



# ALTERNATIVES TO CUSTODY FOR YOUNG OFFENDERS

NATIONAL REPORT ON JUVENILE JUSTICE TRENDS

Spain



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## A. Introduction

Restorative justice is an alternative intervention to understand and address the criminal conflicts, promoting a greater role of the parties in the management of the consequences caused by the criminal act. In this context, the emotional, physical and symbolic reparation for the damage caused is promoted, and also the restoration of the human and social relations between the person who causes the damage and the victim are favoured.

MARSHALL defines 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”.<sup>1</sup>

The literature states, with respect to mediation as a manifestation of restorative justice, that the foundation of Canadian and American “Victim-offender Reconciliation Programmes” (VORP) emerged in the 70s. The VORP programmes fit into a philosophy of restorative justice which considers crime as a harm done to people and communities, and seek to identify and address solutions to such damage. This requires that the infringing people recognize how their actions have harmed the victim, their community and their own lives. These programmes maintain that the offender should recognise the harm caused and that it is necessary to work with him to adopt solutions that can meet the victim’s needs, depending on the extent that the crime could affect them in their life, and providing a compensation accordingly.

The first initiatives appeared in the mid-70s in Kitchener (Ontario) in 1976, followed by the first U.S. programme in Elkhart (Indiana) in 1978. It is at the end of this decade that such initiatives begin to appear in Europe. Particularly in Great Britain we can find in

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<sup>1</sup> MARSHALL T., *The evolution of restorative justice in Britain*, en *European Journal on Criminal Policy and Research*, Vol. n° 4, n° 4, Londres, 1994, p. 37.

1977 the first programme of repair, while the Norwegian conflict resolution committees and municipal experiences in Finland are somewhat later. Throughout the 80s both Holland and Germany began their first steps in this field and Austria established its first model in Salzburg in 1985. It's in the early 90s when France, Spain, Italy and Belgium add to the experience.<sup>2</sup>

The concept of restorative justice was officially adopted by the scientific doctrine at the International Congress of Criminology in Budapest in 1993,<sup>3</sup> extending this name to other international symposia such as victimology events in Adelaide in 1994, Amsterdam in 1997 and Montreal in 2000.

Restorative justice is positioned as a third way between the model of retributive justice, more focused on the relationship between crime and the criminal sanction, and the rehabilitation justice model focused on recovery and reintegration of the person who breaks the law.

The classic criminal law relegated the victim in a way that was completely secluded from the conflict, creating a situation in which the State and the author of the criminal offense were the only protagonists. Criminal law is necessary for the functioning of society by ensuring order and coexistence, thus protecting the most valuable legal instruments to society. Its legitimacy resides not only in its ability to be respectful with the constitutionally established purposes, but also in their ability to limit the negative consequences that causes its application to citizenship. Hence, the question that arises is whether it is possible to create a tool to reduce violence: both interpersonal and that exerted by the penal and correctional institution.

A growing interest in the victim, so that they might recover their role in the criminal process through a political-criminal victimology movement which favours the victim; a criminal law review focused exclusively on the offender; and the conception that custodial penalties have failed to return the offender to society in the best possible conditions, have all positioned restorative justice as a possible alternative, where the remedies provided by the infringer and agreed with the victim emerge as a different legal consequence to the traditional system of penalties or security measures of criminal law in our environment.

It is important to note, as CERVELLÓ DONDERIS<sup>4</sup> pointed out, that in the restorative justice model within which the offender mediation develops, there are some differences regarding the traditional model of retributive justice that must be treated with some caution in order not to break the system guarantees. But there are also important

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<sup>2</sup> GIMENEZ SALINAS E., “La mediación en el sistema de justicia juvenil: una visión desde el derecho comparado” en EGUZKILORE Cuaderno del Instituto Vasco de Criminología, nº 10, 1996, p. 202.

<sup>3</sup> GONZALEZ CUSSAC J.L y TAMARIT SUMALLA J.M (Coords.), *Justicia Penal de Menores y Jóvenes*, Tirant lo Blanch, Valencia, 2002, p. 48.

<sup>4</sup> CERVELLO DONDERIS V., Principios y garantías de la mediación penal desde un enfoque resocializador y victimológico, *Revista Penal* nº 31, 2013, p. 23.

similarities because in mediation processes the offense not only concerns the victim but also the community, the crime does not depend on the will of the victim, as it keeps its public character, and the agreements do not depend only on the victim, but require the presence of a mediator who must respect the legal principles in accordance with the rule of law. This author rightly states that the principles and guarantees of criminal law must be respected as they constitute a cornerstone of the rule of law. But that respect should not be considered a limitation on the use of mediation. Conversely, it involves a space of compatibility, facilitating its integration into the system and its use by the courts.

However, restorative justice involves a dynamic process between the victim and the offender through active participation to resolve the conflict through mediation programmes and conciliation. In this intervention model the state gives prominence to the individuals concerned and takes a secondary role.

Mediation in criminal matters arises as a tool in the process, which increases the chances of peaceful conflict resolution, taking into account the needs of the victim and supporting the possibility of reintegration of offenders without affecting the principle of legal certainty and the purposes of general and specific prevention of criminal law. The offender, through his remorseful attitude and a full compensation for the damage, takes a step toward social rehabilitation, recognizing the damage. With his efforts for reintegration, the purpose of special prevention is satisfied, just as voluntarily recognizing that he has broken the law and helping to restore the social peace means that the purpose of general prevention is also satisfied.

Sometimes the traditional models of criminal justice fail to respond adequately to the real needs of the victims or their families, who are subjected to the need to enter into complicated procedural frameworks that sometimes are long and in the best case could only provide a monetary repair (when the offender has means to address economic liabilities arising from the criminal offense). The result and future of the convicted person is unknown, as are the answers to other questions such as those concerning the motivations that led the offender to choose the victim.<sup>5</sup>

Restorative justice is an ideal system to manage the criminal conflict. The intervention of the victim is reinforced as his uncertainties are transformed into appropriate responses to his needs and the creation of the possibility of keeping compensation in proportion to the experienced damage. On the other hand, the accused feels the responsibility for the delinquent behaviour, acquires empathic attitudes, makes an effort to repair with the application of the relevant legal consequences, and generates possible alternative measures aimed at solving the causes that cause delinquent behavior without entering the criminal justice system. And as for the community, restorative justice efforts are aimed at the rehabilitation of the offender so that he can reintegrate into society, preventing

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<sup>5</sup> RIOS MARTIN J.C., MARTINEZ ESCAMILLA M., SEGOVIA BERNABE J.L, GALLEGO DIAZ M., CABRERA P., JIMENEZ ARBELO M., *Justicia Restaurativa Y Mediacion Penal. Analisis De Una Experiencia (2005-2008)*, Consejo General del Poder Judicial, Madrid, p.8.

recidivism and criminal behaviour and reducing criminal justice costs.

When the current situation of restorative justice is observed, the solution mechanisms to the conflict can take many different forms, as can be seen in comparative law. There are countries where this system is quite institutionalized and there are others, like Spain, where today it is only intended for juvenile justice. Other options are raised at a procedural level; therefore, it is possible to choose the appropriate procedural opportunity to raise extrajudicial solutions. Thus, there are systems that allow doing it in the police detention phase and other alternatives during the investigation or pre-trial phase, in trial phase and even during the execution of the sentence imposed.

In some systems there is also a difference depending on the types of offenses that may be resolved by conciliation, repair and the offender profile eligible for this type of solutions. In this sense we can find laws that judge the crimes in different ways, for example saving this type of solution for very serious crimes, or not preventing extrajudicial solutions even if there is severity in the offense. Similarly there are certain laws that restrict some offenders, due to personal circumstances (recidivism, lack of language skills...) from being likely to be incorporated in these procedures. So other options arise related to the figure of mediators where in some systems there are institutional bodies that carry out these tasks and in other ones there are voluntary organizations that operate to carry out these processes. In this study, the characteristics of the Spanish case in juvenile justice will be highlighted.

With regard to adults, most criminal codes take into account as a modifying circumstance of criminal responsibility, lessening the severity of the penalty, situations where the offender shows a willingness to repair the damage, or to lessen its effects if the first is not possible. In many countries the legislation incorporates compensation as a necessary requirement for the suspension of the sentence, as in the criminal laws of Germany, Austria, Belgium, Denmark, Scotland, Wales, England, Netherlands, Poland, Portugal, Sweden and Switzerland. However, in Spain's adult criminal justice the instruments of restorative justice, such as conciliation or repair, have not yet been legally completed, as it currently has not been incorporated into its law of criminal procedure and the Spanish Criminal Code (although the Framework Decision of the Council of the European Union of 15 March (2001/220/JHA) on the standing of victims in criminal proceedings provides that: "Member States shall seek to promote mediation in criminal causes...").

It is possible to find some practical experiences in mediation programmes in certain courts with the purpose of, and on the basis of, accommodating these institutions to the current legislation. To act in this sense, the Spanish courts for adult criminal justice who are interested in participating in these projects must fulfil a variety of requirements, such as having an institutional collaboration for the purpose of providing personal resources (mediation teams) and materials, having the agreement of the prosecution of its administrative area, and informing the *Consejo General del Poder Judicial* (the governing body of the judiciary in Spain) of the willingness to participate in projects of this nature where the procedure ends with a sentence signed by the court.

