliza a las víctimas principalmente para impulsar una acusación, las víctimas se sienten utilizadas y despreciadas. Considerando la normativa de las Naciones Unidas, la justicia restaurativa puede definirse como "[...] una forma de responder a comportamientos delictivos teniendo en cuenta las necesidades de las comunidades, de las víctimas y de los delincuentes." Se trata de un concepto evolutivo que debe avanzar en base a la reflexión.

En aplicación de la Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito, en Catalunya son los órganos judiciales quienes informan de las posibilidades de la justicia restaurativa. Para él, un factor clave es que la intervención tiene que tener en cuenta las necesidades de las víctimas y cómo quieren ser reparadas. En ese sentido, se menciona un libro que sirve de apoyo para las intervenciones de facilitación, "Un lugar en el mundo: Guía de prácticas restaurativas para centros de protección a la infancia y adolescencia", de David Roman. Este libro propone una serie de preguntas en relación con el concepto y aplicación de la restauración.

Mònica Albertí i Cortés (Cultura Restaurativa SCP) se refirió a la metodología de cambio sistémico. Para ella, no se trata sólo de instaurar prácticas restaurativas. Dar respuesta al conflicto también implica cómo escuchamos las necesidades de la comunidad afectada. Para ello es importante el enfoque restaurativo en el ámbito educativo[4]. Este enfoque se presenta, en forma de pirámide, a partir de tres niveles de acción: construir, mantener y reparar. Sobre la etapa de construir, se quiere ir más allá de la idea de dar respuesta a los con-

[3] Los contenidos principales del proyecto se pueden consultar en la siguiente web: https://instajuridic.com/es/portfolio-items/proyecto-singulares-dialogo-ambiental-por-el-futuro-de-todas/.

[4] Véase https://projectes.xtec.cat/convivenciapositiva/categoria/enfocament-restauratiu/.

flictos, diferenciando que conflicto no es igual a violencia. Esta idea procede de la cultura de paz. Para crear comunidad, nos podemos capacitar en dos habilidades fundamentales para adquirir capacidad responsiva y de provención de los conflictos: la escucha activa, atenta y empática, pero también restaurativa (Hopkins, 2019); y la comunicación no violenta (Rosenberg, 2006) que ya está muy presente en prácticas concretas. El segundo nivel de la pirámide es mantener. Para cuidar de las relaciones entre les miembros de la comunidad, y gestionar adecuadamente las relaciones y los conflictos entre sus miembros, se pueden poner en práctica varias técnicas de las prácticas restaurativas, como los círculos restaurativos y la escucha empática, entre otras. En la fase de reparar hay que superar el binomio castigar/no hacer nada. Se deben buscar estrategias para superar ese binomio e intervenir de manera efectiva en el "reparar". Desde 2018 se trabaja con el modelo "escuela y familia". Hay un equipo de formadores en el enfoque restaurativo global. Del 2020 al 2023 se han formado más de mil centros docentes. Si bien se ha evaluado el programa, todavía no su impacto. En todo caso, es importante sensibilizar y ofrecer acompañamiento. La justicia restaurativa no es una formación, sino un trabajo que requiere al menos de tres a cinco años. Por ello, no vale formar sólo a los docentes, se debe trabajar desde toda la comunidad. Por último, se destaca la "Guía para el despliegue del enfoque Restaurativo en el ámbito educativo"[5].

Clara Casado Coronas (Síndic de Greuges de Catalunya) habló sobre la cultura restaurativa en el Síndic de Greuges. La primera Ley del Síndic de Greuges ya preveía fórmulas de resolución de controversia (Ley 14/1984, de 20 de marzo, del Síndic de Greuges). En la posterior Ley 24/2009, de 23 de diciembre, esta parte se desarrolla más, al incorporar el hecho de facilitar una comunicación y entendimiento con la ciudadanía. La parte principal de su trabajo consiste en recibir las quejas de los ciudadanos agraviados y decidir, pidiendo información, si la Administración ha cometido alguna irregularidad. Si esto ha causado una injusticia, desde el Síndic se puede solicitar otro tipo de actuación y otra interpretación de la norma. Otro elemento importante es el derecho a la buena administración. Es un derecho de nueva generación, pero es revelador. Una primera referencia se encuentra en la Carta de Derechos Fundamentales de la UE (art. 51). Los ciudadanos tienen derecho a que la Administración actúe bien, de forma transparente, gestionando con rigor y asumiendo sus responsabilidades. En conclusión, el marco normativo que enmarca el trabajo del Síndic no habla de justicia restaurativa, pero sí de elementos relacionados.

Durante el mandato del Sr. Ribo, el Síndic impulsó la necesidad de ser más accesibles. Es un elemento importante que diferencia el talante de la Administración. Si bien todo proceso debe ser por escrito, con garantías, esto implica

[5] Para más información puede consultarse la web: https://www.culturarestaurativa.com/guia-per-al-desplegament-de-lenfocament-restauratiu-global-a-lambit-educatiu/.

la pérdida de la comunicación directa y reduce la importancia de sentirse escuchado. El cambio debe ser no sólo en la gestión de las quejas, sino también a nivel organizativo para mejorar la atención al ciudadano y potenciar el trabajo colaborativo, entre otros temas. Por ejemplo, en el marco de políticas concretas, que generan disfunciones, deben construirse espacios de trabajo colaborativos.

Hace falta experiencia. Se deben crear oportunidades para poner en práctica y que se vea la utilidad de la justicia restaurativa. Para realizar procesos restaurativos se requiere tiempo y energía y la cultura de implicación se genera con confianza, poco a poco. En su caso, la legislación ambiental nos lleva a tener que repensar qué significa la justicia restaurativa cuando no existe una víctima directa o cuando no es humana. Al mismo tiempo, es importante ver cómo la parte proactiva se está desarrollando en el ámbito educativo y comunitario y reflexionar cómo trasladarlo al ámbito ambiental.

4. JUSTICIA RESTAURATIVA AMBIENTAL. EXPERIENCIAS RESTAURATIVAS EN CATALUÑA Y OTROS PAÍSES

La aportación de la criminología verde es muy sustancial. Permite un enfoque de la justicia restaurativa desde una perspectiva no antropocéntrica. Por otra parte, se introduce una visión del delito que va más allá del Código Penal y se cuestiona quién infringe la Ley y como responde el sistema penal. En cuanto al daño, se pregunta sobre quién determina qué es dañino y lo que es delictivo, en una tensión entre economía, clíma y formas de vivir en un planeta conectado. Por ello, la Criminología verde también tiene en cuenta las desigualdades en la perpetración y victimización de los delitos.

En el Instituto Vasco de Criminología de la Universidad del País Vasco, desde el Laboratorio de Teoría y Práctica de Justicia Restaurativa[6], se trabaja en justicia restaurativa corporativa en delitos medioambientales, particularmente en delitos prescritos, pero donde el daño persiste. Además, se ha desarrollado un taller para reescribir restaurativamente la respuesta a delitos que ya han pasado por la administración de justicia, así como una encuesta dirigida a empresas y activistas para sondear el entendimiento y la posible aplicación de mecanismos restaurativos, ligándolo con la responsabilidad social corporativa, la Directiva europea sobre transparencia y la Directiva de diligencia debida, así como con los programas de cumplimiento, sin perjuicio de un riesgo de *restorative washing*.

