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**RESTORATIVE JUSTICE WITH YOUTH OFFENDERS.**

**COMPARING THE USE OF RESTORATIVE JUSTICE IN SPAIN AND THE UK  
(ENGLAND AND WALES) AND HOW THE CRMINOLOGIST CAN ADD  
VALUE TO THE PROCESS.**

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## 1. **ABSTRACT.**

This paper analyses the use of Restorative Justice with Youth Offenders focusing on one of the most used practices, Mediation, in this case, Criminal Mediation. The definition and its meanings will be defined, how it is used according to the Spanish system and in comparison, the process used in the United Kingdom (England and Wales). As a final focus point, a Criminologist is proposed to work alongside the existing professionals adding value as an additional tool to this restorative practice, Criminal Mediation.

**RESUMEN:** En el siguiente trabajo se analiza el uso de la Justicia Restaurativa en el ámbito de menores infractores, centrándose en una de sus prácticas más utilizadas, la mediación, y en este caso, la mediación penal. Se presenta en primer lugar la definición y los atributos de la Justicia Restaurativa, su uso en el entorno español y posteriormente, desde el derecho comparado, se explica su uso en el Reino Unido (Inglaterra y Gales). Para finalizar, se concluye el uso de la mediación con menores junto con el énfasis hacia la figura del criminólogo como herramienta útil, junto con otros profesionales, para esta práctica restaurativa, la mediación penal.

**KEYWORDS:** Restorative Justice. Victim – Offender Mediation. Youth Offenders. Technical Team. Youth Offending Teams. Youth Cautions. Criminologist.

**PALABRAS CLAVE:** Justicia Restaurativa. Mediación Penal (*Victim – Offender Mediation*). Menores Infractores. Equipo Técnico. *Youth Offending Teams*. *Youth Cautions*, Criminólogo.

## **2. PRESENTATION AND REASONS FOR THIS TOPIC.**

Why is justice that seeks re-education, re-socialisation and social peace something so questionable in the criminal justice courts? Restorative Justice tries to achieve just that.

Prevention should be key to eradicating recidivism. Using and encouraging these resources should be a primary objective in the criminal justice system, placing greater emphasis on the cases of youth offenders. In most cases, these youths have a long life ahead of them, to which stigmatisation and labelling must be avoided in order to improve their lives. Restorative Justice can help them make amends and possibly stop their criminal careers. This paper does not try to justify the abolishment of retributive systems as a whole, but to include a humanitarian vision that encourages the participation of all those involved in a criminal act, i.e. both the perpetrator and victim to reach social harmony at some stage following the crime.

I believe that the ideology of Restorative Justice covers all areas in the search for improvement after a criminal act, in the interest of both the individual (victim or offender) and general interest (good of all).

Therefore, in this paper I present a comparative study of the use of Restorative Justice in the Spanish Criminal Justice System comparing it to the use of Restorative Justice in the United Kingdom, specifically England and Wales, emphasising the field of juvenile justice and youth offenders and how Criminologists can become part of this very important process.

### **3. RESTORATIVE JUSTICE AND VICTIM – OFFENDER MEDIATION .**

#### **3.1 Definition of Restorative Justice.**

Following new trends in Criminal Justice, accompanied by the rise of victimology, which is a social science that fights violations of human rights<sup>1</sup>, a paradigm shift in the conception and treatment of crime has been observed. Restorative Justice focuses on the purpose of punishment and the victim's role in the criminal process<sup>2</sup>. This is a reparative system rather than a retributive system.

Below, the definition of Restorative Justice is described alongside its origin, the objectives and goals, the pillars and principles and the different practices and use of this as an alternative to retributive justice mainly in youth offenders.

A widely accepted definition is by Marshall “Restorative Justice is a process whereby all parties with a stake in a specific offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future<sup>3</sup>”.

While emphasising one of the main precursors of this justice, Howard Zehr adapts this definition, identifying the ways to obtain the objectives of this process: “Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible<sup>4</sup>”.

Regarding the goals and objectives of Restorative Justice, Susan Sharpe summaries them in the following way in her book: *Restorative Justice: A Vision for Healing and Change*<sup>5</sup>;

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<sup>1</sup> J, Wemmers, *Victimology: a Canadian perspective*. (Toronto: University of Toronto Press, 2017), 25.

<sup>2</sup> A, García Herrera, *Justicia restaurativa: breve reflexión sobre su integración en el marco del proceso penal en España*, Diario La Ley, núm. 8654, Sección Doctrina, 26 de noviembre de 2015, Ref. D-445, p.1. Quoted in: A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).

<sup>3</sup> T, Marshall, *Restorative Justice, An Overview*. (London: Home Office, Research Development and Statistics Directorate, 1999).

<sup>4</sup> H, Zehr, *The Little Book of Restorative Justice*. (United States of America: Good Books, 2002), 37.

<sup>5</sup> S, Sharpe, *Restorative Justice: A Vision for Healing and Change*. (Canada: Mediation and Restorative Justice Centre, 1998). Quoted in: H, Zehr, *The Little Book of Restorative Justice*. (United States of America: Good Books, 2002), 37.

Restorative Justice programs aim to:	Achieving these goals requires that:
<ul style="list-style-type: none"> <li>● Put key decisions into the hands of those most affected by crime.</li> <li>● Make justice more healing and, ideally, more transformative.</li> <li>● Reduce the likelihood of future offenses.</li> </ul>	<ul style="list-style-type: none"> <li>● Victims are involved in the process and come out of it satisfied.</li> <li>● Offenders understand how their actions have affected other people and take responsibility for those actions.</li> <li>● Outcomes help to repair the harms done and address the reasons for the offense (specific plans are tailored to the victim and the offender's needs).</li> <li>● Victim and offender both gain a sense of "closure"<sup>6</sup> and both are reintegrated into the community.</li> </ul>

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<sup>6</sup> The word "closure" is often offensive to victims, especially of severe crimes. It seems to suggest that all can be put behind and the book closed. However, the word does imply a sense of being able to move forward, which restorative justice aims to make possible. H, Zehr, *The Little Book of Restorative Justice*. (United States of America: Good Books, 2002).

