

## Penal mediation service in a Basque urban local court

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### Abstract

In the debate on ways to obtain justice, the writer, lecturer of Jurisdictional Law - the branch of Law that studies the performance of judges in exercising their judicial function-, defends strongly, in line with the global movement Alternative Dispute Resolution (ADR), that jurisdiction -understanding this one as judges that act in Spanish courts and the function that the latter develop there-, is not the only mechanism for resolving legal disputes. It is not the only way citizens have to obtain justice. Neither the only mechanism that recognizes and provides the State in order to. This statement can be specifically applied to criminal disputes, to crimes or offenses and misdemeanours. Developing this idea, next lines we intend to study in depth penal mediation as extrajudicial formula or way to solve penal disputes. After looking at its genesis, basis and development in the Spanish legal system, we are analyzing how a penal mediation service works in a Basque urban local court.

### Key words

Alternative Dispute Resolution; criminal mediation; restorative justice; urban local court

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**Table of contents**

1. Jurisdiction is not the only way to obtain justice .....	3
2. Theoretical and legal framework of criminal mediation in the Spanish legal system .....	3
2.1. Contextualization of penal mediation: the crisis of the penal system in the frame of Alternative Dispute Resolution global movement. The changing process from retributive justice to restorative justice .....	3
2.2. How do we understand criminal mediation? Concept and features. Special attention to its relationship with jurisdictional system .....	6
2.3. Current regulation of criminal mediation in our legal system.....	9
3. The experience of a Penal Mediation Service in a Basque Urban Local Court ....	10
3.1. Penal Mediation Service of Barakaldo: origin, composition and objectives	10
3.2. Actuation protocol of PMSB.....	12
3.2.1. Presentation .....	12
3.2.2. Crimes and misdemeanours subject to mediation.....	12
3.2.3. Criminal mediation procedure: its phases.....	13
3.3. Results .....	15
4. Conclusion.....	16
Bibliography .....	17

## 1. Jurisdiction is not the only way to obtain justice

The following lines mean to be a humble author's contribution to The Oñati Process III on the Transformation of Europe. In the debate on ways to obtain justice, the present writer, professor of Jurisdictional Law -the branch of Law that studies the performance of judges in exercising their judicial function-<sup>1</sup>, defends strongly, in line with the global movement Alternative Dispute Resolution (ADR), that jurisdiction -understanding this one as judges that act in Spanish courts and the function that the latter develop there<sup>2</sup>-, is not the only mechanism for resolving legal disputes. It is not the only way citizens have to obtain justice. Neither the only mechanism that recognizes and provides the State in order to. And while we talk about legal disputes in general, this statement can be specifically applied to criminal disputes, to crimes or offenses and misdemeanours. Developing this idea, next lines we intend to study in depth penal mediation as extrajudicial formula or way to solve penal disputes. After looking at its genesis, basis and development in the Spanish legal system, we are analyzing how a penal mediation service works in a Basque urban local court

## 2. Theoretical and legal framework of criminal mediation in the Spanish legal system

### *2.1. Contextualization of penal mediation: the crisis of the penal system in the frame of Alternative Dispute Resolution global movement. The changing process from retributive justice to restorative justice*

We must place, in general, criminal mediation in the global movement called Alternative Dispute Resolution (ADR). Although it was based originally in the U.S.A., this philosophy or ideology has spread worldwide.<sup>3</sup> We are in front of a trend that, with the basic intention of overcoming all the weaknesses of jurisdictional way - which are many -<sup>4</sup> and with the ultimate goal of ensuring access to justice for all citizens, advocates the need to develop and use extrajudicial or non-judicial mechanisms to resolve legal disputes. It is very important to underline that ADR does not postulate the disappearance of the jurisdiction. Considering that, as State power, it is essential,<sup>5</sup> advocates its use only when it is irreplaceable, recommending in the rest of the cases the use of private mechanisms, based on the autonomy of the parties, that, leaving fighting spirit that guides the judicial process, resolve disputes through dialogue and cooperation. As a conclusion, this philosophy draws a frame or spectrum integrated by a plurality of conflict resolution methods in which citizens freely choose the one that suits them in a concrete case.

<sup>1</sup> We call, following Montero Aroca, Gómez Colomer, Montón Redondo, Barona Vilar (2009, p. 21), Jurisdictional Law that traditionally called Procedure Law in Spain, understanding that the main element of our subject is the jurisdiction.

<sup>2</sup> It was defined like that by Montero Aroca (1996, p. 166), highlighting that it is the most important element of Jurisdictional Law, appearing in the background the action (the set of rights conferred on citizens before the courts of justice) and process (the instrument used by judges to exercise the judicial function and by citizens to satisfy their right of action).

<sup>3</sup> As said Barona Vilar (1999, p. 42), far from being a parochial and localized phenomenon, we are in front of a world wide movement. Furthermore, it must be clarified that nowadays the origin of this philosophy is in U.S.A. because it was there, in the seventies of last century, where arose a current for extrajudicial solution of disputes. We explain the origin of this movement and its sources, Ordeñana Gezuraga (2009, pp. 80 and next).

<sup>4</sup> The high cost of the system both for the public treasury and for the litigants; the collapse of courts that produces delay in causes judgement; the negative consequences that the adversarial nature of the jurisdiction has for the parties, who are often forced to follow combative strategies that do not respond to their real interests; its high technical complexity, inefficiency,... With Del Rey Guanter (1995, p. 30), ADR movement has its origin and cause in the belief that, although society gives or put much resources to jurisdiction, the level of conflict will spill over its capacity to function, becoming, therefore, the search for non-judicial alternatives in a need for society's capacity to resolve conflicts that arise in it.

<sup>5</sup> For instance, whenever the rights around the dispute are unavailable.

In the context of this Alternative Dispute Resolution movement, non-judicial resolution of criminal dispute presents peculiarities. Let's look at those that appear in our legal system.

The starting point of the basis on which our penal system is built in the State's monopoly of *ius puniendi*: only State can criminalize certain misconducts to protect the public interest, composing what we call Criminal Law, and in the same way, only judges, on behalf of the State, can punish those citizens who commit criminal types, after following the adequate criminal proceeding.<sup>6</sup> All this, in a context dominated by the principle of legality and necessity, where public crimes prevail, those that can be prosecuted *ex-officio*, regardless of the will of the victim (arts. 101, 105 and 303 Criminal Procedure Law) (hereinafter, CPL), and where it has to be specially highlighted the unavailability of citizens in criminal matters.<sup>7</sup> Also, criminal law nowadays in force in Spanish legal system is chaired by the principles of minimal intervention, last ratio and subsidiarity.