En dicho Laboratorio también se trabaja en un proyecto con infracciones administrativas cometidas por jóvenes en materia de “basuraleza”, en colabora-

[6] Véase su web en https://www.ehu.eus/es/web/ivac.

ción con *Libera*. Se trata de superar la multa administrativa en casos de basura, en el contexto de ocio y consumo de tóxicos en actividades juveniles, para crear un programa restaurativo que ayude a responsabilizar a los jóvenes a través de círculos restaurativos, pero también a conciencias a toda la comunidad sobre los problemas de los jóvenes.

Antoni Cardona Barber, profesor de la UAB, señala que, desde el Derecho penal, existen diferentes posiciones sobre la justicia restaurativa. Puede apreciarse un criticismo en relación con una posible deriva hacia una justicia penal privada. En este sentido, sin perjuicio de que víctima y victimario se encuentren, no se puede aceptar que el acuerdo reparador sea de obligada aceptación por el juez. Además, ello podría dar lugar a una desigualdad de trato, favoreciendo a los que tienen más recursos. En el caso del delito ecológico, es necesario un daño sustancial al ambiente, que puede afectar a una concurrencia de personas (no necesariamente víctimas), lo que plantea a quién convocar a un proceso restaurativo para que se vea como legítimo.

Según Cardona, podemos utilizar varias herramientas penales ya existentes para mejorar un enfoque restaurativo:

1. Al delincuente ambiental se le puede condenar a una pena de multa. En este caso se podría proponer que el dinero de la pena se destine a reparar el daño ambiental, como ya se hace en temas de seguridad vial.
2. El Estado puede comisar/confiscar bienes utilizados por la comisión del delito. Esta técnica se utiliza en el tráfico de drogas.
3. El artículo 112 del Código Penal incide en que el condenado repare el daño causado. En el caso de las empresas, estas pueden ser penalmente responsables, pero no se prevé para ellas los trabajos en beneficio de la comunidad. Se debe imponer el artículo 112 del Código Penal, para que las empresas reparen personalmente con sus medios el daño cometido.

En definitiva, la justicia restaurativa constituye, simbólicamente, un concepto interesante porque obligamos a reparar el daño, pero no necesariamente sirve para la restauración del daño. Además, debe formarse a todos los operadores jurídicos, y en especial a abogados, fiscales y jueces, en justicia restaurativa en las Facultades de Derecho.

Julia Barjau Dachs destaca el papel del Foro Europeo por la Justicia Restaurativa que se creó para apoyar la extensión de la justicia restaurativa, conforme a unos principios mínimos. Los objetivos del Foro son hacer posible que toda persona en Europa, si bien sus miembros proceden de todos los continentes, tenga acceso a la justicia restaurativa, en todo lugar y todo momento (una justicia gratuita y de calidad) y ser una práctica segura para todas las personas

participantes. En el Foro se trabaja con diferentes profesionales y ciudadanía. Gracias a los grupos de trabajo se puede descentralizar el trabajo y así crear guías, ofrecer formaciones, organizar jornadas y actividades internacionales, realizar cursos, etcétera.

El grupo de trabajo de la justicia restaurativa ambiental se crea en 2020, después de un seminario en 2019, en el que se insistió en la cuestión ambiental. En 2025, se publicará una Guía de práctica monográfica, de acceso abierto, en la web del Foro[7]. Entre algunas de las cuestiones que se plantean encontramos cómo se identifican las víctimas en temas medioambientales, quiénes participan o cómo se mide el daño y si se puede restaurar y de qué forma.

Jordi Recordà Cos recuerda que, desde INSTA, se trabaja en casos concretos de justicia restaurativa ambiental. Las prácticas restaurativas se pueden aplicar en casos ambientales, tanto para resolver como prevenir el conflicto. Expone un caso de justicia restaurativa en Francia, en el medio agrícola (Recordà Cos, 2019). La metodología fue la de un círculo restaurativo, con entrevistas previas, garantizando un espacio seguro. Se formularon determinadas preguntas para abordar el problema, y el tema central del círculo fue: ¿qué podía hacer cada uno de los participantes para mejorar la calidad del agua? Los participantes propusieron 27 acciones. El proceso fue muy positivo para estas personas, que no se habían reunido previamente. Se consiguió una buena representatividad de la comunidad afectada y se priorizo la participación de mujeres. Una buena parte de ellas expresó la transformación que les permitió esta experiencia. La otra cara de la moneda es que después de realizar las acciones y aplicarlas, los políticos decidieron no continuar con el proyecto. Por tanto, no hay resultados evaluables de los efectos sobre el territorio a medio o largo plazo.

Otra experiencia, relatada por Jordi Recordà Cos, es un proyecto teórico para constituir las bases de un espacio natural "restaurativo". Este proyecto alimentó una amplia reflexión: ¿Sería posible realizar una gestión de todo un espacio teniendo en cuenta la cultura del diálogo? ¿Sería posible construir un parque natural a partir del modelo del "sistema restaurativo"?

En relación con todo ello, es importante conocer la dimensión terapéutica y educativa de la justicia restaurativa y que la justicia penal clásica no incluye. El contexto actual ambiental generará muchos más conflictos y deberemos gestionarlos de una forma no violenta. Es necesario que la respuesta sea menos violenta y menos cortoplacista. También debe nombrarse quién debe responsabilizarse. De alguna manera, se identifican necesidades de escucha, de responsabilización, que van más allá de lo que la justicia penal clásica puede ofrecer.

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[7] Véase en https://www.euforumrj.org/working-group-environmental-restorative-justice.

Para Julia Barjau la justicia penal por sí sola no es suficiente, ni tampoco la restaurativa. Se debe empezar a sensibilizar a nivel de escuelas. Cuando hablamos de las víctimas, es necesario tener en cuenta a las futuras generaciones en los conflictos ambientales.

La justicia restaurativa es una justicia en que, junto con la comunidad, intervienen personas que han cometido delitos y personas que los han sufrido que requieren una respuesta menos punitivista. El derecho penal ofrece garantías y se fundamenta en el castigo para prevenir la comisión de delitos, aunque no sabemos muy bien cómo funciona esa disuasión en diferentes personas, contextos y delitos. Por otra parte, dogmáticamente la víctima sigue teniendo una cierta visión instrumental en ese proceso de disuasión y castigo. Además, la práctica del derecho penal es discriminatoria y en este tipo de delitos más aún. Se debe trabajar con la multiplicidad de actores que cometen los delitos o infracciones, sin demonizar y respetando las garantías de los causantes de daños, pero deben exigirse responsabilidades, en su caso de forma restaurativa, lo cual siempre implicará una visión de aprendizaje y comunitaria, complementaria con otras intervenciones penales o de otro tipo, si es adecuado.

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JUSTICIA RESTAURATIVA MEDIOAMBIENTAL: UN TALLER PARA REFLEXIONAR, DIALOGAR Y TRANSFORMAR DESDE LAS ESCUELAS

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1. INTRODUCCIÓN

Este capítulo parte de la creencia de que los errores y las ofensas son parte intrínseca de nuestra sociedad, en la que estamos todos interconectados. En este contexto, el daño ocasionado a cualquier parte de nuestro ecosistema se entiende como una herida colectiva, que podemos considerar como propia. Desde esta perspectiva, y según los valores de la justicia restaurativa, parece fundamental involucrar a las generaciones más jóvenes en una reflexión que les permita tomar conciencia y empoderarse en torno a este conflicto.