### 3.2 The Three Main Pillars of Restorative Justice.

The three fundamental pillars (Engagement and prominence of the parties. Full damage repair of the harm caused by the criminal act and the negotiating techniques<sup>7</sup>) on which the practice of Restorative Justice is based, linked and interwoven with the common principles (voluntarism, safety, neutrality on behalf of the mediator/facilitator and accessibility<sup>8</sup>) must be followed in any restorative practice for effective execution. Respect must also be present at all times during the process.

#### 3.2.1 Pillar 1: Engagement and Prominence.

The first pillar refers to active involvement, engagement and prominence of the parties involved, i.e. the victim, offender and anyone else who has suffered as a result of the criminal act. Together they are essential to the healing process when attempting to repair the damaged caused by the crime. Although it is the State who punishes, through its *Ius Puniendi*, the parties must not remain in the shadow of the criminal process but have important roles in such procedures. Restorative Justice fights to rehabilitate the offender, not by simply punishing him or her, but making the person take responsibility and being accountable for his or her actions by learning values, norms and guidelines of the group to which they belong<sup>9</sup>. But most importantly the victim's active involvement and engagement are key.

In both the Directive 2012/29/EU and in the Spanish Law 4/2014, April 27, of the Standing of Victims of Crime, the use of Restorative Justice and how it offers greater satisfaction to the victims by giving them the opportunity to have a voice and be heard in the criminal process is made clear. They are able to express their feelings, ask the offender questions directly and use other ways of participating in other restorative mechanisms<sup>10</sup>. The victim goes from a passive element to an active participant in this process, aiming to repair his or her harm in a way that they believe is appropriate for them and the situation.

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<sup>7</sup> A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).

<sup>8</sup> See Note 7.

<sup>9</sup> E, Urbano Castillo, *La Justicia Restaurativa Penal*. La Ley Penal núm 73, 2010, p. 6. Quoted in: A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).

<sup>10</sup> See Note 7.

The first pillar, mentioned above, Engagement and Prominence is related to the Principle of Voluntarism. Participation in any restorative process is voluntary and based on informed choice, for both parties and it allows them to abandon the process at any time they wish or feel it is necessary. This principle is intertwined with another, the principle of safety or confidentiality, which aims to ensure the safety of all participants and creates a safe space for the expression of feelings and views about the harm that has been caused. Anything that is discussed in the restorative process remains completely private. The judge will not be party to the content of any conversation unless both parties have previously signed an agreement to the contrary. This principle encourages confidence in the process and makes all parties concerned feel free to express their opinions sincerely.

### *3.2.2. Pillar 2: Full Damage Repair to the harm caused by the Criminal Act.*

Referring back to the victim, he or she must feel that the harm caused has been, or is being, repaired in an integral and complete manner. The perpetrator is expected to act with restorative behaviour towards the crime committed, according to the restorative process, in a different way to just merely giving economic compensation. They must take into account the psychological and emotional damage they have caused<sup>11</sup>. For Restorative Justice, justice begins with the concern for victims and their needs<sup>12</sup>. This type of process tries to repair the damage as much as possible<sup>13</sup>. This can be considered the main goal for this second pillar.

### *3.2.3 Pillar 3: Negotiating Techniques.*

The last pillar, refers to the negotiating techniques used by the mediator/facilitator who must obey the principles of neutrality and impartiality. This should be accessible to all parties concerned, leaving discrimination completely out of the equation.

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<sup>11</sup> M<sup>a</sup> J, Tamarit Sumalla, *La articulación de la justicia restaurativa con el sistema de justicia penal*. (Granada: Comares, 2012), 62. Quoted in: A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).

<sup>12</sup> H, Zehr, *The Little Book of Restorative Justice*. (United States of America: Good Books, 2002), 22.

<sup>13</sup> An adequate reparation of the damage caused can be symbolic (taking into account his or her responsibility and asking for forgiveness), to benefit the victim or the community by carrying out an activity in the form of community service or in the form of economic compensation. I.J Subijana Zunzunegui, *Las víctimas en el sistema penal. En especial, la Justicia Restaurativa*. Estudios de Derecho Judicial, núm 121, 2007, p.7. Quoted in: A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).



Dialogue is the common element to all restorative practices. It is the dialogue between victim and offender, directly or indirectly, where they try to resolve the conflict or dispute with the help of a third party. The third party being a qualified professional in the form of a mediator/facilitator. Restorative processes are fair and unbiased toward the participants and the mediator has the role of helping the parties find solutions based on the needs and wishes of both victim and offender, in a total impartial and neutral manner. Finally, it is important to know that every restorative process is adjusted to each specific case. The procedure, as a whole, should be flexible and accommodating to the circumstances of each situation<sup>14</sup>.

In summary, and in the words of Zehr, Restorative Justice requires, at minimum, we address victims' harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders and communities in this process<sup>15</sup>.

### **3.3 Origins of Restorative Justice.**

Restorative Justice originated in the Anglo-Saxon world, in the 1970s (Canada, the United States, Australia and New Zealand) and a decade later it was adopted in Europe, Ireland, England and Wales being pioneering countries<sup>16</sup>. However, since 1989, New Zealand has made Restorative Justice the hub of its entire juvenile justice system<sup>17</sup>. In many places today, Restorative Justice is considered a sign of hope and the direction of the future as an escape route from the traditional, severe and retributive justice<sup>18</sup>. Restorative Justice is a form of justice that promotes healing and it puts the real needs of the parties, the emotional communication, the ethics of care and the objectives of pacification over the idealist conception of justice<sup>19</sup>.

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<sup>14</sup> A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).

<sup>15</sup> H, Zehr, *The Little Book of Restorative Justice*. (United States of America: Good Books, 2002), 25.