Nevertheless, penal systems based on mentioned principles, such as ours, are currently living a deep crisis. This is mainly because it is questioned its ability to fulfil those that have been considered its duties or objectives: retributive function, special prevention and general prevention. In this way, and briefly, it is said that they make a too much retributive justice, limiting the State's criminal response to crime to penalty or ill that imposes on the delinquent.<sup>8</sup> It also fails the function of special prevention of the penalty, because, far from achieving healing and reintegration of the delinquent -as required Spanish Constitution (art. 25)-, it turns him into a victim of criminal system and enemy of society, producing the victimization of the victimizer.<sup>9</sup> Likewise, general prevention is not achieved because penalty does not serve as an exemplary element or persuasive to prevent citizens from making typified behaviours previously punished.<sup>10</sup> All these problems of the penal system to fulfil its objectives show that this satisfies neither the criminal nor society. It would be minor evil, if at least it could satisfy the victim of crime or misdemeanour. But, again, it does not. Moreover, the latter is the last monkey in a penal system in which the State takes possession of criminal conflict, monopolizing its treatment focused on the delinquent. The victim is almost non-existent. It is neutralized by the State, producing what is known as "secondary victimization".<sup>11</sup> Hence, victimology has emerged as a science that focuses on the study of the victim, trying to give them the prominence they deserve.<sup>12</sup>

As jurisdictionalist, we are especially concerned about all complaints that appear around the implementation of the formal aspect of State's *ius puniendi*. It is criticized the remoteness of criminal rule (substantive and formal) of reality, slowness and complexity of criminal procedure, dissatisfaction that causes to all

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<sup>6</sup> The latter is what jurisdictionalists call the "principle of jurisdiction exclusivity": only and exclusively judges can punish the citizens according to law, so following the procedure set in law and recognizing in it to the parties certain rights and guarantees.

<sup>7</sup> Victims of crime cannot, generally, dispose of the procedure and of the crime that is being known in the latter through their forgiveness (arts. 106 CPL and 130 Penal Code) (hereinafter, PC). Thus, because it is not recognized to citizens an individual subjective right of punishment, being the latter monopoly of the state, and being forbidden private justice or self-defence in Spanish legal system. In the latter sense, the art. 455 PC forbids to act an own right, acting outside the legal channels, using violence, intimidation or force in things.

<sup>8</sup> This penalty is determined in proportion to the offense committed to society and is never negotiable, nor is the crime.

<sup>9</sup> In this sense, it is said that the entry of the offender in the penal system, instead of solving the problem and protect society, has become stigmatizing and consolidating element of crime.

<sup>10</sup> This element is evidenced by the increase of criminal cases. The current penal system, far from suppressing the crime, is becoming an area where crimes and offenses increase alarmingly. In this regard, among others, Sánchez Concheiro (2001), Sáez Valcarcel (2006) and Ríos Martín (2008).

<sup>11</sup> In this way, graphically, Beristain Ipiña (1994, p. 230), call him "stone guest". Clarifies Kerner (1997), that the victim is systematically considered as mere "element" in the building of the system of "theory of crime", and estimated as "object" of the searching of procedure truth in the summary, as a mere mean of proof in criminal evidentiary procedure law.

<sup>12</sup> With dramatic tone, Sáez Valcarcel (2006), says that "is victims time".

parties,<sup>13</sup>... As we have previously stated, it is censured specially the imbalance in the roles that current criminal procedure in Spain gives victim and delinquent. While the latter is main protagonist of criminal proceeding, being recognized a lot of rights, the former is almost invisible. Its role is a simple witness who is limited to report the violation of rights that he suffered. Moreover, in this sense, their duties are more than their rights.<sup>14</sup>

Definitely, and taking into account the failure of its goals, we can say that current criminal system fails as an instrument of social control. It is inefficient in its material field, in its work of typifying behaviours, and in its formal level, when it articulates the judgment of crimes and misdemeanours through the criminal proceedings before judges.

In this atmosphere of censure and reformulation of current penal system -which, we repeat, it is not exclusive of Spanish legal system-, while some authors (called abolitionists) postulate its abolition, others, highlighting all its weaknesses, ask for its minimal application or intervention (minimalists). What alternatives present ones and others? The first present a utopian space where crimes and misdemeanours are handled through informal mechanisms. The second, more realistic, also support informal channels or ways, although complemented by jurisdiction, reducing the latter's intervention to the minimum necessary.<sup>15</sup> Then, both agree to use informal mechanisms to solve crimes and misdemeanours. The penal mediation we are studying is an informal mechanism for criminal conflict resolution. Therefore, both sectors support the need to use informal techniques to solve crimes and misdemeanours as a mean to change the paradigm of current criminal justice. They proclaim the need to abandon the principles of retributive justice to deepen the values of restorative justice. Let's have a look.

The transition of a mandatory penalty system based on retributive justice to one based on restorative justice, consensual and bargaining, represents a change in the conception of crime and misdemeanour and of its protagonists. Obviously, it also involves a different treatment of them. It moves from a system governed by the principle of legality, where the principle of necessity prevails, to other where the principle of opportunity prevails.

Specifically, category of crime and misdemeanour are left down and conflict, dispute or controversy is used instead. The former are associated with the traditional model of retributive justice, with that paradigm in which the right to punish (*ius puniendi*) is the exclusive monopoly of the State, on a strict frame that is looking for the protection of general public interest. As we know, in this context, the State takes over the crime, leaves the victim and imposes a solution to the offense based exclusively on the offender. By contrast, when we speak about criminal conflict, dispute or controversy we enter in the field of restorative justice; we refer to those involved in the specific criminal offense, to the one who commits it and to the one who suffers from it, to offender and victim. In this area, we do not talk about the delinquent but the offender, a term that carries more social burden and that means a person who has violated a social norm and has to cope with the consequent social responsibility.<sup>16</sup> On the other hand, the victim is considered to be

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<sup>13</sup> In this sense, criminal procedure is described as coercive and violent scenario where defendant and victim become enemies in the context of duality of positions principle and within attack-defence dynamic. In addition, often both appear as losers in a cold conflict resolution way that does not protect them. It is highlighted by Sánchez Álvarez (2006).