El daño causado al medio ambiente persiste, aunque sea diferido, y los niños suelen ser tanto generadores indirectos e involuntarios de dicho daño como víctimas de él. Por ello, resulta esencial crear iniciativas que los conviertan también en actores protagonistas de pleno derecho en la co-construcción de procesos restaurativos. En definitiva, excluir a los jóvenes de este proceso resulta contradictorio con los principios de la justicia restaurativa y constituye, en sí mismo, un daño adicional (Varona, 2024).

A continuación, presentamos un proyecto cuyo objetivo es implementar un taller en las escuelas locales de Euskadi, Navarra y Cataluña, que promueva la reflexión en torno a los valores de la justicia restaurativa medioambiental con alumnos de primaria. Este taller se basa en tres enfoques clave:

1. Pedagogía restaurativa, en la que se replantean las dinámicas de poder y se promueve un aprendizaje mutuo entre adultos y niños.

2. Estimulación del pensamiento complejo, entendido como un pensamiento que es, a la vez, crítico, creativo y ético.
3. Trabajo sobre las experiencias vitales y cotidianas de los participantes, para que los valores de la justicia restaurativa —como los derechos humanos y animales, la justicia, la igualdad, la solidaridad, el respeto por la dignidad del otro y la búsqueda de la verdad— no se conviertan en meras etiquetas abstractas. En definitiva, el objetivo es que los alumnos puedan identificar, reflexionar y dialogar sobre sus propios conflictos relacionados con el bienestar ambiental y animal, transformándose así en agentes activos en la construcción de su identidad y su entorno.

2. FOMENTANDO LA JUSTICIA AMBIENTAL EN LOS JÓVENES: UN DERECHO Y UN COMPROMISO

La educación de las futuras generaciones es una de las estrategias más efectivas para prevenir un crecimiento perjudicial para el planeta y sus especies, tanto humanas como no humanas. En este sentido, la Convención sobre los Derechos del Niño de las Naciones Unidas establece que la educación debe orientarse al desarrollo del respeto por el entorno natural. Una de las principales formas de garantizar un entorno seguro y saludable es fomentar en los niños una comprensión profunda y un respeto por todo el ecosistema, con la expectativa de que este aprendizaje repercuta positivamente en sus familias y comunidades.

Asimismo, de acuerdo con el artículo 1 de la Convención de Aarhus, la población, incluyendo a la infancia, tiene derecho al acceso a la información, a la participación en los procesos de toma de decisiones públicas y al acceso a la justicia en asuntos medioambientales. Lamentablemente, en la actualidad, los niños siguen enfrentando múltiples barreras (legales, económicas y sociales) para ejercer estos derechos. Con este taller, buscamos acercar a los jóvenes a este derecho fundamental, especialmente en lo que respecta a la justicia ambiental.

3. TRANSFORMANDO EL CONFLICTO AMBIENTAL: JUSTICIA RESTAURATIVA PARA LAS GENERACIONES FUTURAS

La justicia restaurativa es un medio de justicia alternativo que prioriza la reparación del daño hecho a las relaciones humanas por encima de la violación de leyes, que fomenta la participación activa de los ciudadanos en la resolución de sus propios conflictos, y que se centra en la reparación de los perjuicios en lugar de en el castigo (EFRJ, 2020).

En el caso del daño hecho al medio ambiente, donde las comunidades son parte inherente y activa del conflicto, resulta esencial que especialmente los más jóvenes, se involucren pro-activamente en la prevención y restauración.

La justicia restaurativa medioambiental ofrece respuestas significativas al deterioro del medio ambiente, buscando no solo frenar el daño que sufren la Tierra y sus habitantes (humanos y no humanos), sino también reparar los daños ya causados y construir sistemas respetuosos con los ecosistemas y los derechos de las generaciones futuras. Los desafíos actuales son más grandes que nunca, y la justicia restaurativa presenta una oportunidad para corregir las ineficaces respuestas medioambientales del pasado, enfocándose en la urgente necesidad de cambiar las prácticas nocivas y prevenir futuros daños al medio ambiente (EFRJ, 2020).

4. MÁS ALLÁ DEL CONFLICTO: ENSEÑAR JUSTICIA RESTAURATIVA PARA FOMENTAR UN CAMBIO PROFUNDO

Promover instituciones educativas restaurativas significa abogar por un entorno escolar en el que el objetivo principal de los educadores sea crear un clima en el que los estudiantes se sientan valorados e incluidos. Este clima debe ser emocionalmente seguro, donde todos los miembros de la comunidad escolar (alumnos, docentes y familias) puedan participar activamente y sentirse parte de la vida escolar (EFRJ, 2022).

Además, enseñar justicia restaurativa a los niños en las escuelas no solo implica transmitir técnicas y habilidades para resolver conflictos. Se trata de fomentar una forma de ser, promoviendo una mentalidad en los alumnos que los ayude a crear, mantener y reparar relaciones justas con su entorno. Este aprendizaje será aplicable en todos los aspectos de la vida, no solo dentro del aula (Hopkins, 2020).

5. PEDAGOGÍA RESTAURATIVA COMO CANAL PARA EL DIÁLOGO Y LA REFLEXIÓN SOBRE EL MEDIO AMBIENTE

La pedagogía restaurativa se aparta de los métodos tradicionales centrados en el instructor, basándose en los valores fundamentales de la justicia restaurativa. Esta pedagogía busca:

1. Inspirar una transformación individual y social.
2. Fomentar un sentido de comunidad entre los participantes.

3. Crear un espacio emocionalmente seguro donde los alumnos puedan expresarse.
4. Ofrecer oportunidades para resolver problemas reales de la vida cotidiana.
5. Valorar la experiencia única, el contexto social y la perspectiva de cada participante.
6. Fomentar un entorno de aprendizaje creativo, co-creado por estudiantes y educadores.
7. Ver a los alumnos como generadores de conocimiento.
8. Ver a los educadores como aprendices en un proceso continuo.
9. Motivar a los alumnos a reflexionar sobre problemas sistémicos y estructurales, destacando las dinámicas de poder y el contexto social e histórico del daño.

Esta visión pedagógica resulta adecuada para tratar temas complejos y emocionalmente delicados, como el daño al ecosistema, especialmente cuando los participantes son niños ya que con este enfoque queremos permitir que exploren y discutan posibles conflictos internos o temas sensibles que surjan de manera natural durante las conversaciones y debates. De este modo, evitamos generar ansiedad en aquellos niños que pudieran sentirse especialmente vulnerables al enfrentarse a contenidos para los que no están preparados.

6. FORTALECIENDO VÍNCULOS, REPARANDO EL DAÑO: CONVERSACIONES INTERGENERACIONALES SOBRE JUSTICIA AMBIENTAL

"la búsqueda del bienestar por parte de la generación actual no debe disminuir las oportunidades de una vida buena y decente para las generaciones venideras"

(Naciones Unidas. Wang y Chan, 2023)

Hemos propuesto, como parte final del taller, una conversación restaurativa entre el alumno y su familia. Esta idea surge de la convicción de que, aunque una persona no sea directamente responsable de un daño (como el medioambiental), puede haber contribuido a él, beneficiarse de él o estar implicada, incluso sin ser consciente de ello (Varona, 2023).

En este sentido, creemos que fomentar una conversación intergeneracional puede ser beneficioso para transformar esta inconsciencia en responsabilidad. Además, esta dinámica puede convertir el daño ocasionado en una

oportunidad para que ambas generaciones se involucren en actos preventivos y restaurativos, contribuyendo así a una reflexión conjunta y al fortalecimiento de los lazos familiares.