To date, the Spanish legislation has incorporated the mechanisms of restorative justice in the juvenile field, since Articles 19 and 51.3 of the Law on Criminal Responsibility of Minors (hereinafter referred to as LORPM) determine the effects of mediation and conciliation in the trial phase and implementation of the measures imposed in sentence.

## B. Documents and international legislation

Mediation, as the main tool of restorative justice, which consists of approaching positions faced by a conflict with the support of an impartial third party, is making its way slowly into the penalty area. This chapter will detail the documents and instruments that support the court solutions: firstly, in the field of adult mediation, for what is stated in this context shall apply also for minors by the principle of equality and non-discrimination on grounds of age; and secondly, other details that are specifically contemplated in juvenile justice will be laid out.

It is important to observe the documents and studies of both the United Nations and the European Union in this area, as many of them are incorporated into the Spanish legal system and therefore are required. As for those which have no binding effect, their importance lie in their content that will guide the Spanish policy maker to formulate the rules that in the future will perform in this area. In this regard the formulated Articles 10.2, 39.4<sup>6</sup> and 96.1 of the Spanish Constitution should be recalled. Article 10.2 of the Spanish Constitution states that “provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain”<sup>7</sup> and Article 96.1 of the Constitution that says “validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law”.

### Criminal mediation in adults: documents and international legislation

In this point, it can be seen that there are a variety of international rules concerning the possibilities of employing restorative justice in adult criminal matters.

First of all, the Charter of Human Rights, June 26, 1945, Article 33 (Chapter VI) listed the following as solutions to conflict resolution: “negotiation, enquiry, mediation,

6 Article 39.4 “Children shall enjoy the protection provided for in the international agreements safeguarding their rights”.

7 Sentencia del Tribunal Constitucional Español nº 36/1991 de 14 de febrero de 1991 (Boletín Oficial del Estado nº 66 de 18 de marzo de 1991) referred to Article 10.2: “This rule merely establishes a connection between our own system of fundamental rights and freedoms, on the one hand, and the international conventions and treaties on the same subject in which Spain is a party, on the other hand. It does not give constitutional status to the rights and freedoms internationally proclaimed as are not enshrined in our own Constitution, but requires interpreting the relevant provisions of it according to the content of such treaties or conventions, so that in practice this content becomes somewhat constitutionally declared in the content of the rights and freedoms set forth the second chapter of title I of our Constitution”.

conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.

At the United Nations level in criminal mediation for adults, we can find the resolutions of the Economic and Social Council of the United Nations from 1997/33 of 21 July 1997, titled “*Elements of responsible crime prevention: standards and norms*”, as well as its resolution 1998/23 of 28 July 1998, in which Member States are recommended to consider the use of informal means to resolve minor offenses between the parties, for example by encouraging mediation, acceptance of civil repair or a compensation to the victim agreement, and the use of non-custodial measures, such as community service in lieu of incarceration.

Also it is necessary to mention Resolution 1999/26 of 28 July 1999, entitled “*Development and implementation of mediation and restorative justice measures in criminal justice*”, in which the Council requested the Commission on Crime Prevention and Criminal Justice to consider the desirability of formulating United Nations standards in the field of mediation and restorative justice.

Important are also Resolution 2000/14 of 27 July 2000, titled “*Basic principles on the use of restorative justice programmes in criminal matters*” (E/2000/30) and Resolution 2002/12 of 24 July 2002 of the Economic and Social Council of Nations United on the basic principles on the use of restorative justice programmes in criminal matters.

In this international organization, existing international commitments shall be taken into account with regard to the victims, including the Declaration of the United Nations on “*Basic principles of justice for victims of crime and abuse of power*”, of 29 November 1985 (Resolution 40/34 of the General Assembly), which calls for the use, where appropriate, of informal mechanisms for the resolution of disputes, including mediation, arbitration and customary practices of justice to facilitate conciliation and redress for victims.

The basic rules of the United Nations on the non-custodial freedom of 14 December 1990 (resolution 45/110 of the General Assembly) highlight the importance of encouraging greater community participation in the management of criminal justice and the need to promote among offenders a sense of responsibility towards the victims and the whole society.

The Vienna Declaration on Crime and Justice: Meeting the Challenges of the XXI Century motivated the development of policies, procedures and restorative justice programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties. This document is the resolution 55/59 of 4th December 2000 of the General Assembly of the United Nations and has its origin session at the X United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Vienna from 10th to 17th of April 2000.

Also, the discussions on restorative justice that the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders are interesting, under the agenda item “*Offenders and victims: responsibility and fairness in the justice process*” and Resolution 56/261 of the General Assembly of 31 January 2002, titled “*Plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*” as well as the Report of the General Secretary of Economic and Social Council to the Commission on Crime Prevention and Criminal Justice on the meeting of the Expert Group on Restorative Justice in April 2002 (E/CN.15/2002/5/Add.1) whose objective was to list a number of comments from these experts on the desirability and means of establishing common principles for the implementation of restorative justice programmes in criminal matters.

In 2005, the declaration of the Eleventh Congress of the United Nations Convention on the Prevention of Crime and the Treatment of Offenders urged the seminar on “*Empowerment of criminal justice reform, including restorative justice*” to Member States to recognize the importance of further developing policies, procedures and restorative justice programmes including alternatives to court proceedings.

Within the framework of the European Union and its institutions the adult penal mediation also receives their support in a number of documents.

Recommendation No. R(83)7 of the Committee of Ministers of the Council of Europe of 23 June 1983 concerning the participation of the public in crime policy recommends that governments of member states ensure “public participation in the development and implementation of criminal policy to prevent crime, to resort to alternative measures of imprisonment [...] in particular by facilitating the compensation of the victim by the offender, such as providing an obligation as a substitute for imprisonment”.

Recommendation No. R(85)11 of the Committee of Ministers of the Council of Europe on the position of the victim in the framework of criminal law and criminal procedure, of 28 June, 1985, recommended that the Governments of the Member States consider the potential advantages of conciliation and mediation. The victim should be informed of the date and place of a hearing concerning an offence which caused him suffering; his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice; and how he can find out the outcome of the case. It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realized should be abolished. Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction. All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the severity of the sentence, take into account the victim’s need for compensation, as well as any compensation or restitution made by the offender or any genuine effort to that end.

Recommendation No. R (87)21 of the Committee of Ministers of the Council of Europe on assistance to victims and prevention of victimization of 17 September 1987, recommended that the Governments of the Member States encourage experiments, in national or local scope, of mediation between the offender and the victim, and evaluate the results, noting in particular the extent to which they serve the interests of the victim.

Recommendation No. R(92)16 of the Committee of Ministers of the Council of Europe on the European rules on sanctions and measures applied in the community considers that sanctions and measures complied with in the community are important ways to combat crime and avoid the negative effects of imprisonment.

The Communication of the Commission to the Council, the European Parliament and the Economic and Social Committee on Crime Victims in the European Union: Policies and measures, of 14 July 1999, states that the mediation between the offender and the victim could be an alternative to a long and discouraging criminal proceedings in the interests of the victims, and allows compensation for damage or recovery of stolen goods outside a normal criminal procedure.

Recommendation No. R(99)19 of the Committee of Ministers of the Council of Europe concerning mediation in penal matters sets out principles to be taken into account by Member States when developing mediation in criminal matters. This text is important for the specificity of the subject matter.

The Presidency Conclusions of the European Council held in Tampere on 15 and 16 October 1999, stated in point No. 30 of his Opinion, that Member States should establish alternative and extra-judicial procedures.

The European Parliament resolution of 15 June 2000 on the Communication from the Commission on crime victims in the European Union, declares the importance of the development of the rights of crime victims.

The Council Framework Decision 2001/220/JAI of 15 March 2001<sup>8</sup> on the standing of victims in criminal proceedings, provides in Article 10 that “each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account”. In Article 17 “each Member State shall bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision regarding Article 10, before the 22 March 2006”.

Belgium submitted in June 2002 a formal initiative for the adoption of the Council Decision establishing a European network of national contact points. This network should help develop, support and promote the various aspects of restorative justice in

8 Eur-Lex, 32001F0220, OJ L082 of 22/03/2001 p. 0001-0004.

the Member States, as well as in the European Union.<sup>9</sup> The Commission of the European Communities developed the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union of 30 April 2004<sup>10</sup> taking into account the conclusions of the Tampere European Council in order to analyze whether national differences on penalties constitute an obstacle in relation to the enforcement in one Member State of the penalties imposed on another. In Annex II, this paper discusses the status of mediation in the Member States at the time stating that Germany, Austria, Belgium, Finland, France, Luxembourg, Sweden and the United Kingdom possessed quite detailed legislation on criminal mediation. In Denmark, Spain, Ireland, the Netherlands and Portugal, pilot projects were carried out. Similarly this text relates that some Member States have special provisions on penal mediation in juvenile crime giving the situation that these provisions were adopted before the mediation on adults.