<sup>14</sup> The victim-witness must report alleged crime (art. 259 CPL). If he does not do, he can be fined or taken by the security forces or accused of a crime against the public administration (art. 420 and 466 CPL). Besides, victim is required to be truthful in his statement (art. 433 CPL). Call the victim "luxury witness (...)" although his worries and needs are ignored, Sánchez Álvarez (2005).

<sup>15</sup> Both doctrine are described properly by Salinas i Colomer (1999, p. 76).

<sup>16</sup>The offender has produced a criminal conflict and must face the consequences of his action because has capacity to do. It is explained like that by, Domingo de la Fuente (2008). In the same direction, Ríos Martín (2007), defines mediation as an adequate instrument in order to victimizer take responsibility for produced damages.

the person who suffers directly from the offense. The victim is a person, a member of society, directly affected by the evil that leads criminal dispute. As the victim has voice and he is directly affected must be listened to in criminal dispute solution. The rest of the society (victim's family, authorities, police...) are secondary victims.

Taking into account all this, through the prism of restorative justice criminal conflict is understood, more as a violation of human relationships, than a violation of law, resulting a matter of people and communities rather than of States. It is a social evil which belongs and affects to every member of the society.<sup>17</sup>

After exposing the new conception of the offender and the victim and the criminal conflict, we can get in the way in which it is channelled or treated the latter under restorative justice postulates. Restorative justice, as previously mentioned, on the basis that criminal dispute is a social evil, and therefore, something to avoid, considers that, once occurred, there are risks and opportunities. Without intimidating by the first, without forgetting them, restorative justice defends opportunities. All in pursuit for the benefit of the victim, of the offender and of society and inspired by the principle of opportunity. In this way, once criminal dispute has arisen, negative effects and harm that it causes to the victim, to the society and to offender have to be repaired. Specifically, victim has to be restored from the physical and mental damage he has suffered; security that has been threatened has to be restored to society and the offender has to be restored to the society. But, how do we achieve all this? Through the active participation of the offender and his victim -leaving the State in a secondary position- in the reparation of the damages caused by the criminal conflict. In an area featuring both, the offender has to face the victim of criminal dispute and social and criminal norms infringed. Through the act of reparation he responds facing the victim, facing society and facing himself. In this repairing procedure the victim is listened and given voice while also rights and interests of the offender are protected. The latter, besides, will learn and feel supported and integrated into society, contributing to its peace through the act of reparation.

In any case, reparation as response to criminal dispute must be immediate, based on the will of the protagonists (victim and victimizer) and provided with minimal coercion.

In this construction, if offender does not want to repair the damage that was caused, in other words, becoming impossible the main purpose of restorative justice, the latter provides that offender must stay in a place where emphasis is made on safety, ethical values, responsibility and civility.

This formulation seeks to ensure all citizens a more useful justice for all, closer and less retributive. It longs for a more humane justice that offers a positive response to crime. In order to achieve it, a treatment for the offense is proclaimed, not based on punishment, but on compensation; a justice that does not support exclusion but inclusion; that does not postulate revenge, but forgiveness and that far from imposing, mediate. All this shows, that a criminal law based on compensation is a re-socializing law and not stigmatizing.

## *2.2. How do we understand criminal mediation? Concept and features. Special attention to its relationship with jurisdictional system*

Within the above framework, as the principal informal mechanism for resolving criminal conflict, we understand penal mediation as the technique in which the parties of penal conflict (offender and victim), star the resolution of it with the help of an impartial third party, before, during or after criminal proceeding; in order to do that, they base on dialogue and mutual understanding, giving voice to the victim

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<sup>17</sup> It is understood that crime is most committed against individuals and communities than against States. In this way, with Del Río Fernández (2006), we cross from a punishment justice to a reparation justice.

and making the offender responsible, offering to the latter the opportunity to repair the damage done to the former, contributing in this way to the improvement of judicial system.<sup>18</sup>

This shelf created definition wants to collect all the features of this resolution mechanism. Three elements are specially emphasized: people involved in criminal mediation and their role in this procedure; the basis of this technique and its relation to jurisdiction. All they are analyzed in the following lines.

We already know the three people involved in criminal mediation: the offender, the victim and the mediator. Under the principles of restorative justice, criminal mediation becomes protagonist of the management of their dispute the two former. Far from taking their dispute away from them -as the jurisdictional way does-, criminal mediation entrusts them its solution. The offender puts himself in front of the victim and takes responsibility of produced evil, while the latter tries to understand and forgive the victimizer.<sup>19</sup> All this allows that, far from the coldness and stiffness of criminal proceeding, victim and offender could show their feelings and emotions in a communicative and interactive environment.

The prominence of the victim in criminal mediation must be especially emphasized. So far, the penal system based on retributive justice has moved him away from the solution of crime, focusing all its arguments on the offender and listened only the latter in criminal proceedings. As we said, it is one of the main causes of the discrediting of traditional criminal justice system. Therefore, in order to obtain a criminal justice that satisfies the needs of society, the offender and the victim, it is necessary to give voice to the latter. Criminal mediation is the appropriate tool for this.<sup>20</sup>

Although parties of criminal dispute are the protagonists of mediation, this one cannot exist without the mediator. Regarding the latter, it is more accurate to talk about the mediation organ, because it could be individual or collegiate. After clarifying that, it is important to underline that this procedure requires the intervention of one or more people who try the parties to listen and respect each other in their way to obtain an agreement that contains a restorative solution to the dispute in accordance with the principles of restorative justice. We are dealing with an autonomous mechanism, not heteronomous, as the mediator can never impose a solution to the controversy. Besides, the mediator must always be impartial and keep the confidentiality.<sup>21</sup> He must also protect equality and contradiction of the parties, their right of defence and presumption of innocence.

Going into the basis of criminal mediation in depth, paradigm of restorative, negotiating or consensual justice, this mechanism can only be based on freedom or autonomy of the parties. Only the consensus of the will of the offender and the

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<sup>18</sup> We like a lot criminal mediation definition presented by Roldán Barbero (2003). He describes criminal mediation as "the interaction between victims and offenders with the assistance of a third party, which facilitates the settlement of the criminal conflict in a non-punitive way in accordance with the wishes and feelings of the parties."