7. EL TALLER

El taller propondrá, mediante una caja de tarjetas ilustradas con detalles para educadores y participantes, actividades que fomenten el pensamiento restaurativo en los alumnos, a la vez que los invitará a cuestionar y comprender sus propios conflictos cotidianos.

7.1. Algunos datos prácticos:

Este taller no está diseñado para tener una evaluación final en términos académicos o curriculares.

El taller se desarrollará en varias sesiones de aproximadamente dos horas cada una.

Está dirigido a alumnos de primaria, especialmente a niños de 8 a 12 años. El contenido se adaptará ligeramente según el curso escolar en el que se imparta.

Antes del inicio del taller, el educador deberá participar en una sesión informativa con un responsable del proyecto.

Al menos durante las primeras sesiones, el taller será co-facilitado por una persona independiente a la institución, con experiencia en prácticas restaurativas.

7.2. Material didáctico[1]

El material necesario para llevar a cabo el taller consiste en una caja que incluye las siguientes tarjetas:

1. Tarjeta introductoria al taller: Breve presentación del objetivo y enfoque del taller.
2. Tarjeta de conceptos básicos y valores: Definición de los principios clave de la justicia restaurativa y su relación con el medio ambiente.
3. Tarjeta con recomendaciones para facilitar el taller: Guía para educadores sobre cómo dirigir las actividades de manera efectiva.

[1] Una muestra de este material se encuentra en el apartado Anexos de este capítulo. Para recibir el material completo, podéis contactar con Julia Barjau Dachs (barjau.julia@gmail.com).

4. Tarjetas con preguntas para filosofar: Dos tarjetas que invitan a reflexionar sobre la mentalidad restaurativa y los derechos humanos y de los animales.
5. Tarjeta con ilustración para reflexionar sobre la multiplicidad de víctimas en el daño medioambiental: Esta tarjeta presenta un estudio de caso imaginario que permite abordar el impacto global del daño ambiental.
6. Tarjeta para dirigir un "role-play" de círculo restaurativo: Diseño de un círculo restaurativo para abordar un caso de daño medioambiental.
7. Tarjeta para dirigir el juego "Cambio de cerebro": Actividad que fomenta la empatía y la escucha activa en el contexto del daño a los seres no humanos.
8. Tarjeta para que los alumnos imaginen e ilustren su propio caso de estudio: Los estudiantes podrán crear y compartir un caso de conflicto con su desenlace.
9. Tarjeta para la actividad final del taller - "Una conversación restaurativa con tu familia": Guía para facilitar una conversación intergeneracional restaurativa, donde el alumno y un miembro de su familia reflexionen sobre el daño medioambiental y sus responsabilidades.
10. Tarjeta "Toolkit" para educadores: Herramientas adicionales para aquellos educadores que deseen profundizar en la justicia restaurativa animal y medioambiental.

8. CONCLUSIONES Y PRÓXIMOS PASOS

Basándonos en conocimientos actualmente aplicados en diversos ámbitos, tales como la justicia restaurativa, la justicia medioambiental, los derechos de los animales, los derechos de la infancia, las escuelas restaurativas y la pedagogía restaurativa, hemos concebido esta iniciativa como un espacio donde todos estos enfoques convergen. El objetivo es crear una acción no solo restaurativa, sino también transformadora, especialmente dirigida a las generaciones más jóvenes.

Esta iniciativa brinda el derecho a las futuras generaciones, protagonistas afectados de muchas formas por el daño ambiental, de empoderarse a través del conocimiento, de entender que sus opiniones y acciones son valiosas y cuentan para el autocuidado que representa proteger el medioambiente. Este conocimiento, vendrá impartido, no como un trasvase de sabiduría sino de sus propias reflexiones y necesidades de saber. Dándoles el espacio necesario de buscar respuestas al daño que puedan haber sufrido y sufrir en un futuro a causa del deterioro ambiental y de las otras especies no humanas.

Este ejercicio, esperamos que repercuta no solamente en una sensibilidad mayor a la necesidad de proteger el medioambiente y los seres que lo habitan sino también en una visión más amplia de cómo abordar futuros conflictos y de sentirse dueños de estos. En definitiva, se trata de promover, en los más jóvenes, la reivindicación al derecho de pensar por ellos mismos, buscando alternativas significativas, despertando el espíritu crítico.

El material que ofrecemos a las escuelas locales, junto con el acompañamiento de un experto en justicia restaurativa, está diseñado para ser dinámico y vivo, permitiendo que evolucione y se enriquezca a través de las experiencias de los participantes. De esta manera, garantizamos que el taller siga siendo relevante y adaptable a las necesidades de cada grupo.

Como próximos pasos, hemos considerado proponer este taller en las escuelas de Euskadi, Navarra y Cataluña, territorios que ya trabajan la justicia restaurativa desde las instituciones públicas. Estos territorios, a través de sus consejeras de justicia, firmaron en noviembre de 2023, la Declaración de Donostia por una Cultura Restaurativa[2] que estipula su compromiso por generar un cambio cultural y sistémico de la sociedad a través de la justicia restaurativa, promoviendo así una cohesión social con un sentimiento colectivo de confianza, respeto y cuidado.

Creemos que nuestra propuesta puede contribuir de manera significativa a la implementación de los compromisos de la Declaración de Donostia/San Sebastián por una cultura restaurativa, así como de los Objetivos de Desarrollo Sostenible (ODS) de la Agenda 2030 desarrollados en las escuelas, tales como el acceso a la justicia (Objetivo 16), la acción climática (Objetivo 13) y la educación de calidad (Objetivo 4). Siendo estos objetivos fundamentales para asegurar los derechos de la infancia y adolescencia en el contexto del cambio climático.

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ANEXOS

El contenido de esta caja ofrece una propuesta didáctica para compartir con las generaciones más jóvenes el poder del cambio de paradigma, que implica reemplazar un enfoque punitivo por uno restaurativo, y un enfoque etnocéntrico por uno ecocéntrico.

En la caja vas a encontrar tarjetas con

Conceptos básicos y valores

Como desarrollar la experiencia

Propuestas de actividades

Propuesta para dirigir un taller final

"Toolkit" para educadores

Con este material, se espera poder ayudar tanto a los alumnos como a los adultos de su entorno a reflexionar juntos sobre nuestros actos cotidianos, a través de temas como la justicia climática, la justicia interespecies y la justicia social. Además, se busca abordar la responsabilidad histórica y la justicia intergeneracional, enfatizando especialmente que quienes están más afectados, los niños, tengan una voz activa y puedan participar lo antes posible en la prevención y reparación del daño causado a su entorno.

Esta experiencia está diseñada para abordarse desde el prisma de la justicia restaurativa, medioambiental e intergeneracional, y, sobre todo, a través de una pedagogía restaurativa.

Justicia restaurativa:
es un método para abordar el daño o el riesgo de daño a través de la participación de todos los afectados, con el objetivo de llegar a un entendimiento común y un acuerdo sobre cómo se puede reparar el daño o la transgresión y alcanzar justicia.

Justicia restaurativa medioambiental:
indica tanto la forma en que una agenda medioambiental puede contribuir a la justicia restaurativa como la forma en que la justicia restaurativa puede usarse en un contexto de daño. medioambiental.