*The Opinion of the European Social Committee (EESC) and Economic Committee on the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on “strengthening the rights of victims in the European Union” and the “proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime”, COM (2011) 275 final - 2011/0129 (CO) 11 in point 4.6.12 states that the European Economic and Social Committee (EESC) welcomes proposals on restorative justice in the mentioned Directive, but considers that the definition in the proposal is too strict and that it should be emphasized that there are several options for seeking restorative justice that do not involve bringing people together. The EESC considers it important to bear in mind the wishes and the protection of victims and their families in all cases and ends by noting that at present very few Member States provide funding for restorative justice and recommends that the Commission supports pilot projects to develop standards and training in restorative justice to create economies of scale and support the exchange of best practices.*

Directive 2012/29/UE of the European Parliament and of the Council of 25 October 2012 (OJ L 315 of 14 November 2012 p 57-73), laying down minimum standards for the rights, support and protection of victims of crimes, and amending framework Decision 2001/220/JHA, mentions that the information and advice provided by the competent authorities, support services for victims and restorative justice, should offer, as far as possible, through a variety of media and forms and that can be understood by the victim, for example, victim-offender mediation, family group conferencing and sentencing circles. These can be of great support to the victim, but require safeguards to prevent any secondary and repeat victimization, intimidation and retaliation. Therefore, these

9 Eur-lex 52002IG1008(01), OJ C 242 08/10/02, p.20.

10 Eur-Lex 52004DC0334.

11 Eur-lex, 52011AE1854 OJ C 043, 15/02/2012 P. 0.039-0.046.

services should establish as a priority meeting the interests and needs of the victim, repairing the damage that has been caused and preventing any additional damage. When referring an issue to the restorative justice services or conducting a restorative justice process, several factors should be taken into consideration: factors such as the nature and seriousness of the crime, the degree of damage, repeated violation of the physical, sexual or psychological integrity of a victim, power imbalances and age, maturity or intellectual capacity of the victim, which could limit or reduce their ability to make a fully informed decision or to cause harm.

Restorative justice procedures should be in principle confidential, unless the parties agree otherwise or the national law provides otherwise for reasons of special public interest. They may consider factors such as threats or any form of violence committed during the process requiring disclosure for reasons of general interest. In particular this Directive refers to Article 12<sup>12</sup> of particular interest on the security in the context of restorative justice.

Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing the “Justice” programme for the period 2014 to 2020,<sup>13</sup> in Article 4.1 c) mentions as an objective providing an effective access to justice for all, including the promotion and support for the rights of victims of crime, while the rights of the defense are respected.

12 Directive 2012/29/EU Of The European Parliament And Of The Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Article 12:

1. Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:

(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim’s free and informed consent, which may be withdrawn at any time;

(b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

(c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.

13 Eur-lex, OJ L 354 - 28/12/2013 p. 0073 – 0083.

## Restorative justice for minors: documents and international regulation

Addressing juvenile justice, initiatives in restorative justice are also reflected in various documents; as in the previous section, these will be, first, the major United Nations documents, and then, the European Union ones.

The first step is the United Nations Minimum Standard Rules for the Administration of Juvenile Justice (“The Beijing Rules”)<sup>14</sup> of 28 November 1985 (resolution 40/33 of the General Assembly). Rule 11 deals with the so-called “Diversion” that qualifies as adequate response when the family, school and other informal social control institutions have reacted appropriately and constructively as it allows the termination of the judicial proceedings, reducing the negative effects of the continuation. Rule 18 introduces the principle of flexibility to avoid as far as possible detention and urges the competent authority to consider a wide variety of alternatives between different disposition measures. These rules are, in the view of VAZQUEZ GONZALEZ, “the first international legal instrument that comprises detailed rules for the administration of juvenile justice”<sup>15</sup>.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, of November 29 1985 (resolution 40/34 of the General Assembly) in paragraph A.3 provides that the provisions of the Declaration apply to everyone without distinction, such as race, color, sex, age, etc. Therefore, consistent with paragraph A.7, it is encouraged to use alternative systems for dispute resolution in juvenile justice, including mediation, arbitration and customary practices of justice to facilitate conciliation and redress for victims.

The Convention on the Rights of the Child of 20 November 1989 (resolution 44/25 of the General Assembly) is configured as a historic event in the social and legal status of children and adolescents. The Convention on the Rights of the Child became law in 1990, after being signed and accepted by 20 countries, including Spain.<sup>16</sup> Article 40.3 b) and 40.4 promote the deletion of judicial procedures in which minors in conflict with the law are involved:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not

14 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly in Resolution 40/33, of 29 November 1985. These rules were approved in the Seventh United Nations Congress on the Prevention of crime and the treatment of offenders, celebrated in Milan (Italy) from the 26 August to 6 September 1985.

15 VAZQUEZ GONZALEZ C., *Derecho Penal Juvenil*, Dykinson, Madrid, 2006, p. 69.

16 Instrumento de Ratificación de 30 de noviembre de 1990, Boletín Oficial del Estado-España- nº 313, de 31 de diciembre de 1990, entrando en vigor el 5 de enero de 1991.

to have the capacity to infringe the penal law.

- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence”.

The Committee on the Rights of the Child is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues. This body, in its 44th session held in Geneva in 2007 of 15 January to 2 February, drew up the General Comment No. 10 “Children’s rights in juvenile justice”<sup>17</sup> where the encouragement of interventions without judicial proceedings is considered a basic element in a juvenile justice policy, considering that the majority of young offenders only commit minor offenses; therefore, according to this body, they shall be provided for a series of measures involving removal from criminal or juvenile justice proceedings and referral to alternative (social) services.

This body leaves State Parties to decide the exact nature and content of the measures to be taken with juvenile offenders without pursuing the judicial proceedings, and left free to adopt such legislative and other measures needed for its implementation. However, it proposes a series of community-based programmes, such as community service, supervision and guidance by social workers, probation officers, family conferences and other forms of restorative justice programmes, including restitution and compensation for victims.

In the VIII United Nations Congress on the Prevention of Crime and Treatment of Offenders, in Havana (Cuba) held from 27 August to 7 September, 1990 a series of rules that are the Basic Principles for the Treatment of Prisoners were adopted, as well as the United Nations Guidelines for the Prevention of Juvenile Delinquency, the UN Rules for the Protection of Juveniles Deprived of their Liberty and the Standard Minimum Rules of the United Nations non-custodial measures of freedom. It is noteworthy that the interest has always been in those United Nations Congresses on the subject of juvenile delinquency and juvenile justice, not only in the Seventh and Eighth Congresses but also in the ones celebrated later.<sup>18</sup>

<sup>17</sup> CRC/C/GC/10 Committee on The Rights of The Child, General Comment No. 10 (2007), *Children’s rights in juvenile justice*.

<sup>18</sup> Ninth Congress of El Cairo (Egipto) 28 April to 5 May 1985. Tenth Congress in Viena (Austria) 10 to 17 April 2000. Eleventh Congress in Bangkok (Tailand) 18 to 25 April 2005. Twelfth Congress in Salvador (Brasil) 12 to 19 April 2010.

One of the issues that stands out the Minimum United Nations Rules for Non-custodial measures of freedom (the Tokyo Rules) of 14 December 1990 (resolution 45/110 of the General Assembly) is firmness in expressing that Member States should introduce non-custodial measures in their legal system, from pre-trial to post-judgment, to provide more options and thus reduce the application of imprisonment penalties, and to rationalize criminal justice policies. With regard to the alternative measures the possibility of dealing with offenders in the community is highlighted, avoiding recourse to formal proceedings or trial court.

The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) of 14 December 1990 (resolution 45/112 of the General Assembly), as one of the main international instruments on juvenile justice, also reflects that the direction of juvenile justice policies should create and decide on appropriate measures to avoid criminalizing and penalizing a child for behaviour that does not causes serious damage to the development or harm to others and themselves, and separate juveniles and young people as far as possible from the criminal justice system.

The Economic and Social Council of the United Nations has issued several papers in relation to restorative justice in the juvenile justice systems. The Annex Draft Guidelines for Action on Children in the Criminal Justice System 21 July 1997, in Resolution 1997/30, states that the desirability of making a review of existing procedures and, where possible, developing initiatives in order not to pursue the criminal justice systems in the case of juveniles accused of crimes urges States to take the appropriate measures to provide a broad range of in-pre-arrest phase, preliminary, judicial and post-judicial alternative measures and to prevent recidivism and promote social rehabilitation. This document states that informal mechanisms should be used to resolve disputes in cases involving young offenders, including mediation and restorative practices or traditional justice, particularly processes involving victims.

In the Resolution of Economic and Social Council 2007/23 on Supporting national and international efforts to reform juvenile justice, in particular through a better coordination of technical assistance, of 26 July 2007, as well as in the Resolution of Economic and Social Council 2009/26, on Supporting national and international efforts to reform juvenile justice, in particular through a better coordination of technical assistance (E/2009/30, chap. IB, draft resolution) 30 July 2009, Member States are invited to adopt national action plans on crime prevention and juvenile justice, in particular preventing minors' involvement in crime and reducing the use and duration of minors' detention, especially in the pre-trial stages, including through the use of diversion, restorative justice and alternatives to detention.