<sup>19</sup> The aim of criminal mediation is to put the offender in front of the victim, in order the first repairs damage produced to the latter while takes responsibility for the transgression of social and criminal norms committed, feeling regret and internalizing guilt and those rules of coexistence that has been infringed, contributing in this way to social peace of the community. In this direction, graphycally, Ordóñez Sánchez (2007), says that criminal mediation gives back to conflict parties, victim and victimizer, part of the faculties.

<sup>20</sup> Obviously, the offender or delinquent, who has been the element has focused the legal response and the theoretical discourse of classical criminal law, is also the protagonist of mediation, without this mechanism eliminates or reduces the guarantees or rights traditionally recognized to him.

<sup>21</sup> In this direction, criminal mediation is configured as an intimate space where offender and victim can express themselves with absolute freedom. Therefore, the mediator must keep the secret about all he has heard in the conversations of the parties and never can be called to trial as a witness or expert, unless it is to confirm the accuracy of the reparation record. Judge is not aware of the discussions in the mediation procedure. That is part of the intimacy of mediation procedure, which remains forever in parties and mediator's memory. Only is sent to the judge the last document, result or record of the mediation, which incorporates, where appropriate, any agreements of the parties.

victim may lead to mediation. Only these two can decide to become main players in the resolution of their conflict, using mediation and renouncing its court solution. They choose horizontal solution of their dispute, leaving in the background the coercion and rigidity of jurisdictional criminal procedure. They opt for a peaceful mechanism in order to resolve their dispute. In any case, the parties may only use criminal mediation considering what they are doing, that is, being aware of what mediation is, how it is developed and its consequences.<sup>22</sup> They must also know they can leave it any time and they are not required to obtain an agreement. In the same way, they must be aware of the fact that to recourse to mediation never means recognition of commission of facts or of guilt by a party, as this would run counter to the presumption of innocence.

Freedom, which is the gateway to criminal mediation, is also the centre of its development. The parties, with the advice and guidance of mediation organ, will decide time and place, rhythms and dynamics to try to reach a reparation agreement that solves the dispute. Among all of them, they will try to create a meeting space where an honest dialogue and mutual understanding take place, trying to be one in the other shoes. Without any doubt, criminal mediation procedure is more flexible and dynamic than criminal proceeding.

To finish explaining how we understand criminal mediation and its main characteristics it is necessary to make reference to its relation with jurisdiction, something that as a jurisdictionalist we consider especially important. We are in front of an extrajudicial mechanism. There is no doubt. Nevertheless, this technique, currently, in our legal system -in which the privatization of criminal conflict resolution or renounce to criminal intervention of the State are not regulated as generality<sup>23</sup>- can only be understood in the context of jurisdiction.<sup>24</sup> Let's remember as well, as we explained when presenting the ADR global movement, this does not intend to replace or eliminate the jurisdiction. Neither does the criminal mediation. Moreover, criminal mediation is an appropriate instrument to improve the jurisdiction.

As regards to the relationship between the two mechanisms in depth, it is the official principle the link between criminal mediation and its outcome and jurisdiction. According to this, we understand criminal mediation as an instrument of jurisdiction, which is developed under the control of judges, without limiting the right to punish of the State (*ius puniendi*) and the rights of citizens. In this way, it corresponds to the judges, with previous agreement of prosecutor, the possibility to take or derive a case to criminal mediation, and the agreement reached through this technique must be incorporated to criminal procedure as stay of proceedings, as compliance or as benefit in execution.<sup>25</sup> Besides, criminal mediation must respect the principle of legality, regardless of the fact that it leans more on the principle of opportunity than on the principle of necessity. It must specially respect common rights and guarantees of jurisdiction (impartiality of mediator, presumption of innocence, equality and contradiction of parties,...). All this, without denying that criminal mediation and the reparation that can achieve through it, introduce education and preventive elements of criminal behaviours in current

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<sup>22</sup> Parties must be aware that the reparation to the victim and society, both symbolically (repentance and apology) and material (the payment of a sum of money, social services, ...) is the centre of the new paradigm of restorative justice, in its intention to offer a non-punitive or penal-minimizing alternative to criminal response.

<sup>23</sup> So, where necessity principle prevails.

<sup>24</sup> We will analyze in next section the legal space where criminal mediation develops in our legal system.

<sup>25</sup> It is important to emphasize the moment where criminal mediation can take place. It may occur before criminal procedure, to try to avoid it; during it or after it has ended. In the second case, depending on the act of the trial is open or not, criminal mediation may obtain a stay of proceedings or a compliance judgment. Criminal mediation developed once the procedure has finished with criminal judgment, can obtain the suspension of the penalty or the substitution of imprisonment for another in execution phase.



penal system, opening a space to restorative justice, along with the classic penalties and security measures.

### *2.3. Current regulation of criminal mediation in our legal system*

Criminal mediation lacks a full and systematic regulation in our legal system, based, as we know, on postulates of retributive justice. However, there are some institutions and elements that, trying to get away from the principle of necessity, are inspired by the principle of opportunity, recognizing a small space to restorative justice. Which ones are these elements? The most important ones are the following:<sup>26</sup>

- 1) Reparation as mitigation of criminal responsibility: Under art. 21.5 PC it is generic cause of attenuation of criminal responsibility that the guilty repairs the damage caused to the victim or lessens its effects, at any time during the procedure and before the oral trial takes place.
- 2) Reparation as specific mitigation: in the crimes on the order of territory (art. 318 and next PC), on the historic patrimony (art. 321 and next PC), crimes against natural resources and environment (art. 325 and next PC) and those related to protection of flora and fauna (art. 332 and next PC), reparation to victim is specific attenuating (art. 340 PC).
- 3) Reparation as cause of punishment exemption: in crimes against public treasury, against social security and subvention fraud (arts. 305-310 PC) offender's reparation can make penalty to disappear.
- 4) Institution of compliance: reflection of a negotiated justice, our legal system regulates (arts. 655 and 694-700 CPL) the possibility that the defendant accepts the penalty requested by the prosecution, or worse than those that have been applied for if there are multiple accusers, giving judgment immediately, without public hearing. In return, offender gets a more favourable judgment.
- 5) Prosecution of semi-public crimes requires complaint.<sup>27</sup>
- 6) Prosecution of private crimes (libel and slander) requires a special complaint called "querrela" in Spanish legal system.<sup>28</sup>
- 7) Forgiveness of the victim in relation to some crimes and misdemeanours is regulated.<sup>29</sup>