Pedagogía restaurativa:
propone unas técnicas de educación diferentes a las de la pedagogía centrada en el instructor basadas en los valores básicos de la justicia restaurativa. Instructor y alumnos aprenden unos de otros. Esta visión pedagógica parece adecuada para reflexionar temas tan controvertidos y emocionalmente delicados como el daño hecho a nuestro entorno con una población tan vulnerable como valiosa en pensamiento como los niños.

Justicia restaurativa intergeneracional:
practicas restaurativas para conflictos que afectan a diferentes generaciones como el cambio climático, por ejemplo.

Intentaremos despejar el aula de muebles para que los participantes se sienten en círculo. Una vez sentados, les recordaremos la importancia de respetar la opinión y la palabra de todos. Para facilitar este proceso, utilizaremos un objeto, que llamaremos "talking piece", para pasar el turno de palabra cuando alguien termine de hablar.

En la primera sesión del taller, realizaremos el ejercicio de construir nuestra propia hoja de pactos colectivos. Para ello, haremos una ronda en la que cada participante compartirá qué necesita del grupo para poder aprender. Cada concepto se anotará en un papel y se colgará en las paredes del aula durante cada sesión, para recordar a todos los valores que debemos respetar a lo largo del taller.

Cada sesión del taller comenzará con una ronda en el círculo, en la que cada participante podrá compartir una palabra que describa cómo se siente ese día en relación con la actividad que vamos a realizar.

Las actividades se llevarán a cabo en pequeños grupos (de entre 3 y 5 personas), dispuestos en círculo. Cada grupo contará con un "guardián del tiempo" (quien velará porque el grupo termine la actividad a tiempo), un "repórter" (que anotará las aportaciones del grupo para compartirlas más tarde con el grupo entero) y un "facilitador de la palabra" (quien se asegurará de que todos tengan la oportunidad de participar).

Cada sesión del taller terminará con una ronda en el círculo titulada "¿Qué hemos aprendido hoy?". El objetivo es no solo aprender unos de otros, sino también identificar posibles confusiones o dudas surgidas durante las actividades y "¿Qué nos gustaría aprender en la próxima sesión?". Estas rondas nos ayudan a mantener el método colaborativo de aprendizaje del taller y favorecen la autoevaluación.

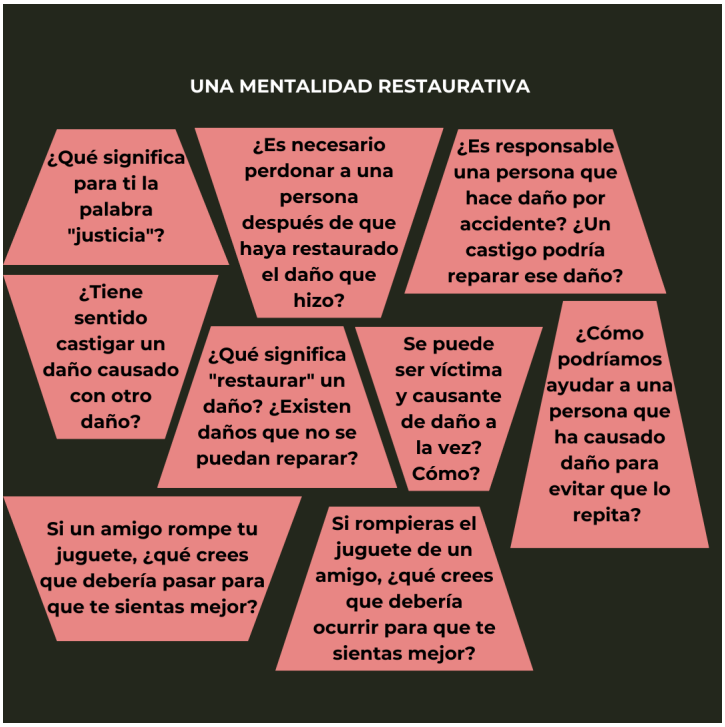
EL FACILITADOR

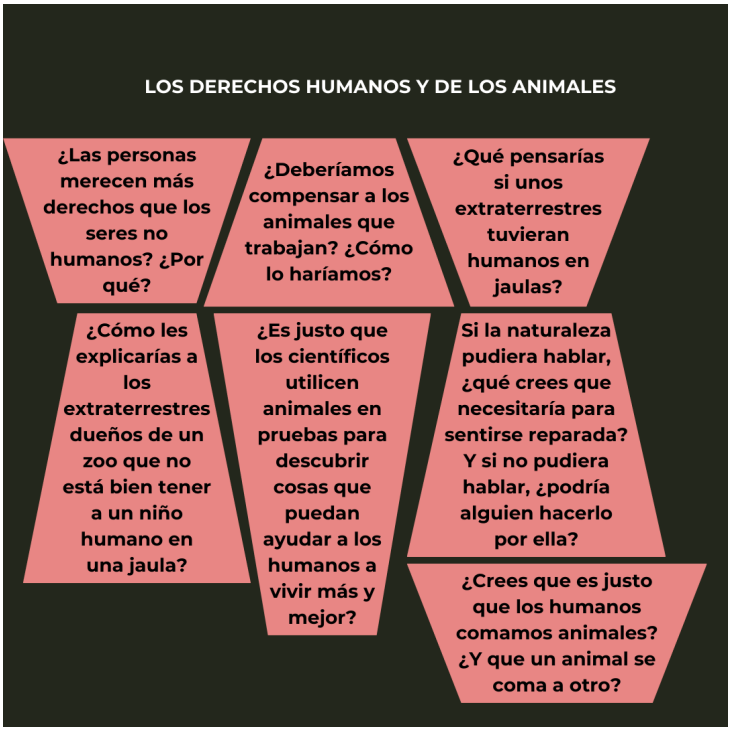
Su función no es imponer conocimientos ni abogar por una causa específica, sino actuar como un acompañante que fomenta la participación equitativa. Debe facilitar el diálogo abierto, asegurándose de que cada voz sea escuchada y que las ideas y emociones expresadas sean tratadas con respeto y empatía. De esta manera, el taller se convierte en un espacio seguro para el intercambio de experiencias y el aprendizaje mutuo, fortaleciendo la comunidad y el entendimiento entre los participantes.

Para lograr esto, es fundamental que el facilitador sea consciente de sus propios prejuicios en relación con las dinámicas de poder y que realice un ejercicio individual previo en el que valore su predisposición a salir de la visión normativa adultocéntrica y etnocéntrica, estando abierto a aprender de los participantes.

El facilitador intentará encontrar el equilibrio entre fomentar que los niños salgan de su zona de confort (donde ocurre el aprendizaje y la transformación) y asegurarse de que nadie se sienta desprotegido ni presionado a participar en conversaciones que puedan generar ansiedad en los participantes.

El facilitador debe trabajar de manera intuitiva con los niños, respondiendo a sus necesidades a medida que surgen, sin esperar ningún resultado académico predeterminado.


UNA MENTALIDAD RESTAURATIVA
¿Qué significa para ti la palabra "justicia"?
¿Es necesario perdonar a una persona después de que haya restaurado el daño que hizo?
¿Es responsable una persona que hace daño por accidente? ¿Un castigo podría reparar ese daño?
¿Tiene sentido castigar un daño causado con otro daño?
¿Qué significa "restaurar" un daño? ¿Existen daños que no se puedan reparar?
Se puede ser víctima y causante de daño a la vez? Cómo?
¿Cómo podríamos ayudar a una persona que ha causado daño para evitar que lo repita?
Si un amigo rompe tu juguete, ¿qué crees que debería pasar para que te sientas mejor?
Si rompieras el juguete de un amigo, ¿qué crees que debería ocurrir para que te sientas mejor?