In Resolution 65/230 on the XII Congress of the United Nations on Crime Prevention and Criminal Justice (A/RES/65/230) of the United Nations General Assembly adopted on 21 December 2010, support was shown for the principle that detention of children should be used only as a last resort and for the shortest time possible, and recommends appropriate wider application of alternatives to imprisonment, restorative justice

measures and other relevant measures to remove young offenders from the criminal justice system.

Following the statements of the various United Nations bodies we can find the Resolution adopted by the Human Rights Council<sup>19</sup> 24/12 of 26 September 2012, on human rights in the administration of justice,<sup>20</sup> including juvenile justice that encourages States that have not yet integrated into their general activities aimed at strengthening the rule of law issues concerning children to do so, and to develop and implement a comprehensive juvenile justice policy to prevent juvenile delinquency and fight against it, to promote, among other things, the use of alternative measures, such as diversion and restorative justice, and ensuring the application of the principle that the deprivation of liberty of children is carried out only as a last resort and for the shortest appropriate period of time, and avoiding, whenever possible, the custody of children.

In the European Union framework there are several documents to highlight that will be described below.

The Committee of Ministers Resolution No. 78 (62), social transformation and juvenile delinquency, 29 November 1978, is of special interest. A series of recommendations to the governments of Member States on the prevention of crime and the socialization of young people are made, as well as recommendations to explore the opportunity to adopt a series of measures, such as reviewing of sanctions and imposed measures on young people, in the field of criminal policy, by strengthening their educational and socializing nature, as much as possible, as well as limiting penalties and custodial sentences.

In turn, Recommendation No. R87 (20) of the Committee of Ministers of the Council of Europe “*Social reactions to juvenile delinquency*” (adopted by the Committee of Ministers on 17 September 1987, during the 410th meeting of the Ministers’ Deputies), in point II encourages the development of mediation as a tool to prevent minors’ being inserted into the criminal justice system.

Also Rec (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (adopted by the Committee of Ministers on 24 September 2003 at the meeting 853 of the delegates of Ministers), indicated as new responses in point III, that alternatives to traditional judicial procedures should be developed. It recommends that, to combat serious, violent or repeated infractions committed by minors, Member States should develop a broader measures or sanctions to this group, characterized by innovation and effectiveness and, if necessary and possible, they should also allow mediation, repairing the damages

19 The Human Rights Council is an inter-governmental body within the United Nations structure, with a membership consisting of 47 states. The Council is responsible for strengthening the promotion and protection of human rights around the globe. It was created by the UN General Assembly in 2006 with the overall objective of addressing human rights violations.

20 A/HRC/RES/24/12.

incurred and compensation to the victim.

The Opinion of the European Economic and Social Committee on “*Prevention of Juvenile Delinquency, ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union*”,<sup>21</sup> shows a series of guidelines to analyze the situation of juvenile offenders, and intervention instruments under juvenile justice systems that can be used to achieve protection, rehabilitation and reintegration into society, thus preventing recidivism in delinquent behavior. The opinion holds that the evolution of the juvenile justice system has given rise to a restorative or reparative conception of justice which is described as an ideal model for the juvenile justice system for reducing stigmatization, its high educational value and its less punitive character.

The European Parliament resolution of 21 June 2007 on juvenile delinquency “the role of women, the family and society”,<sup>22</sup> highlights that to substantially tackle the phenomenon of juvenile delinquency, an integrated strategy is required, at national and European level, which combines three guiding principles: prevention, judicial and extrajudicial measures and the social inclusion of all young people. In this document the European Commission is requested to be responsible for designing a co-financed operational programme including measuring and analyzing the effectiveness of long-term management systems recently developed on juvenile offenders, such as calls for restorative justice.

The Recommendation (2008)<sup>11</sup> of the Committee of Ministers of the Council of Europe on the European Rules for juvenile offenders subject to sanctions or measures, adopted in 5 November 2008 is as much a specific document for the implementation of custodial measures as it is a consideration of the restorative justice mechanism, and so it is mentioned in the rule A.12 that mediation and other restorative measures should be encouraged in all phases of treatment with minors.

Also interesting is that in the Proposal for a Directive of the European Parliament and of the Council on procedural guarantee of suspected or accused persons in criminal proceedings, of 27 November 2013,<sup>23</sup> that, in its Article 19, regarding training, it is stated that a person who provides support or restorative justice services to children should also receive an appropriate level of training to ensure that children receive a respectful, impartial and professional service.

21 Eur-lex 52006IE0414, 2006/C 110/13, OJ 9th May 2006.

22 2007/20011 INI, OJ 12 June 2008.

23 Eur-Lex 2013/0408 (COD).

## C. Spanish legislation-background

To date, the Spanish legislation has only incorporated the mechanisms of restorative justice in juvenile justice, specifically in Articles 19 and 51.3 of the Law on Criminal Responsibility of Minors<sup>24</sup> (LORPM), establishing the effects of mediation and reconciliation in the investigation and implementation stage of the measures imposed in final sentence, and Articles 5 and 15 of Royal Decree 1774/2004<sup>25</sup> of 30 July by the regulations of the Organic Law 5/2000, regulating the criminal responsibility of minors. With regard to adult criminal law, mediation it is not considered yet.

Repair, as its own mechanism of restorative justice systems, already appeared in our juvenile justice system in Articles 15.16 (extra-judicial measures during the pre-trial phase of the procedure)<sup>26</sup> and 16.3 (possible suspension of execution of the judgment by accepting the repair) of Law 4/1992 of 5 June, on Competence and Procedure of Juvenile Courts. It must be noted that before being expressly stated in this law, we can find experiences of this nature; thus, for example, in 1990 a mediation repair programme started in a part of the Spanish territory (Catalonia) in the context of juvenile justice promoted by the then Department of Justice of the Generalitat of Catalonia.

The LORPM, as the main legislation of our current Spanish juvenile justice system, starts from the principles of the, so-called, responsibility model<sup>27</sup> that reinforces the legal position of the minor, bringing the juvenile system closer to the adult criminal justice system because the same rights and guarantees as adults are recognized for minors. In its writing, the contents provided by the doctrine of the Constitutional Court were taken into account, especially the pronouncements of judgments 36/1991, of 14 February, and 60/1995 of 17 March, regarding guarantees and respect for fundamental rights that necessarily must prevail in the proceedings before the Juvenile Courts, and those judgments refer to respect for the guarantees and rights of children contained in international treaties signed by Spain.

In this system, the main objective is to “educate in responsibility”, and in this way the minor responds to society by committing acts defined as crimes or offenses under the Criminal Code and other special penal laws, and as a legal reaction to the criminal

24 Boletín Oficial del Estado nº 11 de 13 de Enero de 2000. Entró en vigor desde 13 de Enero de 2001.

25 Boletín Oficial del Estado nº 209 de 30 de Agosto de 2004. Entró en vigor desde 01 de Marzo de 2005.

26 Artículo 15.1 6<sup>a</sup> Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores (Vigente hasta el 13 de enero de 2001) “Taking into account the less seriousness of the facts, the circumstances and conditions of the minor, the lack of violence and intimidation, or if the minor has repaired or wants to, the judge, proposed by the prosecutor, shall finalize the procedure”; and Artículo 16.3 3 “The juvenile judge shall decide the finalization of the judicial decision for an unspecified period of time or a maximum of two years, whether the minor and the damaged party accept an extrajudicial repair”.

27 This system approved by the LORPM leaves the former system approved by Decreto de 11 de junio de 1948 inspired in positive model, considering the minor as no responsible of his acts, with no judicial guarantees applied.

offense the appropriate action will be imposed. These measures consist of an educational intervention in nature and cannot be merely repressive, but preventive, aimed at reintegrating, and other essential purposes different to the Adult Criminal Law. In this Act there is a flexible use of the principle of minimum intervention, in the sense of providing relevance to the possibility of not carrying out the proceedings, reconciliation between the offender and the victim, etc. As highlighted in the Statement of Motives of LORPM, damage repair and reconciliation of the offender with the victim are situations that, in line with the principle of minimum intervention, and with the assistance of the technical staff mediator, can result in a failure to continue or dismiss the case; or, in the case of the compliance with the measure imposed, to promote the educational and re-socializing criteria.

The current text of Article 19, referring to conciliation or repair during pre-trial phase, is the result of reforms<sup>28</sup> introduced by the Organic Law 8/2006 of 4 December 2006 amending the Organic Law 5/2000 of 12 January, governing the criminal liability of minors. <sup>29</sup>

It is interesting to consider the amendments that were made in Parliament on the Draft Law of Criminal Responsibility of Minors dated 16 March 1999,<sup>30</sup> to know the policy maker's intention when setting up conciliation and repair as it was reflected finally in the law.

First, to the project was added, as product of an amendment of the Basque parliamentary group (EAJ -PNV), a paragraph in point 1 of Article 19 determining that the withdrawal is only possible if the alleged offense was less serious or misconduct, justifying that in case of serious crime the judicial procedure should continue even if the reconciliation is carried out. Also interesting is the proposal of the Federal Parliamentary Group Izquierda Unida, in relation to Amendment No. 42, proposing an addition to Article 19.2 with the following text: "If the victim refuses conciliation or repair, the technical team can recommend a repair in the benefit of the community". This amendment was not incorporated in the final text, and was only in the regulation of LORPM (2004) that, although not expressly referring to the opposition of the victim to accept the settlement or repair, allows the technical team to propose duties in the benefit of the community, where Article 5.1 f ) reads as follows:

Article 5.1 f) When conciliation or direct or social repair is not possible, or when the technical team deems most suitable to the interest of the child, performing tasks or the

28 In the text published the 13th of January 2001 (BOE n° 11) point 2 of Article 19 was different to the present. The first text of Article 19.2 was "without prejudice of the agreement of the parties in relation to the civil liability derived from the offense or misconduct, regulated in this law". The new article states that "without prejudice of the agreement of the parties in relation to the civil liability".