<sup>26</sup> We must clarify that internationally there are different provisions that require give voice to the victim, considering criminal mediation the best instrument for this purpose. Already referred to it the Sixth Congress of the United Nations, held in Caracas from August 25 to September 5, 1980, which focused on crime prevention and treatment of offenders, and later, the Seventh UN Congress on the same topic, held in Milan in 1985. Years later also referred to the victim, calling States to exchange information and experience on mediation and restorative justice, Resolution 1999/26 of Economic and Social Council of the United Nations (28 July 1999) on the development and implementation of measures for mediation and restorative justice in criminal law. Although with smaller geographical area, at European level we also find legal instruments in the same direction. In this way, Recommendation No. (83) 7 of 23 June, of Committee of Ministers of the Council of Europe; Recommendation No. R (85) 11, June 28, 1985, of Committee of Ministers of the Council of Europe on the position of the victim under the criminal law and criminal procedure; Recommendation No. R (87) 21 of the Committee of Ministers of the Council of Europe of September 17, 1987, on assistance to victims and prevent victimization; Recommendation No. R (92) 16 of the Committee of Ministers of the Council of Europe, European rules on sanctions and measures applied in the community and Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe of September 15 on criminal mediation. Similarly, we can not ignore the communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the victims of crime in the European Union: policies and measures, in May 28, 1999, European Parliament Resolution on the Communication from the Commission on Victims of crime in the European Union, June 15, 2000, the Framework Decision 2001/220/JHA European Union Council of 15 March 2001 on the standing of victims in criminal proceedings and Recommendation No. (2006) 8, June 14, 2006, on assistance to victims of criminal offenses.

<sup>27</sup> Some of the semi-public crimes regulated in our legal system are next: practice of assisted reproduction to a woman without her consent (art. 161 PC), assaults, harassment or sexual abuse (art. 191 PC) or the discovery and disclosure of secrets (art. 201 PC).

<sup>28</sup> It is a private criminal prosecution action.

- 8) Mandatory prior conciliation: crimes of libel and slander require previous mandatory conciliation (arts. 278 and 804 CPL), providing an opportunity for agreement of the parties and avoiding, where appropriate, the subsequent process.
- 9) Power of court to suspend the penalty: according to art. 80 PC the judge may suspend execution of imprisonment penalty not exceeding two years. He will do it through a reasoned decision and taking into account the criminal dangerousness of the subject and the existence of other criminal proceedings against him.
- 10) Power of judge to replace the penalty: The judge may replace the penalty of imprisonment not exceeding one year (exceptionally two) by fine or work for the benefit of the community. He can do that when the nature of the act, the special circumstances of the defendant, his conduct and, especially, the effort to repair the damage that was caused, recommend it (art. 88 PC).
- 11) Regulation of free pardon (arts. 62 i) Spanish Constitution and 4.4 PC).
- 12) Regulation of criminal mediation in the field of minors: 5/2000 organic rule, that regulates minors responsibility orders conciliation, reparation and mediation, without any clear difference among them, regulating law-maker same consequences for all.<sup>30</sup>

But it is important to highlight that this legal space is insufficient for the development of criminal mediation in our legal system. Although it is very important to appreciate the willingness of those judges, public prosecutor and parties who took part and take part nowadays in the experiences of mediation in criminal cases,<sup>31</sup> it cannot be ignored that if we wish to provide an opportunity to criminal mediation in Spanish legal system it is essential the law-maker intervention for such purpose.

### 3. The experience of a Penal Mediation Service in a Basque Urban Local Court

#### 3.1. Penal Mediation Service of Barakaldo: origin, composition and objectives

The Penal Mediation Service of Barakaldo (hereinafter, PMSB) is one of the Services of Cooperation with the Justice that offers the Criminal Execution Direction of Justice and Public Administration Department of the Basque Government.<sup>32</sup> This service, is currently conducting a pilot experience in criminal mediation in Vitoria-Gasteiz and Barakaldo. Henceforth we will concentrate on the experience of the latter.

As a result of the collaboration between judicial organs of Barakaldo and prosecution of the same place, PMSB began its work in July 2007. Therefore, it has only got 3 years experience, but its evaluation, as we will see, is very positive. But let's analyze its origins. The Basque Government has been thinking for many years about the possibility of creating a service like this. As a consequence of this interest, in January 2004, the Department of Justice, Employment and Social Security held in Bilbao an *International Meeting on Criminal Mediation in ordinary courts*. The aim of this meeting was mainly to show in our country all the benefits of Restorative Justice. The initiative was so successful that immediately a group

<sup>29</sup> It is like that, for instance, in discovering and revealing secrets crime (art. 201 PC) or libel (art. 215 PC).

<sup>30</sup> This criminal mediation is studied by Gimeno, Vizcarro (2001), summing up that "conciliation and reparation to the victim operate as alternatives to the procedure if some conditions appear".

<sup>31</sup> Because they have opted for a consensual, bargaining and restorative justice, even with the risk of moving into an area of legal uncertainty. The gloomy element of these experiences, in our opinion, is on the principle of equality: Why a citizen accused of a misdemeanour has the right to settle it through criminal mediation and other citizen of another place with the same misdemeanour has not?

<sup>32</sup> Other services to cooperate with the Justice are the Service to assistance the victim, the Service to assistance the detainee and the Service to assistance the reintegration.

formed by people from different backgrounds in legal area<sup>33</sup> and from The Basque Government was composed in order to design a criminal mediation project for The Basque Country.<sup>34</sup> Firm in its purpose, complying the Framework Decision of European Union Council on the standing of victims in criminal proceedings (2001/220/JHA), which set March 2006 as deadline to promote criminal mediation, in 2005 Criminal Execution Direction of the Basque Government asked Mediation for Conflict Pacification Association of Madrid for making a plan to develop criminal mediation in The Basque Country. Based on all above, in 2006, with the help of the Chief Prosecutor of Euskadi (María Ángeles Montes), the Coordinator Prosecutor and the Dean Judge of Barakaldo, working and writing all protocols and procedures to follow in criminal mediation that would be practiced in Barakaldo, were started.