LOS DERECHOS HUMANOS Y DE LOS ANIMALES
¿Las personas merecen más derechos que los seres no humanos? ¿Por qué?
¿Deberíamos compensar a los animales que trabajan? ¿Cómo lo haríamos?
¿Qué pensarías si unos extraterrestres tuvieran humanos en jaulas?
¿Cómo les explicarías a los extraterrestres dueños de un zoo que no está bien tener a un niño humano en una jaula?
¿Es justo que los científicos utilicen animales en pruebas para descubrir cosas que puedan ayudar a los humanos a vivir más y mejor?
Si la naturaleza pudiera hablar, ¿qué crees que necesitaría para sentirse reparada? Y si no pudiera hablar, ¿podría alguien hacerlo por ella?
¿Crees que es justo que los humanos comamos animales? ¿Y que un animal se coma a otro?

ENVIRONMENTAL RESTORATIVE JUSTICE
PHILOSOPHY IN SCHOOLS
OBSERVA, IMAGINA
E INTERPRETA CON
GAFAS
RESTAURATIVAS

OBSERVA E IMAGINA CON GAFAS RESTAURATVAS

Imagina que una fábrica cercana ha cometido un error, y como consecuencia, el río que vemos en la ilustración ha quedado gravemente contaminado.

¿Quién o qué se ha visto afectado por este accidente? ¿Cuáles son sus necesidades?

¿En esta ilustración hay víctimas del accidente que podrían considerarse en conflicto entre ellas?

¿Quién tiene la responsabilidad de reparar ?

¿Qué imaginas que podría ocurrir para que este daño se pudiera reparar?

¿Cómo podríamos motivar a los responsables para que hagan el esfuerzo de reparar el daño?

Este ejercicio y el siguiente están inspirados directamente en el libro Environmental Crimes and Restorative Justice de Hamilton, M. (2022), pág. 217.

ROLE PLAY Y CIRCULOS RESTAURATIVOS

Siguiendo con el caso anterior, intenta dividir la clase en dos grupos de entre 5 y 10 personas (aproximadamente) y asigna un rol a cada miembro de cada grupo para que lo lleve a cabo en un círculo restaurativo. A continuación, algunas ideas de roles que puedes repartir:

- El agua del río, que se ha degradado a causa de los productos químicos vertidos por la fábrica.
- Los peces muertos que habitaban en el río.
- Las aves que vivían en el río y que fueron heridas o murieron a consecuencia del accidente.
- Las futuras generaciones de humanos, si el río no logra recuperarse, quienes heredarán este recurso en peores condiciones que las generaciones anteriores.
- Las personas que enfermieron por estar nadando en el río en el momento del accidente.
- La comunidad en general, ya que un recurso compartido por todos ha sido degradado.
- Comerciantes, como los granjeros que regaban sus cultivos con agua del río o las empresas de alquiler de kayaks que dependen del río para su actividad.
- La empresa responsable del accidente
- El facilitador sera el propio facilitador del taller

Procura que todos los participantes tengan ocasión de contestar a algunas de las preguntas siguientes:

- **Para el responsable del daño ocurrido:**

- ¿Qué te llevó a realizar los actos que causaron el daño?
- ¿Cuál era tu conocimiento sobre la normativa aplicable y tus responsabilidades en relación con el medio ambiente?
- ¿Qué necesitas entender o aprender para poder prevenir futuros incidentes?
- ¿Qué acciones estás dispuesto a tomar para reparar el daño causado?

- **Para las víctimas (humanos y animales afectadas por el crimen):**

- ¿Cómo te ha afectado a ti, a tu comunidad y a tu forma de vida lo ocurrido?
- ¿Cómo te sientes al respecto?
- ¿Qué crees que ayudaría a restaurar el daño causado a ti y a tu comunidad?

- **Para la comunidad (sociedad en general y futuras generaciones)**

- ¿Cómo ha impactado este accidente a la comunidad y a las futuras generaciones?
- ¿Cómo te sientes respecto al esfuerzo que están haciendo las demás partes para reparar el daño?
- ¿Cómo crees que la empresa y la comunidad deberían actuar para reparar el daño y prevenir futuros incidentes?

- **Para el medio ambiente (el agua y el ecosistema del rio)**

- ¿Cómo ha impactado el daño causado al río?
- ¿Qué necesita el río para poder restaurarse?
- ¿Cómo debería ser tratado el río en el futuro para que su bienestar sea considerado en las decisiones futuras?

- **Para el grupo entero que forma el circulo:**

- ¿Cómo podemos asegurarnos de que todas las voces de los afectados sean escuchadas y respetadas?
- ¿Cómo podemos garantizar que los actos acordados para reparar el daño se lleven a cabo de manera efectiva?
- ¿Qué podemos hacer como colectivo para prevenir futuros crímenes similares?

JUEGO “CAMBIO DE CEREBRO”

La actividad que proponemos es una forma creativa y efectiva para fomentar la empatía, la reflexión y la comprensión de diferentes perspectivas en un caso de justicia restaurativa.

Instrucciones para el juego:

Asignación de roles: A cada grupo se le asignará uno de los roles identificados previamente en el caso (el ofensor, la víctima, la comunidad, el medio ambiente, etc.).

Preparación de preguntas: Cada grupo, asumiendo que ahora tiene el cerebro del personaje que se les ha asignado, debe preparar previamente algunas de las preguntas restaurativas descritas en el ejercicio anterior. Deben pensar en cómo su personaje respondería a esas preguntas y qué información sería relevante para compartir desde esa perspectiva.

Presentación de las respuestas: En una segunda fase del juego, cada grupo responderá las preguntas restaurativas en nombre de su personaje, sin revelar explícitamente quién es. El resto de la clase escuchará las respuestas con atención.

Adivinanza: Basándose en las respuestas dadas, el resto de la clase deberá adivinar de qué personaje se trata. Esto permitirá que todos los participantes reflexionen sobre cómo se sienten los diferentes involucrados .

- **Reflexión personal sobre un caso de conflicto:** Invita a todos los participantes a pensar y dibujar un caso de conflicto, ya sea real o ficticio, en el que haya existido una situación de daño o perjuicio. Este conflicto puede involucrar a personas, animales y/o al medio ambiente.

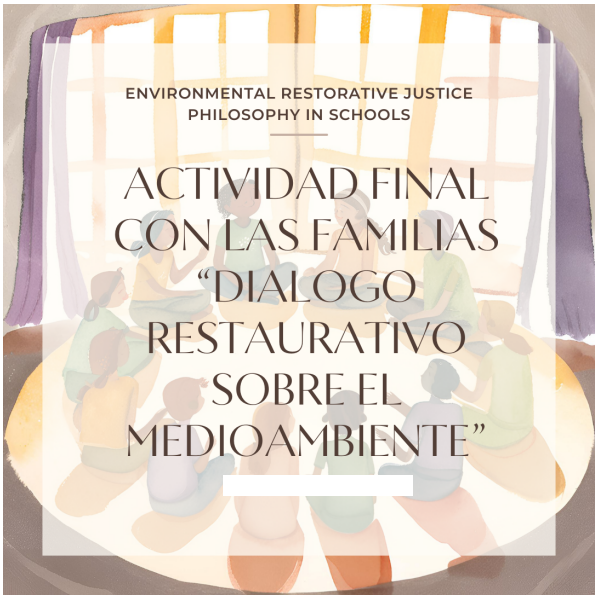
- **Imaginar el final del caso:** Pide a los participantes que imaginen el desenlace de ese conflicto, ya sea restaurativo o no. ¿Cómo podría resolverse? ¿Qué medidas se tomarían para reparar el daño? ¿Cómo afectaría el final a las partes involucradas y a la comunidad en general?