29 Boletín Oficial del Estado n° 290 de 5 de diciembre de 2006.

30 Boletín Oficial Cortes Generales (Congreso Diputados) VI Legislatura n° 144-10. Boletín Oficial Cortes Generales VI Legislatura. Serie A: 3 de noviembre de 1998 Num. 144-1 PROYECTOS DE LEY 121/000144 Orgánica reguladora de la responsabilidad penal de los menores.

provision of services in benefit of the community will be proposed.

However, the final and consolidated text of Article 19, with the Organic Law 8/2006 (being the Rules of 2004), still did not mention anything about the possibility of performing services for the benefit of the community, or socio-educational tasks when repairing or settlement is not possible for reasons not attributable to the minor. Like the original 2000 text, it states that only the fulfillment of the “educational activity proposed by the technical team in a report” is referred to, without determining circumstances in which the minor is fit to undertake such an educational activity. So it is necessary to keep going to the regulatory provision to justify the circumstances in which the minor can perform for the benefit of the community or socio-educational tasks, in case the reparative activity has not been able to be done for reasons not attributable to the minor, when the victim is selected in a personalized manner, or when the victim refuses to accept the settlement or repair.

Another amendment came from another Parliamentary Group to the draft project, saying in Article 19.2 that “reconciliation will be considered when the minor regrets the damage caused to the victim and is motivated to repair”. The justification provided by the parliamentary BEGOÑA LASAGABASTER, who defended this amendment, is that it makes sense to require regret as a prerequisite of reconciliation, since responsibility and regret is not the same, even when this requirement has disappeared from adults for the attenuating of Article 21.5 of the Spanish Criminal Code, highlighting that the minor can be involved voluntarily in the process at any time. However, the reference to regret of the minor is in the explanatory memorandum of the LORPM.<sup>31</sup>

Amendment No. 180 given by the Catalan Parliamentary Group (CiU) requested to add the lack of seriousness of violence or intimidation in the commission of the offense, justifying that the reconciliation between the victim and the offender could take effect when the offense involved the commission of mild assault or threats given the frequency in which they are conducted among adolescents. This proposal was added to the final text. Amendment No. 181 proposed by the same parliamentary group requested to add to the title of Article 19 the reference to “repair”, since, along with the conciliation, it constitutes another route to the dismissal of the file since the drafting originally read “*Article 19. Discontinuance of proceedings for conciliation between the minor and the victim*”.

Finally the articles that our juvenile criminal law engaged in extrajudicial solutions are Article 19 and 27.4 of LORPM, allowing conciliation and repair during the pre-trial phase of the case, and Article 51 of LORPM, allowing reconciliation in implementation phase of the conviction measure imposed.

31 Explanatory memorandum of LORPM 13.II “Conciliation has the objective of reaching a psychological satisfaction by the victim through the regret of the Young offender”.

## **Article 19. Discontinuance of proceedings for conciliation between the minor and the victim.**

- 1.** The prosecution can also withdraw the continuation of the criminal record, depending on the gravity of the facts and circumstances of the minor, in a particular way to the lack of serious violence or intimidation in the commission of the offense, and the fact that the minor has conciliated with the victim, or has committed to repair the damage caused to the victim, or has committed to attend the educational activity proposed by the technical team in its report. The withdrawal in the issue will only be possible when the alleged act committed by the minor constitutes misdemeanor offense.
- 2.** For the purposes of the provisions of the preceding paragraph, the reconciliation will be understood when the minor recognizes the damage and apologizes to the victim, and the latter accepts the apology, and repair shall mean the commitment of the minor to the victim to perform certain actions on behalf of the victim or community, followed by its effective realization. This is without prejudice to the agreement that the parties have reached regarding civil liability.
- 3.** The corresponding technical team will carry on with the functions of mediation between the minor and the victim, for the purposes indicated in the preceding paragraphs, and will inform the public prosecutor of the commitments and the degree of compliance.
- 4.** Once produced conciliation or repair commitments have been fulfilled with the victim, or when one or the other could not be carried out for reasons beyond the control of the minor, the prosecutor shall terminate the pre-trial phase and shall ask the Judge the dismissal with submission of the proceedings.
- 5.** In the event that the minor do not meet the agreed repair or educational activity, the prosecution will continue processing the case.
- 6.** In cases in which the victim of the crime or offense is a minor or disable, the commitment referred to in this article shall be made by the legal representative of the same, with the approval of the juvenile court judge.

## **Article 27. Report of the technical team.**

- 4.** It may also be proposed by the technical team in its report, whether not to continue processing the case in the interest of the child, for having been sufficiently expressed the reproach through the procedures so far, or for considering unsuitable for the best interest of the minor any intervention, given the time elapsed since the commission of the offense. In these cases, if the requirements of Article 19.1 of this Act are met, the prosecutor may refer the case to the court with a proposal for dismissal of the judicial process, also referring, where appropriate, evidence of the proceedings to the public minor's protection body appropriate for the purposes of acting in favour of the minor's protection.

### **Article 51. Replacing measures.**

3. The reconciliation of the minor with the victim, at any time that the agreement is made between the two referred to Article 19 of this Law, may annul the measure imposed when the Judge, as proposed by the Prosecutor ministry or the minor's solicitor and heard by the technical team and the representation of the correspondent public administration, considers that the act and the time duration of the measurement already accomplished is enough reproach compared to what the acts committed by the minor deserves.

And in the Royal Decree that develops the LORPM, the normative references are found in Article 5, determining the procedure for carrying out extrajudicial solutions during the pre-trial phase, and Article 15, related to the procedure for conciliation and repair in the execution phase as mechanisms for reviewing the measure imposed.

### **Article 5. Mode of carrying out extrajudicial solutions.**

1. In the case provided in Article 19 of the Organic Law 5/2000, of 12 January, governing the criminal responsibility of minors, shall proceed as follows:

- If the Public Prosecutor, in view of the circumstances or at the request of the minor's solicitor, will consider the possibility to withdraw the continuation of the case, he will ask the technical team for a report on the advisability of adopting the most appropriate extrajudicial solution for the best interest of the minor and the victim.
- Once the application by the technical team has been received, the minor will be interviewed, as well as the legal representatives and the solicitor of the minor.
- The technical team will expose to the minor the possibility of extrajudicial solution under Article 19 of the Organic Law 5/2000, of 12 January, and will hear their legal representatives.

If, after hearing his solicitor, the minor accepts any of the solutions that the team proposes, if possible in the same act, the conformity of their legal representatives shall be obtained. If the minor or legal representatives express their refusal to the extrajudicial solution, the technical team shall inform the public prosecutor and start drawing up the report referred to in Article 27 of the Organic Law 5/2000 of 12 January. The technical team will contact the victim to manifest their agreement or disagreement to participate in a mediation process, either through personal appearance before the technical team, either by any other means which provides a record.

If the victim is a minor or disable, this consent must be confirmed by their legal representatives and be made known to the competent juvenile judge.

- If the victim is motivated to participate in the mediation process, the technical team will propose a meeting to the offender and victim, to finalize the settlement or repair

agreements. However, reconciliation and reparation may also take place without meeting, at the request of the victim, by any other means which provides a record of the agreements.

- If the social or direct reconcile or repair is not possible, or when the technical team considers it the best for the interest of the minor, socio-educational tasks or the provision of services to benefit the community will be proposed.
- The technical team shall inform the public prosecutor about the result of the mediation, the agreements reached by the parties and their compliance, or, if applicable, the reasons why they have failed to put into effect the commitments made by the parties, for the purposes of Article 19.4 and 5 of the Organic Law 5/2000 of 12 January on the criminal responsibility of minors.

2. If, according to the provisions of Article 27.3 of the Organic Law 5/2000, of 12 January, governing the criminal responsibility of minors, the technical team considers desirable that the minor performs a repair activity or reconciliation with the victim, it will be reported to the Public Prosecutor and the solicitor of the minor. If the solicitor considers the withdrawal of the record, then he will ask that the technical team reports on the most appropriate extrajudicial solution and the procedures provided for in the preceding paragraph shall continue.

The provisions of this article shall be applicable to the mediation procedure provided for in Article 51.2 of the Organic Law 5/2000, of 12 January, governing the criminal responsibility of minors, subject to the jurisdiction of the public entity and the provisions of Article 15 of this regulation. References to the technical team made in this article shall be made to the public entity where, in accordance with the provisions of Article 8.7 of this regulation, that entity performs the functions of mediation.