<sup>16</sup> A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).

<sup>17</sup> See Note 15.

<sup>18</sup> H, Zehr, *The Little Book of Restorative Justice*. (United States of America: Good Books, 2002), 4.

<sup>19</sup> M<sup>a</sup> J, Tamarit Sumalla, *El necesario impulso de la Justicia Restaurativa tras la Directiva europea de 2012*, (Ars Iuris Salmanticensis, 2013), vol. 1, 139-160.

There are different restorative practices within Restorative Justice according to their restorative content: conferencing, circles, victim impact panels, restorative cautioning, among others<sup>20</sup>.

### 3.4 Restorative Justice in Spain.

Regarding the current Spanish Justice System, Restorative Justice does exist, however, can only be found, almost exclusively, through Victim - Offender Mediation, and legally regulated only in the Organic Law 5/2000, which regulates the criminal liability of children, ages 14 to 18<sup>21</sup>. However, for some authors of the doctrine <sup>22</sup>, there are elements of such justice regarding a reparation agreement based on art. 110 of the Criminal Code <sup>23</sup> (which deals with adults, ie over the age of 18) and a slight mention on mediation as a condition for suspending a sentence in article 84.1 of the same Criminal Code. However, no further information appears on how to carry out such practice in the case of adult mediation.

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<sup>20</sup> P, McCold y T, Watctel, *Restorative Justice Theory Validation*. (Devon: Willan Publishing, 2002). Quoted in: M<sup>a</sup> J, Tamarit Sumalla, *El necesario impulso de la Justicia Restaurativa tras la Directiva europea de 2012*, (Ars Iuris Salmanticensis, 2013), vol. 1, 139-160.

<sup>21</sup> T, Martínez Soto, *Mediación penal y su implantación en España: ámbito de la responsabilidad del menor. Estudio comparativo con Reino Unido*. Revista Internacional de Estudios de Derecho Procesal y Arbitraje. (núm 1 – 2011).

<sup>22</sup> J, L Del Río Fernández, *El reto de la mediación penal: el principio de oportunidad*, Revista La Ley. Revista jurídica española de doctrina, jurisprudencia y bibliografía. (núm 3 – 2006). Pág. 165; Vid: J, Cuéllar, *la experiencia en mediación penal en Alicante*, Revista La Ley Penal: revista de derecho penal, procesal y penitenciario. (núm 56 – 2009); Vid: C, Hernández, *Implantación en las Audiencias Provinciales de las Oficinas de Medidas Alternativas a la Prisión*, Revista La Ley Penal: revista de derecho penal, procesal y penitenciario. (núm 44 – 2007) Quoted in: T, Martínez Soto, *Mediación penal y su implantación en España: ámbito de la responsabilidad del menor. Estudio comparativo con Reino Unido*. Revista Internacional de Estudios de Derecho Procesal y Arbitraje. (núm 1 – 2011).

<sup>23</sup> Responsibility established in article 110 of the Criminal Code includes restitution, the repairment of the damage, compensation of materialist and moral damages.

### 3.5 Definition of Victim – Offender Mediation.

Victim-Offender mediation, defined by Barona Vilar, is a course between victim and offender, who both voluntarily recognise the ability to participate in the resolution of a criminal conflict, with the intervention of a mediator, re-establishing the previous situation to crime and respect for legal order, in addition to giving satisfaction to the victim and the recognition of such activity by the offender<sup>24</sup>.

In the words of Gema Varona, Mediation makes it possible to speed up social response and fosters the culture of dialogue to resolve conflicts. The last element is of special relevance in the case of minors, as in addition to resolving the underlying conflict in each specific case to which it is applied, the mediation process serves as a learning tool to resolve future conflicts in a peaceful and communicative manner<sup>25</sup>.

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<sup>24</sup> S, Barona Vilar, *Mediación Penal: un instrumento para la tutela penal*, Revista del Poder Judicial núm 94, 2012, p. 24. Quoted in: A, Montesinos García, *Tratado de Mediación. Tomo II. Mediación Penal*. (Valencia: Tirant lo Blanch, 2017).

<sup>25</sup> G, Varona, *Victimología: en busca de un enfoque integrador para repensar la intervención con víctimas*. (Editorial Aranzadi, 2018).

#### **4. USE OF RESTORATIVE JUSTICE, THROUGH VICTIM – OFFENDER MEDIATION, WITHIN THE YOUTH CRIMINAL JUSTICE SYSTEM IN SPAIN.**

##### **4.1 Organic Law 5/2000 January 12th (LORPM), regulating the liability of juveniles and principles.**

As previously stated, penal mediation is greatly recognised in Spanish law in the area of penal responsibility for youth offenders aged between 14 and 18 inclusive. There is no penal punishment for children under the age of 14 who commit crimes, however, there is the possibility of a mediation process<sup>26</sup>. This exists through agreements with public entities, such as, Social Services and Child Protection and Welfare Centres and the Ministry of Justice. Young adults who commit a criminal act when they have already reached the age of 18 or older, will be judged by the Criminal Code as adults with full criminal responsibility. They also have the opportunity, albeit limited, to take part in a mediation process as was mentioned previously.

Criminal mediation for youths is regulated in the Organic Law 5/2000 January 12th (LORPM), regulating the liability of juveniles, which in accordance with international standards<sup>27</sup>, is based on a series of principles that are explained below.

As outlined in the Statement of Motives of the aforementioned Organic Law: “the law is consciously guided by the following general principles:

- Punishment through a punitive formal nature, however, with an educative perspective throughout the penal procedure, i.e from arrest to sentence and visible in the punishment applied to the juvenile offenders<sup>28</sup>.
- Recognition of all their constitutional rights and guarantees in relation to the youth’s best interests.

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<sup>26</sup> C, Amante García, *Cuestiones prácticas para la aplicación de la mediación penal*. (Tirant lo Blanch, 2016).