Going into the integration of PMSB in depth, this service is composed by a multidisciplinary team, integrated by three specialized and experienced professionals: a degree in Psychology,<sup>35</sup> a qualified in Social Work<sup>36</sup> and a Bachelor of Law, acting the latter as coordinator.<sup>37</sup>

It is a free service -paid by the Basque Government- and voluntary,<sup>38</sup> managed by GEUZ, the University Centre for Conflict Transformation of the University of the Basque Country-Euskal Herriko Unibertsitatea.

The place where it is located is a particular characteristic of PMSB: it is inside the Palace of Justice of Barakaldo, where there are specifically two different places dedicated for this service, one for administrative tasks and another one for individual interviews and mediations. Without doubt, this location contributes to humanization of justice, because in the courthouse is not serviced only justice based solely on retributive paradigms, but also restorative.<sup>39</sup>

Its opening hours are, in the mornings, Monday to Friday, from 8.30 to 15.00 and, in the evenings (only on Tuesdays and Wednesdays) from 16.30 to 19.00. Months of July and August they work from 8.00 to 15.00.

Let's look now at how criminal mediation is conceived in the PMSB and what its aims are:

Criminal mediation is conceived as a repairing mechanism, as a complementary way to the judicial procedure incardinated in it. Starting point of this conception are three basic premises:

- (1) Criminal mediation procedure must be checked by legal operators, so agreement of the parties always requires judicial sanction.
- (2) In criminal mediation procedure the rights of all the parties must be guaranteed. In this sense it is emphasized that dignification of the victim cannot lead the disregard of the rights of the offender.
- (3) Public interest inherent to right to punish (*ius puniendi*) is guaranteed in criminal mediation procedure.

Practicing criminal mediation configured or understood as described, the PMSB wants to achieve the following six objectives:

<sup>33</sup> Judges, prosecutors and lawyers, mostly.

<sup>34</sup> Reflecting the interest of the Basque Government, it is a member of the *European Forum for Restorative Justice*.

<sup>35</sup> Amaia Aguirre, also graduate of Mental Health.

<sup>36</sup> Alberto Olalde, Master in Criminology.

<sup>37</sup> Carlos Romera, Master in Criminology.

<sup>38</sup> As we shall see, it always acts at the request of someone: a judge, a lawyer (it is understood, on behalf of either party) or the prosecution.

<sup>39</sup> In this direction, Sander (1995), spoke about "multidoor court-house", calling in this way to the "courtroom of the future", composed of a plurality of means to resolve conflicts. Jurisdiction was one of them. According to the formulation of this professor of Harvard University citizen would present his conflict to an official, who would recommend the most appropriate mean of settlement for it (conciliation, mediation, arbitration,... or jurisdiction).

- (1) To offer a mediation procedure at all stages of criminal proceeding (investigation, prosecution and execution), recognizing to the parties of the offense or of the misdemeanour the possibility to participate actively in the resolution of their conflict, having to achieve this aim the help of mediator.
- (2) To let the victim and the offender take part actively in dispute resolution and transformation.
- (3) To offer the parties the opportunity to communicate and to enter into mediation procedure elements and aspects that do not usually appear in criminal procedure, deepen in mutually agreed solution beyond mere criminal sanction.
- (4) To make the offender person responsible for the committed act and damage caused to the victim, promoting effective reparation on him.
- (5) To help the parties to understand better the conflict management or resolution procedure.
- (6) To reduce the workload of Justice Administration.
- (7) Summing up, it is easy to see that PMSB understands criminal mediation the way we define it, a gateway to restorative justice in a legal system and a penal justice characterized by their retributive nature and inspired by official principle.

### *3.2. Actuation protocol of PMSB*

#### *3.2.1. Presentation*

Considering the absence of a specific State legislation in criminal mediation, the PMSB operates according with an Open and dynamic protocol of repairing criminal mediation in the Basque Autonomous Community (Investigation Courts/Criminal Courts). This protocol has been agreed with all the agents involved in the administration of justice (judges, prosecutors, clerks of the Judicial District of Barakaldo). In order to do that, before starting the experience, Execution Direction of the Basque Government met them and the mediators' team to determine the mediation procedures that would be used. Once the consensus was achieved, the mediation project and the procedures collected in it were sent to the Supreme Court of the Basque Country, Bizkaia Bar Association and the Department of Judicial Activity Planning and Analysis of the General Council of the Judiciary.

Two elements of the protocol above must be especially emphasized. On the one hand, it must be clarified that it is part of a longer document that GEUZ called "Intervention Project." It is also important to stress the open nature of the protocol. In this sense, the Basque Government and Criminal Execution Direction assume that this project is being building, that this is an open and dynamic instrument, that can go through all kind of changes needed to correct it and improve it, recognizing absolute freedom to the Courts, Prosecution, clerks and staff mediator to amend it as long as it is mutually agreed.

#### *3.2.2. Crimes and misdemeanours subject to mediation*

In general, it is considered that the criminal legal qualification of a crime (serious or less serious) must not be decisive to consider the suitability of criminal mediation, except for an act orders it or public interest is affected. In the same way, considered the determining criteria for deciding on the appropriateness of mediation in the particular case are two: (1) the subjective conditions of the

protagonists of the conflict and its resolution<sup>40</sup> and (2) the subjective meaning of the act, regardless of its criminal legal qualification.<sup>41</sup>

In particular, criminal mediation offered by PMSB is applied to all crimes, except for the attack against authority, their agents or servants (art. 550 PC)<sup>42</sup> and crimes committed by civil servants in the exercise of their duties.

In crimes where the imbalance of power between the parties or their emotional tension is clear -for example, in crimes against sexual freedom-, the mediation team, focusing on the psychological situation of the victim and her relationship with the offender, will decide on the appropriateness of mediation.

Moreover, all misdemeanours can be taken to mediation except for those that violate the public interest (Title III PC, arts. 629-632), that are against public order (Title IV PC, arts. 633-637) and immediate misdemeanours judged by police court (art. 962 and next CPL).

Finally, crimes and misdemeanours judged in speedy trials, in general, cannot be presented to criminal mediation. Nevertheless, if the judge considers that the case is suitable for criminal mediation, after hearing the prosecutor and the parties, the procedure can be resolved as preliminary investigation and send the case to mediation, applying art. 798.2.2° CPL.