#### **Article 15. Review of the measure by conciliation.**

1. If during the execution of the measure the minor manifests his willingness to reconcile with the victim, or to repair for the harm caused, the public body shall inform the juvenile court and the prosecution of such circumstances, they will perform the corresponding functions of mediation between the minor and the victim, and will inform on the commitments and their compliance to the judge and prosecutor, for the purposes of the provisions of Article 51.2 of the Organic Law 5/2000 , of 12 January , regulating criminal responsibility of minors. If the victim is minor, juvenile court authorization will be needed under the terms of Article 19.6 of the said Act.

2. The functions of mediation conducted with juveniles in custody shall not result in an alteration of the compliance of the measure imposed, without prejudice to the outputs for that purpose may authorize the competent juvenile court.

## D. Extrajudicial settlement during the pre-trial phase

The pre-trial phase in the juvenile criminal process of the Spanish legislation is that stage where, by order of the Juvenile Prosecutor, the investigations to clarify the facts are carried out, so as to check whether the criminal offense has occurred, and also to determine the identity of the offender and to propose the educational and enforcement measure most suitable when it comes to the interests of the minor.

During the pre-trial phase we have, on the one hand, the possibility of withdrawal in preliminary proceedings (preliminary proceedings consist of the prior appraisal made by the Prosecutor of the terms of reporting and verifying, if necessary, material testing activities for opening decision purposes) of Article 18 of the LORPM. Our juvenile criminal law expressly provides for the principle of regulated opportunity (only when the legal conditions are met) when it allows the prosecutor to have discretion limits (it does not require judicial review although it could be revised in the future if new facts or evidence are to warrant the reopening of the case and even the initiation of the prosecution file) to file or dismiss the record if the alleged act constitutes a misdemeanor and has proceeded to its correctness in education family field, according to the Article 18 of LORPM.<sup>32</sup> The principle of opportunity in juvenile justice can provide an educational response even to the detriment of the exercise of the right of the state to punish.

The extrajudicial settlement contained in Article 18 LORPM is not a mediation or a repair, but the exercise of formal powers of the Prosecutor based on the finding that the fact complies with the legal requirements for the application under this article.

Also it is possible to select extrajudicial solutions during the course of the pre-trial phase, such as the dismissal of proceedings for conciliation or repair between the minor and the victim referred to in Article 19 of the LORPM, that in case of success, the Prosecutor will consider the pre-trial phase as finished, and will ask for the juvenile judge's dismissal. There are also the possibilities provided in Article 27.4 of LORPM which refers to withdrawal of the record if the social reproach that the behaviour deserves is sufficiently expressed – through the steps already performed – and that the course of time would be inappropriate for the minor's interest.

<sup>32</sup> To accept the dismissal of the proceedings, due to correctness in the educational or family environment, two requirements are needed, according to Article 18 of LORPM: 1) Less serious offenses without violence or intimidation, or misconduct. Serious offenses will be excluded (with or without violence or intimidation) and less serious but with violence or intimidation. 2) Minors who have not committed any other offense of the same nature.

To accept an extrajudicial solution according to Article 19 of the LORPM (conciliation or repair between the offender and the victim) it is not necessary to comply with point 2) of the previous section, and even if the offense has not to be serious, it is not taken into account that there has been no violence or intimidation (but it is required that the violence or intimidation is not serious).

So the other cases covered by the withdrawal of the record during the pre-trial phase are:

1. Conciliation with the victim (Articles 19.1 and 19.2 of LORPM).
2. Commitment by the minor of repairing the damage.
3. Commitment of complying with the educational activity proposed by the technical team (Article 19.1 of LORPM).
4. The continuation with the process is not suitable for the minor if there is already sufficient reproach, proportional to the behaviour (Article 27.4 of LORPM).
5. Due to the time that has passed it is inappropriate for the minor's interest (Article 27.4 of LORPM).

Regarding the assumption of commitment to meet the educational activity, since it cannot be possible to find any reference in law or in its preamble that allows us to clarify what is the content of that educational activity, it should be understood to be similar to the measure of socio-educational tasks of Article 7.1 l) of LORPM adapted to the circumstances of the minor.

Then there are the cases where the proceeding is assumed to be inappropriate, or the reproach of the conduct is considered to be sufficiently expressed. These are cases in which, in the best interests of the minor and the circumstances, such as age, maturity and other personal circumstances of the minor, just the fact of being subject to the proceeding is sufficient for the correction of the behaviour.

The fifth case requires that any intervention is inadequate for the interest of the minor due to the time elapsed. First, it is the technical team that considers and values the importance of the time that has passed and if it is deemed as relevant, then they should explain the motives and reasons in the report to the Prosecutor to decide the dismissal.

We will pay attention to the aspects shown in article 19 in relation to mediation and repair, as an actual example of restorative justice.

## The subjects

The subjects involved in the conciliation or repair, during the pre-trial phase provided in Article 19 of LORPM, are Prosecutor, the technical team, the minor, the victim, the legal representatives and the minor's solicitor.

The role of the prosecutor in this case is crucial because it is the prosecutor who makes the decision to refer the case to a possible mediation in the pre-trial phase. This decision can be taken by ex officio or requested by the minor's solicitor or by the technical team.

In the case of Article 19, the Prosecutor did not consider an appropriate exercise of the principle of opportunity mentioned in Article 18. In this case it is not the prosecutor who withdraws the case (unlike the case of Article 18 of the LORPM), but it is the juvenile judge who makes the request, proposed by the Prosecutor once the mediation process has been completed successfully.

The technical team consists of social educators, social workers and psychologists. Their role is to assist the juvenile judges and the Public Prosecutor in their disciplines of expertise, producing relevant reports. Professionally they assist the minor and are the body responsible for carrying out the mediation functions between the minor and the victim.

The technical team has no decision-making powers, as their reports are not binding. Their mission is to advise the Juvenile Judge or Juvenile Prosecutor at all stages of the process: pre-trial phase, prosecution and enforcement. The technical team, in accordance with Article 27 of the LORPM, can inform the prosecutor about the possibility of undertaking a repair activity or reconciliation of the minor with the victim, indicating what will be the content and purpose of that activity. In Spain the possibility has been raised that this mediation is carried out by different external entities, and in this sense we can find contradictory experiences because in some areas there has been systematic refusal by the Juvenile Court, understanding that court mediation intervention was not possible, as the LORPM conferred exclusively the mediator functions to the Prosecutor and Juvenile Court, but not to external entities. Such refusals have been appealed with uneven results, although some sections of the Provincial Courts (acting as territorial courts of appeal in juvenile court) have accepted the resources, meaning that the establishment of external mediation programmes and its creation by the public authorities does not violate any provision; other Sections of these provincial courts, however, have confirmed the orders of the *judge a quo*.

Note that these situations are generally exceptional, as one of the main characteristics of our justice system is the right disposition and flexibility shown by operators in the juvenile jurisdiction to carry out extrajudicial solutions as one of the pillars on which our juvenile justice system is based. Also, Article 8.7 contributes to it, in the regulation implementing the LORPM, saying that notwithstanding the mediation functions conferred by Article 19.3 of LORPM to the corresponding technical teams, public entities may also make available to the prosecutor and the juvenile courts, if necessary, programmes to perform mediation functions referred to in that Article.

In relation to the young people, the features that would be convenient for minors to have access to conciliation or repair always come out. The variables depend on the findings and agreements reached or the positive development of the mediation process, and that ultimately can be summarized in favorable outputs at the end of the repair action. Article 19 of the LORPM mentions the circumstances of the minor as one of the variables that must be addressed to let the Prosecutor decide, on the advice of the technical team, if it is convenient to conduct a mediation intervention. Therefore it is important to be sensitive

and not to exclude from the mediation those minors with socialization difficulties or those who belong to an unstructured family environment as there is a risk of labeling these minors as reluctant to take responsibility and repair damage. Therefore we believe that these favorable expectations assume that the minor may show signs of the intention and willingness to apologize to the victim or to participate in the programme, which also assumes that the minor has the capacity to understand the alternative that is proposed, with the solicitor's counseling.<sup>33</sup> Another case is that in which there were several minors who complied with the requirements to implement the mediation, and other minors who did not meet the requirements for an extrajudicial solution. The possibility of the first group is not related with the second group. In these cases partial mediation processes were carried out, in which the prosecutor requested for the minors allowed the mediation but not for the rest.

The victim can be any natural or legal person affected or damaged by the minor's behaviour. To increase the success probability on conciliation or repair action, it will be convenient for the victim to have predisposition to participate in the mediation process and to receive apologies or accept the repair for the damage caused. If the victim is minor or disabled, the commitment for the conciliation or repair has to be assumed by the legal representative and approved by the juvenile judge, according to Article 19.6 of LORPM. ORNOSA FERNANDEZ<sup>34</sup> points out that the judge has to assess if the victim has approved the conciliation or repair voluntarily or if he or she has received any pressure, which would be considered as negative for this judicial resource.

In relation to the controversial issue of extrajudicial solutions and the conflict with private prosecution, derived from the harmonization of Article 27.4 of LORPM and the extrajudicial solutions of Article 19 of LORPM, there is jurisprudence<sup>35</sup> that confirms the judicial resolution stated by that Juvenile Court, in which the conciliation was refused for reasons beyond the control of the young offender, understanding the jurisdictional body that, according to Article 19.4 of LORPM, private prosecution cannot intervene. The criteria of excluding private prosecution, as the only body interested in the procedure, in these cases, seems to be the most accepted criteria followed by the jurisdictional authorities. However, the existence of certain contradictory resolutions in some jurisdictions means that a modification to legislation has been proposed which explicitly excludes the intervention of private prosecution when the prosecutor, in accordance with the principle of opportunity, supports the extrajudicial solutions.