<sup>27</sup> Recomendaciones y Directivas de la UE, Constitución para Europa, Tratado de Lisboa (2009), *Green Paper, Commission of the European Communities*, Código de Conducta para Mediadores (2004), Tratado de Amsterdam (1999), Víctimas de delitos en la Unión Europea. Normas y medidas (2000), Comisión de Prevención del Delito y Justicia Penal (Viena, 2002), *Common Law*.

<sup>28</sup> In the case of youth offenders, punishments are of a formal nature with the addition of an educative perspective.

- Differentiation of procedural sections and sanctioning purposes according to the youth's age.
- Flexibility in the execution of measures or punishment recommended on a case - by - case basis.
- Competence of the local social service bodies in all autonomous regions, related to the re-education of the youth, to the execution of the measures imposed in the sentence and the judicial control of such activity.

It also states that:

- The criminal law of minors must prioritise the child's best interests and this must be the determining element in the procedure and all the measures or punishments adopted. This is the principle of specialisation.

The best interest of the child has to be valued with technical and non-formalistic criteria by a team of professionals specialised in the field of non-legal sciences (Psychologists, Social Workers and Educators) without violating any of the general guarantee principles such as the accusatory principle, the principle of defence or the principle of presumption of innocence<sup>29</sup>.

Therefore, the principles highlighted above in this law are of paramount importance in the whole penal procedure, from start to finish.

The entire juvenile system is centred around the re-education and re-socialisation of the youth in question. This is the objective of this law, however, in some cases, when the criminal process may not seem the most appropriate way to achieve such a goal, the principle of opportunity then comes into play.

The principle of legality states that upon any suspicion of a criminal act, the criminal procedure must be initiated. In contrast, the principle of opportunity, however, allows the initiated procedure to be abandoned or even terminated when considered necessary and ultimately when it seems to be in the youth's best interests.

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<sup>29</sup> Statement of Motives, Organic Law 5/2000 January 12th (LORPM), regulating the liability of juveniles.

## 4.2 The Principle of Opportunity.

This principle gives the victim, the offender and the community the opportunity to solve the situation through non-criminal proceedings. Each case is analysed individually and if criminal procedure is seen as appropriate, that then goes ahead.

In the area of juvenile offenders, it is the Public Prosecutor who gives the judge a margin of discretion so that they can find and apply the necessary measures or punishment that best fits the interest of each child focusing on their re-education, rehabilitation and re-socialisation<sup>30</sup>. This is decided with the prior help of the Technical Team.

The Technical Team is a legal departmental body composed of psychologists, social workers and educators. They are responsible for writing a report on the personal, educational and social circumstances of the minor, requested by the Public Prosecutor. The best interests of the youth are taken into account and the report will then be sent to the Juvenile Judge who is the competent judicial body who then imposes the recommended measures or punishment based on the aforementioned report. The Technical Team are also the professionals who perform mediation.

It is understood that there are precepts of the principle of opportunity in various articles of this Organic Law:

- Abandonment/file of the initiated procedure by the Public Prosecutor (article 18).
- Dismissal/Discharge of the procedure/file (articles 19, 27.4 and 30.4).
- Conformity in the criminal process (articles 32 and 36).
- Conditional suspension of the execution of the measure (article 40).
- Substitution of the measures imposed on the minor (articles 50 and 51).

What interests us in this paper are the precepts that regulate mediation. We reach the conclusion that, according to the law, mediation can be present in two key moments: At the beginning of the criminal procedure, by dismissal/discharge as a result of conciliation or reparation between the youth offender and the victim; and at the end of

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<sup>30</sup> C, Amante García, *Cuestiones prácticas para la aplicación de la mediación penal*. (Tirant lo Blanch, 2016).

the procedure, as a result of a substitution of measures or punishments when the youth expresses the will to reconcile with the victim or to repair the damage caused.

At no moment does this law mention the possibility of mediation during the criminal proceedings where juvenile offenders could possibly assimilate the situation in a more realistic way and then decide to take part in the solution i.e. mediation. This could be considered a result of repentance where the youth can then opt to repair the physical or emotional damage caused<sup>31</sup>. This practice of mediation does not exist in Spanish legislation at the moment; however, we can find regulated mediation during criminal procedures in the United Kingdom (England and Wales) when juveniles commit criminal offences. This regulation will be dealt with later on.

After interviewing one of the psychologists of the Technical Team of the Youth Courts in Alicante, Noemí Sisamon Rodríguez, she was able to explain to me the real life procedure a youth goes through when he or she has committed a crime. The youth is sent to the Technical Team where he or she is interviewed. The Technical Team tries to study all the personal, social and family circumstances of the individual. As I explained above, they carry out articles 18 and 19, if this is appropriate and the Public Prosecutor agrees. However, Sisamon informed me that in cases of gender violence or sexual assault, these articles cannot be applied. From the interview with Sisamon, I can conclude that mediation and educational based activities are usually favourable alternatives and the most sought by the Technical Team for the youth offender. Agreement with the sentence is very common too, this is when the youth pleads guilty and accepts the Judge's punishment. Sisamon told me that the principle of flexibility in juvenile law is what makes it special, along with its educational and re-socialising approach. I can highlight from the interview that, in her cases, youths who are involved in effective mediation, either at the beginning of the criminal process or in the modification of the punishment and through conciliation or reparation of the damage caused, have fewer relapses and less recidivism than those youths who do not accept the use of Restorative Justice.

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<sup>31</sup> T, Martínez Soto, *Mediación penal y su implantación en España: ámbito de la responsabilidad del menor. Estudio comparativo con Reino Unido*. Revista Internacional de Estudios de Derecho Procesal y Arbitraje. (núm 1 – 2011).

### **4.3 Criminal Mediation at the beginning of the process to override the case file.**

If at first, and in accordance with art. 18, the Public Prosecutor does not consider it necessary to initiate a criminal procedure, either because of correction in the educational and family environment of the youth, or that the criminal act was a less serious crime committed without violence or intimidation, the youth then avoids the continuation of criminal proceedings, although he or her will be transferred to a public entity in charge of the protection of youths.