- **Narración del caso:** Después, cada participante tendrá la oportunidad de enseñar el dibujo y narrar su caso al resto del grupo. Deberán describir el conflicto, las partes involucradas y cómo se resolvió (o cómo imaginan que se resolvería).

- **Debate y diálogo:** Una vez que todos hayan narrado su caso, se abrirá un espacio para el debate. Los participantes podrán compartir sus opiniones sobre los casos presentados y discutir las diferentes formas en que los conflictos fueron resueltos.

- **Preguntas clave:** Durante el debate, los participantes podrán hacer preguntas clave sobre los casos expuestos, tales como:
  - ¿Qué otras formas de resolución podrían haberse considerado?
  - ¿Qué impacto tuvo la resolución en las personas involucradas?
  - ¿Qué habría cambiado si se hubiera aplicado un enfoque restaurativo?
  - ¿Qué valores estuvieron presentes en las decisiones que se tomaron?

- **Reflexión final:** Al concluir la actividad, se puede generar una reflexión colectiva sobre las lecciones aprendidas y cómo las herramientas de justicia restaurativa podrían aplicarse en conflictos futuros. Los dibujos se pueden utilizar para decorar la clase o para otras actividades relacionadas con el tema como por ejemplo en el día anual de la tierra.



Objetivos de la actividad

- **Fomentar el entendimiento intergeneracional: crear** un espacio donde tanto los niños como los adultos puedan compartir sus perspectivas sobre el medio ambiente y reconocer la influencia de cada generación en el estado actual del planeta.

- **Empoderar a los niños:** dándoles voz y permitiéndoles participar activamente en la toma de decisiones sobre el futuro ambiental.

- **Promover la reparación y la acción:** mediante compromisos concretos, las familias pueden comenzar a pensar en maneras de reparar los daños ya hechos y prevenir futuros problemas ambientales.

Esta actividad ayuda a fortalecer los lazos familiares, a fomentar la empatía entre generaciones y a sensibilizar a todos los miembros de la familia sobre la importancia de cuidar el medio ambiente.

El ultimo día de taller, a los participantes se les dará un "kit" para que ellos mismos faciliten la actividad en casa. El "kit" constara de:

- Instrucciones para la actividad
- Un texto para ayudarles a explicar a las familias de que se trata la justicia restaurativa medioambiental e intergeneracional,
- Ideas de preguntas para llevar a cabo el dialogo
- Un objeto especial para utilizar como "talking peace"
- Consejos finales

KIT DE JUSTICIA RESTAURATIVA
MEDIOAMBIENTAL INTERGENERACIONAL

¡Bienvenidos al último día del taller! En este kit encontrarás todo lo que necesitas para llevar a cabo una conversación restaurativa en tu casa, en familia, sobre el medio ambiente. Esta actividad está diseñada para que todos puedan hablar, escuchar y aprender juntos, reflexionando sobre cómo las generaciones pasadas, presentes y futuras están conectadas a través del cuidado de la Tierra.

Pasos a seguir:

1. **Reúne a tu familia: Invita a todos los miembros de tu hogar (abuelos, padres, hermanos, etc.) a unirse a esta actividad. Escoge un lugar cómodo y tranquilo para conversar.**
2. **Explica el propósito de la actividad: Usa el texto que se incluye en este kit para explicar a tu familia de qué se trata la justicia restaurativa medioambiental e intergeneracional. Asegúrate de que todos comprendan la importancia de la conversación y el objetivo de aprender unos de otros.**
3. **El "Talking Peace": Pasa un objeto especial de persona a persona para que sólo quien lo tenga pueda hablar. Este objeto es simbólico y sirve para facilitar un diálogo respetuoso y ordenado.**
4. **Preguntas de diálogo: Utiliza las preguntas que te damos en este kit para guiar la conversación. Asegúrate de que cada miembro de la familia tenga tiempo de hablar y escuchar. Puedes responder a las preguntas y, si lo deseas, dejar espacio para que otros participantes hagan preguntas entre ellos.**
5. **Compromisos y acciones: Al final de la actividad, cada miembro de la familia debe compartir un compromiso concreto relacionado con el cuidado del medio ambiente. Pueden escribirlo o dibujarlo, y colocarlo en un lugar visible como recordatorio.**

KIT DE JUSTICIA RESTAURATIVA
MEDIOAMBIENTAL INTERGENERACIONAL

Texto para Explicar la Justicia Restaurativa Medioambiental e Intergeneracional

¿La justicia restaurativa es un enfoque que se utiliza para reparar el daño causado a las personas, la comunidad y el medio ambiente. En lugar de centrarse solo en castigos o consecuencias, busca que las personas responsables de un daño reconozcan sus actos, se responsabilicen por ellos, y encuentren formas de repararlo.

En el caso del medio ambiente, este enfoque se centra en cómo nuestras acciones afectan a la Tierra y cómo podemos tomar responsabilidad para sanarla y protegerla para las futuras generaciones.

Cada generación tiene un papel en cuidar el planeta, no solo por sí misma, sino también por las generaciones que vendrán. Esto significa que lo que hacemos hoy tiene un impacto directo en el futuro. Es importante que todas las generaciones (niños, adultos, abuelos) trabajen juntas para encontrar soluciones que beneficien tanto al presente como al futuro del medio ambiente.

KIT DE JUSTICIA RESTAURATIVA
MEDIOAMBIENTAL INTERGENERACIONAL

Ideas de Preguntas para Llevar a Cabo el Diálogo

Para los niños:

- ¿Qué crees que está dañando al planeta? ¿Por qué es importante que nos ocupemos de eso?
- ¿Cómo te gustaría que el mundo cambiara para ser un lugar mejor para las personas y los animales?
- Si pudieras hablar con alguien que no cuide el medio ambiente, ¿qué le dirías?

Para los adultos:

- ¿Qué acciones de las generaciones anteriores crees que han afectado negativamente al medio ambiente?
- ¿Qué decisiones crees que podrían haberse tomado en el pasado para cuidar mejor la Tierra?
- ¿Qué legado te gustaría dejarle a las futuras generaciones en cuanto al cuidado del planeta?

Preguntas para reflexionar como familia:

- ¿Qué lecciones podemos aprender de las generaciones pasadas sobre el cuidado de la Tierra?
- ¿Qué compromisos tomaremos juntos para mejorar el estado de nuestro planeta?
- ¿Cómo podemos enseñar a las futuras generaciones a cuidar el medio ambiente mejor que nosotros?

KIT DE JUSTICIA RESTAURATIVA
MEDIOAMBIENTAL INTERGENERACIONAL

Consejos finales

- **Escucha activa:** Recuerda que el objetivo de esta actividad es escuchar genuinamente a los demás y mostrar respeto por las ideas de todos.

- **Tiempo para reflexionar:** Si un miembro de la familia necesita más tiempo para pensar antes de responder, déjale ese espacio. La reflexión es importante para tomar decisiones conscientes.