### 3.2.3. Criminal mediation procedure: its phases

Criminal mediation procedure designed by the Basque protocol is the same that is being followed in other criminal mediation experiences in other regions of Spain, not in vain their legal supports are the same. The protocol distinguishes stages of criminal mediation procedure looking at the origin of the record: investigation courts (crimes and misdemeanours) and criminal courts (trial and execution). Before analyzing them, it is important to mention that a maximum length of two months for mediation procedure is regulated, although it could be extended.<sup>43</sup> Logically, if mediation team considers that a case does not deserve to continue with the procedure, they will stop it.

Next stages are distinguished:

- 1) Previous phase to criminal mediation: As mentioned, criminal mediation provided within the PMSB is voluntary, so protagonist of criminal dispute can use it for their own initiative or because a judge recommends it. Specifically, in Barakaldo six judges, four of investigation and two of criminal, can do it or even justices of peace of this judicial district.<sup>44</sup> It is also possible that the PMSB or any other service of cooperation with justice suggests parties to attend mediation. Regardless of whose initiative is, the approval of the prosecutor and of the lawyers of the parties is always required. The first contact between the PMSB and the protagonists of criminal dispute is on the phone, first with the offender, to prevent his unwillingness to participate in mediation harms the victim even more.<sup>45</sup> It is possible that, even if the offender wants to participate, the victim does not. Obviously, in this case criminal mediation cannot be celebrated, though mediation team will document developed activity in order to achieve appropriate legal

<sup>40</sup> Specifically, their personal abilities and the situation in which they are.

<sup>41</sup> In this sense, cited protocol gathers that is the impression people have on the facts that makes the conflict worthy of criminal mediation, in other words, parties involved in the conflict must want to resolve the dispute in a stable way and as a means of avoiding future disputes.

<sup>42</sup> It is considered that institutional inequality occurs between the parties in these cases makes them unsuitable for mediation.

<sup>43</sup> Statistics show that in a few cases this time is exceeded.

<sup>44</sup> They are, specifically, 8: justice of peace of Abanto and Ciérvana, justice of peace Alonsótegui, justice of peace of Muskiz, justice of peace of Ortuella, justice of peace of Portugalete, justice of peace of Santurtzi, justice of peace of Sestao and justice of peace of Valle de Trápaga.

<sup>45</sup> What would lead to a secondary victimization.

effects.<sup>46</sup>

If the parties agree to go to mediation, the judge who is hearing the case will order to send the proceedings to criminal mediation. This is the moment when PMSB can have access to the file. It is also the time when the court sends a letter to the parties, explaining them they will be given the opportunity to settle their dispute by criminal mediation, emphasizing them specially that this procedure is voluntary and free. They are informed that they will receive a telephone call from PMSB in order to start with criminal mediation procedure.

If the victim is under age or disabled, must necessarily go with his legal representative.

- 2) Reception phase: Once both parties in criminal conflict have shown their willingness to participate in the mediation procedure, mediation organ will meet, individually, each of the parties. In this first individual interview parties are explained about all elements of the technique they have chosen: its content and nature; the parties involved; its duration, form and rules; functions of mediator and effects and impact of mediation on the criminal court process.

Mediation team<sup>47</sup> takes advantage of this interview to analyze and know how the parties are and how they face up mediation. According to the concluding assessments, they will decide if the parties are ready for the next phase of mediation procedure (dialogue meeting), paying special attention to mediation will not be damaging to either party and to their real interest would be to solve peacefully their conflict.

- 3) Dialogue meeting phase: It is the most important stage of mediation, where offender comes face to face with the victim. It is the moment that actually justifies the mediation. Nevertheless, it is possible that parties reach an agreement without direct physical contact. In this way, it is possible that reparation occurs through letter or a phone call. However, this dialogue meeting takes place usually. In an interview with both parties, they show their thoughts, feelings and realities.

This phase lasts one or more sessions and under the Basque protocol, during those the mediation organ is dedicated to control the level of tension, to ensure the parties their possibility to speak, to clarify the discussion and the opinions and to summarize and translate opinions.<sup>48</sup>

- 4) Agreement or disagreement phase: if the previous phase achieves its aim and parties reach an agreement or a shared decision, with absolute freedom,<sup>49</sup> it will be written registered. Reparation agreement must always carry a reparation plan.

Otherwise, if parties fail to reach an agreement, PMSB will inform this result to Court and to Prosecutor. In this case, the judge shall order to continue with the criminal proceedings, calling the parties to the hearing.

As we know, no matter how the mediation ends, no intervener may subsequently use in trial the submission to mediation as data or evidence of guilt of the accused, because the presumption of innocence and the right to no self-incrimination are essential in criminal proceedings. Besides, in any case, parties sign the document outlining the development of criminal mediation. It is a kind of report where the number of meetings and other key aspects appear. This record will be signed by lawyers of the parties too, if they come assisted by. A copy will be given to the parties, to the prosecutor and to the judge who is hearing the case.

<sup>46</sup> Especially the offender will to repair caused damages.

<sup>47</sup> Normally, two people are involved, so we can speak about co-mediation.

<sup>48</sup> In this sense, Pascual Rodríguez (2006).

<sup>49</sup> The protocol requires an agreement or a joint decision "according to their conviction and interest." Do not forget that voluntary is an essential element of mediation.

- 5) 5) Follow-up phase: this last phase, of course, only occurs when the mediation has been completed successfully, so when a reparation agreement has been obtained.

Ratified before the judge the agreement reached in mediation, PMSB follows up the same during the subsequent year.<sup>50</sup> The objective of this monitoring is double: to assess the satisfaction of the parties with the mediation and inform the court of any breaches of the adopted resolution.

### 3.3. Results

After analyzing PMSB, let's look at the statistic of its activity.<sup>51</sup>

In 2008 PMSB processed and closed 153 cases. In 95 of them the mediation procedure was developed. In the remaining 58, it was not. Why? Two are the main reasons: The unwillingness of either party to participate in mediation procedure or impossibility to locate any of them.

At the end of 2008, PMSB had 56 opened cases.

Let's look at the origin of cases and the stage which were taken to mediation. It was the investigation court number 3 of Barakaldo the one that has sent more cases to PMSB, 60 specifically. On the contrary, the investigation court number 2 of Barakaldo has only sent 4 cases to mediation. In between, criminal court number 2 of Barakaldo has sent 40 files to PMSB.<sup>52</sup> Most of these cases when sent to PMSB they were in instruction or judicial investigation phase, some less in trial and a few in execution phase.<sup>53</sup>

Most of the cases closed in 2008 in PMSB ended with agreement, finishing only 19 mediations without a reparation agreement.