As a result of conciliation or reparation between victim and offender, Article 19 can be used. This is the dismissal/discharge of the file through the use of criminal mediation.

- Conciliation: the minor offender recognises the damage caused and apologises to the victim. The victim accepts his or her apologies.
- Reparation: commitment assumed by the minor offender to carry out certain activities or jobs to benefit the victim or the community, followed by its effective realisation.

It is only possible to use the route of mediation if the crimes were committed without the use of serious violence or intimidation, that the youth and victim have been reconciled, or that the youth has assumed the commitment to repair the damage caused to the victim or injured party and that he or she are committed to fulfilling the educational activity proposed by the Technical Team.

After interviewing Pedro Eugenio Monserrat Molina, Lawyer of youth offenders of the Youth Courts of Alicante, he relates that in the case of youths, the practice of mediation is carried out through conciliation and reparation. These practices are part of a broad spectrum and must be understood as effective, i.e. they actually work and are an efficient way to accommodate mediation. In this area, Restorative Justice is used broadly, with each case being treated individually.

In some cases, the victim does not want to participate in the mediation. This is a disadvantage, but not a paralysis of the application of the dismissal/discharge, since it is for reasons beyond the will of the youth (art. 19.4). However, in the event that the minor does not comply with the reparation of the damage caused or the educational activity, the



dismissal/discharge cannot go ahead and allows the Public Prosecutor to continue processing the case through the criminal procedure (art. 19.5).

Mediation is a process of accountability for the youth offender. It serves to raise awareness of the damage caused and makes the minor think about what they have done and its effects. It allows the offenders to take responsibility for their actions, it helps them with their self-control skills and prevents recidivism by seeing the pain caused and its consequences<sup>32</sup>. The use of mediation prior to the judicial process means minimal judicial intervention and avoids the stigmatisation of the youth. From a preventive perspective, this route gives the youth a real vision of the damage he or she has caused helping him or her to realise the fact and therefore helping to avoid reoffending.

#### **4.4 Criminal Mediation at the end of the process, after sentencing the youth.**

Mediation can also be used after the penal process which has ended in a custodial sentence or an imposed punishment. However, if the youth is repentant, reproachful during the execution of his punishment or sentence, the original punishment/sentence could be lessened or reduced if it is deemed necessary and the youth deserving. (Article 51).

The decision is made by the Judge who is specialised in Youth Crime, and makes a prior request to the Public Prosecutor or to the minor's lawyer, to establish if the youth is already attending a centre doing community work or is under state custody. He or She will always hear both parties' sides, the Technical Team and, if needed, Social Services.

Article 51 of the law allows communication between the juvenile offender and victim out of court and at any time during the execution of the punishment that has already been given to the youth. This type of conciliation will be done voluntarily by both victim and offender, and in front of a third party (mediator/facilitator) who helps them with effective communication leading the dialogue to reach an agreement on how to repair the

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<sup>32</sup> C, Amante García, *Cuestiones prácticas para la aplicación de la mediación penal*. (Tirant lo Blanch, 2016).

damage caused<sup>33</sup>. Article 51, unlike Article 19, does not express the need for the crimes to be committed without serious use of violence or intimidation, e.g. less serious crimes.

Criminal mediation during the time in which the sentence is being carried out also has its advantages for the youth offender and the victim or injured parties. The youth offender is given the opportunity to apologise in an emotional and personal way while serving his or her sentence. The victim may feel more satisfaction through this type of mediation by seeing his or her offender fulfil a punishment, but at the same time, seeing the sincere intention the youth has to repair the damage caused in a more personal and acceptable way for the victim.

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<sup>33</sup> T, Martínez Soto, *Mediación penal y su implantación en España: ámbito de la responsabilidad del menor. Estudio comparativo con Reino Unido*. Revista Internacional de Estudios de Derecho Procesal y Arbitraje. (núm 1 – 2011).

## **5. USE OF RESTORATIVE JUSTICE, THROUGH VICTIM – OFFENDER MEDIATION, WITHIN THE YOUTH CRIMINAL JUSTICE SYSTEM IN THE UNITED KINGDOM (ENGLAND AND WALES).**

### **5.1 Age of Criminal Responsibility.**

In the next chapter, the legislation used in the United Kingdom is outlined focusing mainly on England and Wales but some examples used in Scotland, according to the use of Restorative Justice in Youth Courts are also mentioned.

The age of criminal responsibility in England and Wales is age 10. The rules are different in Scotland. A child is responsible at the age of 8<sup>34</sup>.

Children under 10 in England or Wales, and under 8 in Scotland can't be arrested or charged with a crime but other punishments can be given to children under these ages who break the law<sup>35</sup>, i.e, "Local Child Curfew" or "Child Safety Order". In some cases, they can be taken into care by child protection and welfare systems or their parents could be held responsible.

As a result of new regulation over the years in the United Kingdom, listed below are legislations that highlight different ways of repairing damage, re-education, and ways to treat conflict through means of conflict resolution outside the criminal process thus Crime and Disorder Act of 1998, the Youth Justice and Criminal Evidence Act of 1999 and the Powers of Criminal Courts (Sentencing) Act of the year 2000<sup>36</sup>.

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<sup>34</sup><https://www.gov.uk/age-of-criminal-responsibility>. It is important to mention The Bulger Case when reference is made to the age of responsibility in the United Kingdom. The case shocked the entire country when in 1993, two young boys at the age of ten abducted and murdered a toddler who was only two years old. Although it was and still is a very rare crime, because of the horrifying use of violence used and the age of the murderers, there is still little possibility of increasing the age of responsibility for youth offenders. <https://theconversation.com/the-james-bulger-case-should-not-set-the-age-of-criminal-responsibility-91342>

<sup>35</sup>For those under the age of ten a presumption is established *iuris et de iure* of irresponsibility. The child under the age of ten is presumed *doli incapax*. Thus, when a child under the age of ten commits an offense, it will not be held criminally liable, but according to the Children Act of 1989, may be subject to a procedure of protection or care. C, Vázquez González, *Derecho Penal Juvenil europeo*. Dykinson, 2005. Quoted in: M<sup>a</sup> Dolore, Fernández Fustes, *La mediación penal con menores infractores en Inglaterra y Gales. En Mediación con menores infractores en España y los países de su entorno*. (Coord Ester González Pillado) págs 345-371. Valencia: Tirant lo Blanch, 2012.