Parents, or legal guardians, both of the offender or the victim (when under 18 years old or disabled), are considered as legal representatives. The role of legal representatives of the young offender is resolved in the following situations: At the beginning they are

33 BUENO ARUS F. (Coord.), LEGAZ CERVANTES F., PERIAGO MORANT J.J., SALINAS IÑIGO A., *Comentarios al reglamento de la ley orgánica 5/2000 de 12 de enero reguladora de la responsabilidad penal de los menores*, Colección Estudios Jurídicos, Murcia, 2008 p. 194.

34 ORNOSA FERNANDEZ M.R., *Derecho Penal de Menores*, Bosch, Madrid, 2007, p. 484.

35 Auto de la Sección 3ª de Barcelona, de 26 de abril de 2009, Rollo 141/09.

heard when the mediation process is explained to the minor and they can express their disagreement. Similarly, when the minor accepts any of the solutions proposed by the technical team during the mediation process, the agreement of the legal representatives is asked for. When the victim is minor or disabled it is necessary that the conciliation or repair commitment has to be assumed by the legal representative and approved by the juvenile judge.

In relation to the young offender's solicitor intervention, this can encourage the prosecutor to consider the withdrawal of the procedure and the beginning of the mediation process to reach a conciliation or repair agreement. According to Article 5 of the LORPM regulations, the solicitor has to be on site when the minor and the legal representatives are informed of the mediation to be carried out. On the other hand, when the solution is proposed to the minor, the solicitor will be heard to allow the minor to accept the extrajudicial solution.

A practical problem that may arise is to know what is the consequence when the solicitor does not appear in the meeting with the technical team. In practice, many times the solicitor does not appear, but it is considered that the legal provision is complied with if he or she is in the pre-trial phase, when the minor is interviewed. Another solution is to consider that once the solicitor has been informed of the day that the minor is going to be proposed for the mediation process, it is supposed that the mediation can be carried out. When the solicitor is interested in the reconciliation process he might appear, and if not, it is understood that if they do not attend the mediation process it is because they consider that it can be carried out.

## Requirements

A *conditio sine qua non* is necessary in order to choose the extrajudicial solution, namely that the criminal fact is a minor infraction or misconduct. Also the seriousness and circumstances of the facts and the minor have to be taken into account, especially paying attention to lack of violence or serious intimidation when committing the offense.

To determine if an offense is less serious it is necessary to revise Articles 13 and 33.3 of the Spanish Criminal Law. Article 13 of the Criminal Law states that less serious offenses are those that have a less serious penalty, and those that have a less serious penalty are specified in Article 33.3 of the Criminal Code.

To choose an extrajudicial solution, according to Article 19 of the LORPM, unlike Article 18 of the LORPM, it is not required that the minor has not previously committed the same criminal act, and although the offense has to be less serious, it does not imply that there have been violence or intimidation, as long as these have not been serious. This increases the number of offenses that can be considered within the possibilities of Article 18 of LORPM, as many could apply, for example, assault mentioned in Article 242.3 of Criminal Code, or physical damage that are not specially dangerous.

To opt for the extrajudicial solution, we can find specific legal situations, such as less serious offenses, and also there are some objective and subjective criteria, such as the seriousness and circumstances of the facts and the minor. Violence and intimidation is understood by physical as well as compulsive violence towards a passive subject, but any violence inflicted on the perpetrator is not considered to impede proceedings.

Misconduct can also be resolved through extrajudicial means, even if the crime involved violence or intimidation.

DOLZ LAGO<sup>36</sup> points out that the only requirement in relation to the characteristics of the criminal act is that there is a less serious offense or misconduct: “Paragraph 1st of Article 19 of LORPM, states the seriousness and circumstances of the facts, and in particular the lack of serious violence or intimidation as a referent that the prosecutor will take into account to withdraw with the file or not along with the conciliation and commitments of the minor. But lack of serious violence or intimidation is not required, as in the last paragraph of Article 19, it is stated that the withdrawal will only be possible when the fact is a less serious offense or misconduct. This has been written by the policy maker, giving an special relevance to the lack of violence or intimidation, added to the nature of the offense as less serious, and being stated in Article 4.2.1 before the reform of the law, and Article 18”.

Since the list of crimes that can be solved through conciliation and repair is long enough to make a list, we will mention a number of criminal offenses highlighted in the proceedings issued by the Attorney General’s Office report. For example, assaults to secondary school teachers, classified as offenses of assault or misconduct, have been addressed by court extrajudicial settlements. In crimes against the historical heritage, behavior that consists of painting on special interest cultural real estate are also addressed by extrajudicial solutions. The cases of bullying are also solved by extrajudicial settlements.

Cyber crimes and those disseminated by technologies have created a major concern recently as they have increased in the last few years. Teens very often use the new forms of communication, as a consequence of technological innovations. The misuse of social networks (WhatsApp, Myspace, Facebook...), to disseminate threats and harassment on the internet, are also behaviours made by minors. Most of the time the acts committed through these networks are not serious but show that young people have educational deficiencies in the acquisition and comprehension of values such as respect for one’s privacy and that of others. Therefore, a good response to these behaviors, according to the attorney, are the court settlements, imposing educational activities related to the use and abuse of the networks.

With respect to offenses against traffic safety, except for reoffending minors, the appropriate use of the principle of opportunity is usually opted for, expressing to the

<sup>36</sup> DOLZ LAGO M.J., *Comentarios a la Legislación Penal de Menores*, Tirant Lo Blanch, Valencia, 2007. TOL1.050.039

minor the reproach that he deserves and withdrawing the proceeding. Sometimes the judge opts for court settlement of Article 19 of the LORPM by conducting road safety courses by young offenders.

In cases of domestic violence, prosecutors estimate that restorative justice mechanisms can be applied in early manifestations or less serious offenses. It is important to bear in mind the importance of informing the minors involved in domestic violence (as perpetrators) about the penalty that they will receive in case of reoffending.

These requirements are common to the five cases contemplated in Articles 19 and 27.4 of the LORPM, and that are not exclusive of conciliation and repair cases.

### **Object: conciliation and repair**

The purpose of this procedure provided for in Article 19 is reaching a solution between the parties through a mediation process where a voluntary agreement is reached which allows the full satisfaction of the victim and the social reintegration of the minor. That solution may consist of the reconciliation between the parties or in compensation, and even the law does not hinder that a solution could consist of both. While the policy maker has set up the possibility of reconciliation and repair as alternatives, nothing prevents that they could occur together.

The conciliation requires the minor to recognize the damage and apologize to the victim, who must accept his apology. The preamble of the Act states that the conciliation and repair have the common aspect that the offender and victim of the infringement reach an agreement, whereby the compliance of the minor ends the legal conflict initiated by the cause. With the reconciliation it is intended for the victim to receive a psychological satisfaction by the juvenile offender who has caused the damage, and who has to regret and be willing to apologize. The measure will apply when the minor actually regrets and apologizes, and the injured person accepts and gives forgiveness.

Meanwhile, repair requires that the minor assumes the commitment with the victim or injured party of performing certain actions on the benefit of the community, followed by its effective realization. The preamble states that the repair agreement is not reached only by way of psychological satisfaction, but requires something else: that the minor complies with the commitment made with the victim or injured party to repair the damage caused either by work in benefit of the community, either through adapted actions to the needs of the subject, whose beneficiary is the victim.

## Procedure

The procedure is: if the prosecutor decides to proceed with the prosecutor's file, the next step is asking the technical team to issue a report on the circumstances of the minor, as regulated in Article 27.1 of the LORPM, to allow the prosecutor to seek educative punitive measure for the best interest of the minor. The technical team, if it detects the possibility of reconciliation or repair (or other cases) and their viability, then a report to the Prosecutor is sent, as provided in Article 27.3 of the LORPM, which is different from the ordinary and usual Article 27.1 of LORRPM, expressing the content and purpose of the proposed activity.

Meanwhile, if the minor recognizes the facts in the presence of his lawyer, the prosecutor who interviews him can estimate whether admitting the application of assumptions is appropriate, and can enable the mediation action of the technical team himself. In any case, the juvenile judge will be notified that the file is going through this mode of settlement.

The mediation process has several phases. First we have to mention a contact phase between the parties. This is carried out with the minor and also his legal representatives and solicitor. The purpose of this interview is to confirm whether the minor agrees to conduct the mediation programme, to check that the minor complies with the necessary conditions to be carried out, to explain the minor the main issues related to the content of the mediation process, and to know the minor's motivation to face and solve the damage caused, contemplating different ways of solution that can be offered. If the minor or the legal representatives express their refusal to accept a court settlement, the technical team shall inform the Prosecutor.

To avoid false expectations, once the minor's predisposition to repair is known, the victim is contacted. The contact with the victim can be done by letter or phone call, and generally attending an interview is proposed. It is necessary to bear in mind that the victim can be any person (adult, young or child with the features seen in relation to consent), single or group of persons, an institution or an enterprise. The purpose of this interview is informing about the operation of juvenile justice and the mediation programme, knowing the version of the events and their willingness and ability to participate in the process.