- **Compromiso familiar:** Al final de la actividad, es útil escribir o dibujar los compromisos que la familia quiere adoptar para mejorar el cuidado del medio ambiente. Puedes crear un "Compromiso Familiar" que todos firmen y lo pongan en un lugar visible.

¡Gracias por participar!
Con esta actividad, estás contribuyendo a un futuro mejor para todos. No olvides compartir lo que aprendas con otras familias y seguir promoviendo el cuidado del medio ambiente en tu comunidad. ¡Juntos podemos hacer la diferencia!

SOBRE JUSTICIA RESTAURATIVA

UNODC University Series Module Series. Module 8. Restorative Justice

SOBRE PEDAGOGIA RESTAURATIVA

Pointer, L. et al. (2020) The Little Book of Restorative Teaching Tools: Games, Activities, and Simulations for Understanding Restorative Justice Practices. Good Books.

SOBRE JUSTICIA RESTAURATIVA MEDIOAMBIENTAL

European Forum for Restorative Justice: www.euforumrj.org/environmental-justice

SOBRE ESCUELAS RESTAURATIVAS

European Forum for Restorative Justice: www.euforumrj.org/restorative-schools

SOBRE FILOSOFIA CON NINOS

www.wonderponderonline.com

EPILOGUE

RESTORATIVE JUSTICE AS A PATHWAY TO HOPE

Nigel South

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In recent years, floods, fires and cyclones have raged around the world in ways that signal the increasing threat and harms of global warming and climate change, features of the age we now call the Anthropocene (or, as some prefer, the Capitalocene). Southeastern Australia and the Amazon Rainforest have burned, coasts of India, Bangladesh and the USA have been battered by winds, and parts of Europe have felt the force of floods - and so on. According to Dryzek and Pickering (2018: 58), in this "disrupted Earth system", the "very existence of some low-lying Pacific island states is threatened by sea level rise, yet it is overwhelmingly emissions produced in industrialized states that have caused the problem. The Anthropocene not only reveals new sorts of injustice but also intensifies pre-existing injustices." This point is emphasised by Forsyth et al (2021: 18) who observe that "Environmentally destructive practices continue to disproportionately affect the poor and disenfranchised as well as more-than-human spaces and lives". So, familiar questions emerge: What is to be done? How can such injustices be remedied?

There have, of course, been many critical responses to these various issues and challenges: raising general awareness, employing new (and old) legal and criminological tools, reporting and prosecuting cases of environmental crime, and promoting ideas like ecocide, responsibility and reparation (Higgins et al, 2013; Pali and Aertsen, 2021). However the current system of governance is weak and dependent on models of deregulation and voluntary compliance (based on the belief that the market will provide effective and efficient remedies) and legislative-balancing-acts (where agencies tasked with encouraging rule-compliance are also charged with prosecuting and penalising offenders) (South and Brisman, 2012). In addition, systemic problems of regulatory capture (where

regulators are largely representatives of the regulated) and "trivialisation" of injurious actions (via legal objections and disputes) (Pons-Hernández, 2022) occur at levels from major transnational crimes to local misdemeanours. As Forsyth et al (2021: 18) put it, while "Stronger sanctions and better enforcement undoubtedly form part of the response, as do more imaginative campaigns for planetary stewardship of the environment, efforts to criminalise ecosystem destruction and initiatives to acknowledge the rights of nature", they also argue that – as so powerfully demonstrated in this volume - restorative justice also needs to be a "key part of the regulatory mix."

Restorative Justice is a pathway that offers some hope about future responses (Di Ronco and South 2025a). First, it signals ways of breaking away from the constraints of 'northern' epistemologies and disciplinary silos because it draws upon models of justice, respect and arbitration in 'southern' knowledge systems, as well as varieties of knowledge and practice that have emerged internationally in different contemporary contexts (see e.g. Pali *et al*, 2022). Some of this reflects roots in 'southern' Indigenous dispute resolution traditions that have focused on the repair of harm and the healing of damaged relationships. Second, however, there are also ways in which these traditions have been built upon, in approaches that seek to encourage community good behaviour, inclusion, cohesion, and re-integration of rule-breakers (Di Ronco and South, 2025 b).

More than ever, today, nature and the planet – as well as all inhabitants – need champions and allies but also need a new route-map toward a restored and just world, where environmental health, species interdependence and planetary justice are recognised and respected (Alonso and South, 2024; Morelle-Hungría and Serra-Palao, 2024; van Uhm, 2024; Lobo et al, 2024).

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CODA

DEEP CONNECTIONS

Ivo Aertsen

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La selva, el río, el viento, el fuego
Los árboles, la noche, el fuego, los insectos
¿Qué misterios nos esperan en el viaje?
Sufriremos de la muerte sus ultrajes
La lluvia, el aire, el sol, la luna
El rumbo del azar será nuestro destino

The words above form the prologue of Orfeo Chamán, an opera composed by Christina Pluhar with her group *L'Arpeggiata*. The music – supported by just a few words – wonderfully evokes the mythical world of nature (https://www.youtube.com/watch?v=jUxP4v8vd0g) as this must have been experienced a few thousand years ago by Orpheus, the poet and prophet who could make the trees and animals dance with his music. The story tells the fate of men desperately seeking love, entering a forest with its wonders, dangers and mysteries. Above all, the myth shows how this longing for love and eternal struggle can only be understood as part of a more encompassing and deeper belonging.

Restorative justice is not just about a mythical world, but we can learn from myths. The authors in this book share a common endeavour: exploring whether and how human caused harm to nature can be addressed in order 'to do justice' in an integral way. Can restorative justice contribute to this, and under which conditions? How do we have to re-define and to re-shape restorative justice in practice to make this happen? How can we imagine nature as something to be listened to, how to hear her voice and how to communicate with her? How can

we relate to nature without being biased or deformed by human interpretation, by ideas and expectations of utility in the interest of human beings?

As researchers and practitioners working in the field of restorative justice for years, we are continuously trying to expand its field of application to all kinds of human conflict, ranging from ordinary theft, domestic violence, road traffic incidents, corporate crime to political violence and terrorism. However, when developing environmental restorative justice, we face a new challenge; a new type of stakeholders has to be involved: the other-than-human beings. How can these beings be present, or participate, in restorative justice processes? How to imply this new dimension that goes beyond the scene of human relationships?

It has often been said that restorative justice is much more than a method or a technique, that it cannot be reduced to a tool or to something that can be 'used' or 'applied'. It is a mindset, a culture, a way of living that far exceeds professional activities. This is also true when developing restorative justice for the diversity and complexity of environmental harms. In practicing restorative justice in these cases, we (must) enable ourselves to feel, to understand and to anticipate the suffering of animals, plants, rivers, climate and future generations. This obviously requires a process of dialogue with nature. This new – and at the same time very old – type of relationship with nature implies a non-binary world view, where the environment is not considered as something separate from us, but as part of a common existence.

Finally, environmental restorative justice is not only about 'restoring' something – as we have seen multiple examples in this book -, but also about 'justice'. By involving the needs and the rights of nature in our responses to harmdoing and by developing new types of participatory processes, we also adopt another understanding and praxis of 'justice'. We are moving towards a more comprehensive idea of justice where not only the interpersonal, social and cultural levels are included, but also the ecological and spiritual ones. This is innovative justice, with thanks to nature.

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