<sup>36</sup> T, Martínez Soto, *Mediación penal y su implantación en España: ámbito de la responsabilidad del menor. Estudio comparativo con Reino Unido*. Revista Internacional de Estudios de Derecho Procesal y Arbitraje. Núm 1. 2011.

Young offenders in England and Wales between the ages of 10 and 17 can be arrested and taken to court. They are treated differently from adults and are dealt with by Youth Courts, given different sentences and can be sent to special secure centres for young people, but not adult prisons<sup>37</sup>. However, Youth Courts may, in certain situations, transfer the prosecution of the youth to another Court. Specifically, in England the case is transferred to the Crown Court when the child is charged with a serious crime or when the child committed a crime together with an adult<sup>38</sup>.

Young people aged 18 or over are treated as an adult by the law but if they are sent to prison, they will be sent to a secure centre that holds 18 to 25-year-olds, not a full adult prison<sup>39</sup>. This does not happen in Spain, even though youth offenders aged 14 to 17 are sent to youth centres and not adult prisons but if the offender turns 18 while held in the youth centre, it is up to the Youth Judge, to decide whether they should remain in the Youth Centre or be transferred to an adult prison. The decision is made only after being evaluated by the Public Prosecutor, the Technical Team and the professionals who work at the centre. If the decision is to stay put and the offender turns 21, the process will be repeated to again determine whether the young offender is able to stay in the youth centre and not sent to an adult prison, however, it is only in exceptional cases that the young offender remains at the youth centre and not sent to an adult prison to serve the rest of his or her sentence.

## 5.2 Youth Offending Teams.

The equivalent to the Technical Team in Spain is called the Youth Offending Team (YOT) in England and Wales. It is a multi-agency team established by a local authority in cooperation with Civil Servants who work with children at risk of offending, have offended or alleged to have offended. Under the terms of the Crime and Disorder Act 1998, YOTs must include representatives from the police, the probation service,

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<sup>37</sup> <https://www.cps.gov.uk/youth-crime>

<sup>38</sup> P, Parsole, *Juvenile justice in Britain and the United States*. Boston USA, 1980. Quoted in: Fernández Fustes, M<sup>a</sup> Dolores, *La mediación penal con menores infractores en Inglaterra y Gales*. En *Mediación con menores infractores en España y los países de su entorno*. (Coord Ester González Pillado) págs 345-371. Valencia: Tirant lo Blanch, 2012.

<sup>39</sup> <https://www.gov.uk/age-of-criminal-responsibility>.

social services, health and education and they may also include other professionals. These teams provide their services before, during and after the sentencing process<sup>40</sup>.

As one of their tasks, the team looks into the youths' background and tries to help them stay away from crime. Prevention is the essential key for YOT and they make that their main objective. Comparing it to Spanish legislation, the Technical Team here only appears when a youth has committed a crime and even though its Organic Law 5/2000 is based on prevention and stopping recidivism, it would be interesting and valuable, if possible, to introduce a system where support is given to those more vulnerable and likely to commit a future crime, as the YOT do in England and Wales.

The YOT also run local crime prevention programmes<sup>41</sup>, help young people at the police station if they're arrested, help young people and their families at court, supervise young people serving a community sentence and stay in touch with a young person if they are sentenced to custody<sup>42</sup>.

Usually, the police are the first people to contact the youth offending team. But family members and friends can also contact them if they are worried about a young person's behaviour.

As said before, Youth Offending Teams are part of the local council and are separate from the police and the courts. In Spain, the Technical Team are the right hand of the Public Prosecutor and can only to their job through the legal process.

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<sup>40</sup> M<sup>a</sup> Dolores, Fernández Fustes, *La mediación penal con menores infractores en Inglaterra y Gales*. En *Mediación con menores infractores en España y los países de su entorno*. (Coord Ester González Pillado) págs 345-371. Valencia: Tirant lo Blanch, 2012.

<sup>41</sup> There are various prevention programmes that work to keep young people away from crime. They are run within local communities, and can involve parents and families. Young people are placed on these programmes if they have been in trouble with the police, if they're 'at risk' of committing a crime and if they're involved in anti-social behaviour. Attending one of these programmes is voluntary. The young person and their parents or carers have to be happy with everything before it starts. Many programmes are run by the council's local youth offending team or by other local organisations like youth charities. <https://www.gov.uk/youth-crime-prevention-programmes>

<sup>42</sup> A court can give a young person a custodial sentence if the crime is so serious there is no other suitable option, if the young person has committed crimes before, if the judge or magistrate thinks the young person is a risk to the public. A young person can also be sent to custody on remand. It is the Youth Justice Board decides which secure centre a young person will be sent to depending of the youth's circumstances. <https://www.gov.uk/young-people-in-custody>

The YOT work with the police, probation officers, health, housing and children's services, schools and education authorities, charities and the local community. Here we see that England and Wales includes the whole community to prevent crime and in the process of healing when a crime is committed. Restorative Justice tools are used as main elements within the work of the YOT and Spain could also allow different agencies to cooperate with the Technical Team and let these professionals venture out of the court system and visit schools and organisations that aim at preventing crime aimed at those who find themselves in vulnerable situations and at risk of committing crimes..

### 5.3 Community Sentence.

For youths that aren't given a custodial sentence, will be sentenced to carry out Community service, in Spain this punishment is best translated as *Trabajos en Beneficio a la Comunidad*.