With the information gathered in the preliminary interviews, the mediator has an overall view of the conflict from the perspective of both parties, and he assesses whether it is possible or not to continue with the process and in what circumstances.

If the victim accepts the mediation, the technical team will meet with both in a meeting to discuss the reconciliation or repair agreements. In the meeting should be fixed, by mutual agreement, the conditions in which they will take place. At this meeting the different point of view of the parties will be heard in relation to the events that occurred, being advisable to create adequate space for explanations, clarifications and discussions with regard to the fact. The various options for conciliation or repair between the parties

are presented in the meeting, and the conclusions reached are systematized.

Also, some cases are found in which, for different reasons, this meeting is not possible. In these cases the victim participates indirectly, suggesting how he wants to be compensated, or delegating to the technician in charge of mediation the conflict resolution considered most appropriate.

When an agreement between the parties is obtained (which may consist of both reconciliation or a commitment to repair, where the content has to be clarified), and an effective implementation of the agreement is reached, then it could be understood that it has positively concluded the process of mediation.

Spanish law allows, in Article 19.4 of LORPM, the mediation without involving the victim (if the victim cannot be located, the victim is the community, or the victim does not want to participate, etc.) when the Article states that if the conciliation or repair commitments with the victim cannot take effect for reasons beyond the control of the minor. In this case the prosecutor shall terminate the procedure and shall ask the court for the dismissal or closure of the proceedings.

After the process, the technician in charge of mediation will inform the Prosecutor of the outcomes, valuing it generally without explaining what the parties have been reported and submitting the agreements document signed by the parties, so that it can be considered in the context of the criminal proceeding.

## Effects

Once the conciliation has taken place or the commitments have been fulfilled, or if they cannot be met for reasons not attributable to the minor, the Prosecutor shall terminate the pre-trial phase and ask the Judge to dismiss the proceedings, with submission of the proceedings. In principle, the juvenile judge should accept the motion to dismissal, without continuing proceedings; unless the commitments have not been fulfilled in which case the judge will halt the dismissal. In the event that the settlement does not occur or the reparation agreement is not fulfilled by causes attributable to the minor, then it will continue the ordinary judicial proceeding.

One problem that may arise is the protection of the presumption of innocence when the mediation process is initiated but the minor fails to comply with the proposed solution and therefore the judicial process has to continue. Given that mediation processes, as provided in Article 19, need the minor to recognize the damage, to guarantee and protect the principle of the presumption of innocence, it is necessary that the declaration recognizing the damage caused is not considered by the judge in the course of the proceeding.

In relation to the issue of civil liability, arising from the crime and mediation processes that end with a reconciliation between the parties, successfully performed but that has not reached an agreement with the minor in relation to the compensation for property damage, the law determines the dismissal of the criminal case. There is no option in juvenile court for the requirement of civil liability, existing before the reform of LORPM. This implies that the victim that wants to claim, needs to go to the civil courts for economic compensation due to damage and cost derived from the situation and process.

## E. Revision of measures due to conciliation in sentence execution

The possibility of conciliation and reparation as an option that allows the review of the measure imposed is provided for in Article 51.3 of the LORPM, and in Article 15 of the implementing regulation. It is a possibility that has not been used enough from the point of view of practical application compared with previously examined court settlements.

It is necessary to make an initial note. While it is true that Article 51.3 of the LORPM only speaks of conciliation, it is to be noted that article 15 of its implementing regulation (which in its title also refers to the “review of the measure by conciliation”) allows the review of the implementation both for conciliation or repair. So the view is that the policy maker has used the concept of “conciliation” in a broad sense, including both material and psychological compensation to the victim.

However, the large differences between conciliation and repair, in the pre-trial phase, and the one referred in this section, are related to the limits on the nature of the offenses committed.

For the conciliation or repair in the pre-trial phase, it is established that the offenses must be less serious or misconduct, and also there must be lack of serious violence or intimidation when committing. For the conciliation or repair in execution phase, however, the acts committed do not have these limits, without prejudice to the nature of the offenses to be taken into account in assessing that “the act (conciliation) and the duration of the measure already accomplished are the reproach deserved for the minor”.

To make conciliation or repair be enough in relation to the execution of the measure, the young offender must present a suitable profile in regard to responsibility assumption and compensation for damages. That is, there should be a favorable prognosis of conciliation or repair capacity. This means that the minor should have assumed his responsibility for the acts committed.

While the recognition of the damage in pre-trial phase could cause problems in relation to respecting the principle of presumption of innocence, that problem disappears when conciliation or repair occurs in the phase of sentence execution, since the existence of a conviction sentence, which takes into account the proven facts that are the result of the trial evidence, distorts the presumption of innocence.

It is considered that the measure has succeed if the minor has shown good signs of his intention and willingness to apologize to the victim or to participate in mediation and repair programmes. To conclude this, it is necessary to assess the evolution shown by the minor during the educational intervention and where the different operators of the juvenile justice system may collect such information through the progress reports issued

by the technical team in charge of the implementation of the measure.

The minor may have the advice of his solicitor at all stages of repair or conciliation, as the solicitor and the prosecutor are the ones that can propose to the judge the termination of the measure imposed under Article 51.3 of the LORPM.

With respect to the victim, the same parameters, as those seen for conciliation and repair of the pre-trial phase, are taken into account.

In regard to the mediation team, Article 15 of the LORPM implementing regulation states that the mediation functions to achieve conciliation or repair correspond to the competent public entity for the implementation of the measure in question. In this it differs from conciliation and repair carried out under the pre-trial phase, in which Articles 19.3 and 27.3 of the LORPM attribute this function to the technical team of the courts and the prosecutor. In this sense it is also necessary to take into account Article 8.7 of the LORPM implementing regulation.

The collaboration among the educators who intervene with the minors during the execution of the measure is important, as they are the ones who have enough information about the possibility of mediation within the educational programme, taking into account the characteristics of the parties and the circumstances for this mediation process to have an educational character for the minor.

## Requirements

There are two conditions for the conciliation or repair to be provided for the dismissal of the measure in execution:

“That the measure time already complied is enough reproach for the offense committed”.

Both the competent public entity and the mediation team will have to make an assessment about whether the measurement time expresses enough reproach for the acts committed by the minor. Therefore the degree of severity of the offense is an important factor to be considered in order to make that assessment.

“That the safety period has been complied”.

Given that the conciliation and repair in the implementation phase can assume that the measure of the minor is dismissed, it is convenient to take into account the rules stated in the LORPM on this mode of early termination of the criminal responsibility of minors in the Spanish law. It is at this point that the “safety period” foreseen in cases of serious crimes committed by the minor must be taken into account, for which, moreover, the close custodial sentence is seen as mandatory. The two assumptions that we can find are:

when the facts of the case are mentioned under Article 9.2 of the LORPM (cases of extreme gravity), for which the extent of custodial measure has to be complied with due to conciliation, at least until the first year of the measure; and

when the act is constitutive of any of the offenses mentioned in the Criminal Law, in Articles 138 (homicide), 139 (murder), 179 and 180 (sexual assault) or 571 to 580 (terrorist offenses) or any other crime that has a penalty of more than 15 years in the Criminal Code, the custodial measure cannot be avoided due to conciliation or repair until at least half of the measure has been complied with.

With regard to the process of mediation, the law states that the mediation functions cannot result in an alteration of the compliance of the measure imposed, without prejudice to the release authorized by the juvenile court<sup>37</sup> for that purpose.

## Effects

If the results achieved after the mediation process are satisfactory in the opinion of both the Prosecutor and the minor's solicitor, they may propose to the court that the measure imposed is dismissed. Once the proposal has been received, the juvenile judge will hear the other party (who has not been involved in such proposal), the technical team and the representation of the public entity, and then will take the adequate decision.

The only response provided for in Article 51.3 of the LORPM, is the cessation of the effects of the measure imposed. Nevertheless, if the juvenile judge considers that the necessary conditions are not complied with (for example, because the time is not enough to express the reproach in relation to acts committed) then he can adopt, according to the provisions of articles 13 and 51.1 of the LORPM, the decision of reducing the measure imposed or substituting another measure considered more appropriate among those mentioned in the law.

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<sup>37</sup> The authorization for release rules are stated in the LORPM implementation regulation, in Articles 45 to 50. The competent person would be the Director of the custodial centre in case of open prison, and the juvenile judge in case of close prison or therapeutic regime. It is discussed if such authorization should be given by the judge or the Director of the centre in case of open prison in therapeutic regime (the latter case coincides with the opinion of BUENO ARUS F. (Coord.), LEGAZ CERVANTES F., PERIAGO MORANT J.J., SALINAS IÑIGO A., Comentarios al reglamento de la ley orgánica 5/2000 de 12 de enero reguladora de la responsabilidad penal de los menores, Colección Estudios Jurídicos, Murcia, 2008 p.532 y siguiendo el mismo criterio la Circular 3/2013 de la Fiscalía General del Estado sobre Criterios de aplicación de las medidas de internamiento terapéutico en el sistema de justicia juvenil, p.23-24).

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