What crimes and misdemeanours have been submitted to mediation? The most frequent were injuries, submitting to mediation 59 injury crimes and 41 injury misdemeanours. They were a lot of harm and abuse crimes and threat and insult misdemeanours as well.<sup>54</sup> At the opposite, less frequently crimes are burglary, occupation of real property, arbitrary execution of own right, false accusation and attack against law enforcement officer.<sup>55</sup> Less submitted misdemeanours to mediation -one case only- have been misappropriation and the one produced against the general interest.

Let's look now at the content of the agreements achieved by mediation. In most of them symbolic reparation has been elaborated, asking the victimizer for formal forgiveness to the victim. In a lot of cases -64, specifically- the rejection of civil and penal actions has been achieved. Frequently, reparation has consisted on the payment to the victim or on the offender's commitment that the facts will not

<sup>50</sup> The protocol provides that such monitoring can also be made by the Service to assistance the reintegration, which, as we know, is a Service of Cooperation with the Justice in The Basque Autonomous Community.

<sup>51</sup> We take into account the data that collects *The Report in Criminal Mediation Services 2008*, made by the Department of Justice, Employment and Social Security of Basque Government ([www.justizia.net/Docuteca/Documentos/5084Informe%20estadEDsticoSMP02008\\_sp.pdf](http://www.justizia.net/Docuteca/Documentos/5084Informe%20estadEDsticoSMP02008_sp.pdf)). They are the most recent data we have, because we are still waiting for the report of 2009. However, in the report cited before a lot of data can be seen: people served and their personal characteristics (age, sex, nationality, marital status, occupational status, educational level and socio-economic...), the relationship between the parties submitted to mediation (victim and offender), duration of procedure,... In next lines, we are looking especially to those data that define the relationship between mediation and jurisdiction.

<sup>52</sup> This information shows that confidence of the judges on mediation in criminal cases is disparate.

<sup>53</sup> Specifically, and with reference to the files closed in 2008, 88 were in investigation stage, 57 in the trial and only 8 in the execution.

<sup>54</sup> With reference, again, to files closed in 2008, 18 harm crimes, 16 abuse crimes, 19 threat misdemeanours and 14 insult misdemeanours have been known.

<sup>55</sup> Only one case of each one has been known.

happen again.<sup>56</sup> Other mediation -specifically, 6- have been finished with the agreement of the offender to do reflection works or community services.

In what judicial moment has reparation agreement been obtained? In most cases, damages reparation has taken place before submissions or written pleading by prosecutor, but there are also frequent pre-trial reparations.<sup>57</sup> Only in 4 cases reparation has been obtained after trial.

As a proof that criminal mediation does not automatically bring offender's acquittal,<sup>58</sup> most mediations have returned to courts to end with a conviction or verdict of guilty.<sup>59</sup> However, we must highlight that in most of convictions the extenuating circumstance of art. 21.5 PC has been implemented, so the use of mediation has been favourable to the offender. Finally, many court records (34, specifically) have ended with their file after a previous mediation procedure.

#### 4. Conclusion

Although there are not even three years of PMSB`s running, its experience is valued as very positive and useful from all perspectives involved. Citizens (victims and offenders), mediation team and GEUZ centre where it belongs, all affected legal agents (judges, prosecutors, clerks and lawyers) and the Basque Government have expressed their satisfaction.<sup>60</sup>

There is no doubt that criminal mediation helps dignifying the victim. It gives him the word, the opportunity to participate in the resolution of the conflict he is involved in and to be repaired (although only symbolically); a fact that comforts and satisfies him, minimizing secondary victimization.

Offender or delinquent also profits from his active participation on the resolution of the dispute. Not only because he gets the reduction of the punishment or avoidance of entering in prison. Beyond this, the victimizer sees the secondary deviation reduced, learning social skills that teach him how to solve conflicts, to become aware of the suffering of the victim and to feel more integrated into society. All this prevents his reiteration or reoffend.

It is especially laudable the commitment of the offender and the victim to submit their dispute to mediation. Moving away from the thirst for revenge and punishment as a purely retributive element, they freely choose dialogue and mutual understanding as a way to resolve criminal dispute. It is the path to a justice, more fair, peaceful and beneficial not only for the parties but also for society.

For society, community in general, mediation is an ideal instrument to restore social peace, which has a special pedagogic effect, spreading the new culture of conflict resolution while approaching society to Justice Administration.

There is no doubt that Justice Administration wins a lot with criminal mediation. Besides humanizing itself, it obtains the confidence of citizens, improving its image, damaged for many years. Obviously, criminal mediation helps to reduce the workload of judges, allowing them to devote more time for other causes, which gives a general improvement in the functioning of the jurisdiction.

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<sup>56</sup> It has been like that in 30 and 24 cases respectively.

<sup>57</sup> The report cited before says that it has been like that in 41 and 34 cases, respectively.

<sup>58</sup> Then it does not forget the bases or foundations of retributive justice in the framework of the monopoly of the state to punish (*ius puniendi*).

<sup>59</sup> It has been like that in 74 cases. Only 30 mediation agreements obtained an acquittal in courts.

<sup>60</sup> Two documents provide information and support this statement: the *Statistical report of activity prepared by the mediators* (February 2008) and the *External assessment of the activity of criminal mediation service of Barakaldo* (July-December 2007), made the latter by the criminalist, expert in criminal mediation, Gemma Martínez Varona. The latter shows in her report that the experience of criminal mediation of Barakaldo has been an excellent opportunity to bring dignity to the victim and to improve the Administration of Justice in general and criminal court procedure in particular.



Concluding, it is clear that jurisdiction, judges who serve justice in the State network, is not the only way to solve criminal conflict. Criminal mediation also exists and it works properly. Nevertheless, it cannot be hidden that, in the existing legal framework, in Spain, criminal mediation is a tool in the hands of judiciary, developed with judicial control and supervision. It is an option (the commitment to restorative justice in a context inspired by retributive justice) and valid if it has a regulatory assistance. In this sense, it is necessary that Spanish legislator regulates criminal mediation in our legal system.

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