There are 3 main community sentences a court can give you:

- *Referral Orders*: Once the penal process has begun, young offenders are referred to a YOT, who tries to re-educate the youth by holding mediation meetings between him or her, the victim and those who were affected by the crime, or those have an interest in the crime and justify why, for example the Youth Offender Panels (YOP)<sup>43</sup>. Referral Orders can be mandatory or discretionary<sup>44</sup>.
  - **Mandatory Referral Conditions**: when the youth has no previous convictions, he or she pleads guilty to all imprisonable offences with which he or she is

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<sup>43</sup> Youth Offender Panels (YOP) are organised by the Youth Offending Teams (YOT) and could include: the youth offender, his or her family and friends, the victim and his or her family, a representative of YOT and three members of the community. The YOP uses guidelines of Restorative Justice to reach agreements on the rules and conditions of the behaviour program for the youth must require. This may even resort to mediation as a possible result of the agreement reached in the YOP. M<sup>a</sup> Dolores, Fernández Fustes, *La mediación penal con menores infractores en Inglaterra y Gales*. En *Mediación con menores infractores en España y los países de su entorno*. (Coord Ester González Pillado) págs 345-371. Valencia: Tirant lo Blanch, 2012.

<sup>44</sup> Art, 26, Powers of Criminal Courts (Sentencing) Act, 2000. Extraído de: <https://www.cps.gov.uk/legal-guidance/youth-offenders>

charged and the court does not consider that a Detention and Training Order, Absolute Discharge or Hospital Order is appropriate.

- Discretionary Referral Conditions: when Mandatory Referral Conditions are not satisfied and the youth has no previous convictions and pleads guilty to a non-imprisonable offence, or pleads guilty to one or more offences and is convicted after trial on other crimes or the youth has a previous conviction but has never been sentenced to a referral order or the youth has a previous conviction and has been sentenced to a referral order but the youth offending team recommends a further referral order and the court finds exceptional circumstances to justify this course of action.
- Reparation Orders – when you make up for the harm caused by your crime, such as, repairing any damage to the victim’s property.
- Youth Rehabilitation Order – when a court decides what the offender must or must not do, these decisions can last for up to 3 years.

As part of your community sentence you may also have to speak to the victim and listen to their side of the story or apologise to them, either in writing or, if the victim wants, face-to-face. This is where Restorative Justice is used through Victim – Offender Mediation<sup>45</sup>.

However, if the youth breaks the rules of his or her community sentence, they could end up back in court, and if they have recently been released from custody they could be sent back.

The youth can also be given a discharge, when the court decides that the experience of being arrested and going to court is enough of a punishment. Spain’s legislation applies this possibility as explained above in its article 18 of the Organic Law

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<sup>45</sup> With help from the mediator, the victim is protected, the youth offender is held accountable for his or her actions and they reach an agreement to repair the harm caused, through dialogue. M, Umbreit, *Restorative Justice Through Victim – Offender Mediation*. Quoted in: M<sup>a</sup> Dolores, Fernández Fustes, *La mediación penal con menores infractores en Inglaterra y Gales*. En *Mediación con menores infractores en España y los países de su entorno*. (Coord Ester González Pillado) págs 345-371. Valencia: Tirant lo Blanch, 2012.

5/2000. However, England and Wales go one step further by giving the police the competence to decide whether to prosecute or not. This is not possible in Spain as the police force have no say in the legal process and must arrest young criminals and transfer them to the Public Prosecutor as soon as possible.

#### **5.4 Youth Cautions.**

The decision whether to prosecute a youth offender is open to judicial review according to the circumstances and general character of the accused. Following the previous explanation and the possibility of not being prosecuted in court, England and Wales give the police force the competence to act on the matter through Youth Cautions. The principle of opportunity clearly appears in this system by virtue of which the police decide if it is necessary or not to bring a criminal action against the youth offender, depending on the seriousness of the crime and the youth's attitude<sup>46</sup>.

A Youth Caution is a formal out-of-court agreement as set in the Crime and Disorder Act 1998. They are primarily administered by the police and are intended to provide a proportionate and effective response to offending behaviour. Youth Cautions can be used for any offence provided that the police are satisfied that there is sufficient evidence to charge the youth with an offence, that the youth admits the offence to the police and that the police do not consider that the youth should be prosecuted or given a youth conditional caution for the offence (this is a different type of caution that warns the youth that if he or she fails to comply with any of the conditions they may end up being prosecuted)<sup>47</sup>.

There is no statutory restriction on the number of youth cautions that a youth can receive, even if he or she has previous convictions, reprimands, warnings, youth cautions and youth conditional cautions. The police will take into account the offending history and the seriousness of the offence when deciding whether to issue a youth caution. Offence seriousness is scored from 1 to 4. Offences that score 2 or 3 will usually result in

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<sup>46</sup> A, Montesino García, *La mediación penal en Inglaterra y Gales en la mediación penal para adultos. Una realidad en los ordenamientos jurídicos*, (Tirant lo Blanch, Valencia: 2009), p. 107.

<sup>47</sup> <https://www.cps.gov.uk/legal-guidance/youth-offenders>



a youth being given a youth caution. If the offending behaviour cannot be satisfactorily addressed by a youth caution, the police will consider a youth conditional caution. The police must refer the youth who has received a youth caution to the Youth Offending Team who arrange a rehabilitation programme for him or her.

For those youths for whom a formal out-of-court agreement/settlement is not an option, it is still important to ensure that a prosecution is only brought in circumstances where this is a proper and proportionate response. Where a case has proceeded to court, but the prosecutor decides that a youth caution or youth conditional caution can be justified, the matter should be adjourned for consideration of that disposal. Prosecutors are reminded that an admission of guilt to the police is essential before a youth caution can be given. Once a young person has been correctly charged it is likely to be only in exceptional circumstances that a youth caution or youth conditional caution will be given.

Comparing the UK's legislation according to Youth Caution to Spain's Organic Law 5/2000 regulating youth offenders, In Spain there is no possibility of giving the police force some sort of competence to prevent a youth from being sentenced or either working with a YOT on a rehabilitation programme for the young offender, these options do not exist. An out-of-court alternative solution is not possible in Spain when a youth commits a criminal offence. In Spain an offending youth must be presented to the Public Prosecutor and he or she decides if the penal process should begin or not, after analysing the Technical Team's report. In Spain, every procedure applies to the principle of legality and formality, in other words, everything has to happen through court and the legal procedure, except cases of conciliation or reparation, or closure of the file, as explained previously.

In cases, in the UK, where the youth is prosecuted in court, the Criminal Justice and Immigration Act 2008 simplifies the range of youth sentences and the judge determines the sentence according to the age of the offender (chronological and emotional), the seriousness of the offence, the likelihood of further offences being committed and the extent of harm likely to result from those further offences. The approach to every sentence will be very personal, taking into account the youth's circumstances.

### 5.5 Main sentences.

The main sentences for offences are Youth Rehabilitation Order and Detention and Training Order<sup>48</sup>.

#### *Youth Rehabilitation Order (YRO):*

This is a community sentence which may include one or more of the following requirements, which must be completed within a period of 3 years.

- Activity requirement.
- Supervision requirement.
- Unpaid work requirement (ages 16 and 17).
- Programme requirement.
- Attendance activity requirement.
- Prohibited activity requirement.
- Curfew requirement.
- Exclusion requirement.
- Residence requirement.
- Mental health treatment requirement.
- Drug treatment/testing requirement.
- Education requirement.

#### *Detention and Training Order:*

A Detention and Training Order (DTO) may be made in respect of a youth aged 15 or over at the date of conviction, or in respect of a youth aged 12 to 14 at the date of conviction if he or she is a persistent offender. A DTO can only be made if the court

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<sup>48</sup> <https://www.cps.gov.uk/legal-guidance/youth-offenders>

decides that the offence or the combination of offences are so serious that neither a fine alone nor a community sentence can be justified. When a court makes a DTO it must state its reasoning why no other sentence is appropriate and, in particular why a YRO with fostering cannot be justified.

On this particular point, some differences have been noted when comparing both The UK and Spanish laws in juvenile justice. Below, these differences will be summarised and what proposals, if any, could be introduced into Spanish regulation, using the UK's system as reference, if this is at all possible or indeed beneficial. Similarities in both laws will also be included.

## 6. CONCLUSIONS.

1.- In both legislative systems, formal punitive punishment exists albeit concentrating on an educative perspective. The Council of Europe has issued various recommendations or guidelines referring to criminal mediation and each country has adopted some or all of them according to its necessities.

2.- The Principle of Opportunity is key when referring to Youth Offender laws and regulation. Both laws in each country follow this principle but the United Kingdom goes one step further and allows the Police competence in this area through Youth Cautions. That is to say, an out of court decision using Restorative Justice with the least amount of minimal judicial intervention. This procedure isn't recognised in Spain because the Spanish Police Force are not permitted to intervene nor punish without the judicial process.

3.- The Technical Teams and the Youth Offending Teams, in both countries, each have multidisciplinary personnel, however they are missing a specialised figure in crime with knowledge in psychology and judicial studies. This figure could be a Criminologist. The YOT work before, during and after a criminal act has been committed, as well as during the penal procedure, emphasising prevention in all its stages: primary, secondary and tertiary. They work with youths at risk of committing a crime and also with youths that have finished their sentence with follow up work. I consider there to be a lack of prevention within Spanish Technical Teams for youths at risk, as well as follow up work to prevent possible re-offenders. A Criminologist has the capability and knowledge to carry out this type of work as they are specialised in the study of crime prevention.

4.- After exploring the criminal youth processes in both countries, it is seen that Restorative Justice, through mediation, is present throughout the whole procedure in England and Wales and not totally in Spain

Restorative Justice in the UK takes place:

- Before the criminal process though Youth Cautions or when the Judge decides to withdraw the case.
- During the criminal process though Referral Orders, Mandatory or Discretionary.

- After the criminal process through Youth Rehabilitation Orders and Detention and Training Orders. Restorative Justice can also be used to revoke the sentence or re-sentence.

Victim – Offender Mediation is possible through all three stages of the criminal process.

However, in Spain, the use of Restorative Justice only takes place:

- At the beginning of the criminal process through withdrawal of the case or dismissal as a result of conciliation or reparation.
- After the criminal process, through Modification of the sentence or revocation due to successful mediation in any of its forms.

Victim - Offender Mediation is possible at the beginning of the criminal process and after, but not during the period of prosecution.

5.- According to Gabriela Bravo, spokeswoman for the General Judiciary Council from 2003 to 2013, “Mediation gives a role to the parties and finds solutions in a quick and easy way”. In order for mediation to be successful, the role of the mediator/facilitator is of utmost importance. In Spain, only the members of the Technical Team can fulfil this role, these being a Psychologist, a Social Worker or a Social Educator. In the case of England and Wales, this role is not only limited to these professionals but open to any person with sufficient qualifications in mediation. A Criminologist has all the necessary capabilities to perform the role of mediator/facilitator. Within the degree of Criminology, methods of working with both offenders and victims are studied in great depth. Criminology is a social science which studies all perspectives of the criminal world (risk and protection factors, the offender, the victim, consequences for the community, prevention methods and means).

After researching the subject of mediation, my findings are conclusive. I would like to propose that Criminologists are given rightful recognition as useful figures in restorative practices and above all in cases of youth offenders, as part of the Technical Teams in Youth Courts, in protection and child welfare centres and in reformation centres.

Re-education and re-socialisation in youth offenders is a result of a mixture of help and guidance from various professionals in specialist areas. What if there were professionals who encompassed all of the necessary knowledge in this field? Well, there is. They are called Criminologists.

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