Contemporary Tendencies in Mediation

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CONTENTS

DEVELOPMENT AND RESISTANCE IN SOUTH EUROPE JUSTICE SYSTEMS TO RESTORATIVE JUSTICE

Helena Soleto[1]

It is not clear where to situate the start of Restorative Justice; Restorative Justice is said to have been born through social and legal trends in Northern European countries, and, above all, in Canada and the United States: initiatives in Ontario in the seventies, academic constructions or social developments with roots in ancient legal cultures or native justice produced this way of delivering Justice.

Mediation and Restorative Justice currents have had limited efficacy in Southern European countries, and namely in Spain; over the last years, the European contribution has been crucial to their development.

This paper focuses on the origins and models of Restorative Justice (hereinafter: RJ), the European contributions in developing RJ, the factors that hinder assimilation of RJ in civil law systems, as well as the principles which I view as fundamental in a RJ framework.

1. Genesis and models of Restorative Justice

1.1. Factors of change in traditional Criminal Justice triggering the genesis of Restorative Justice

We can summarize five factors which have been calling for change, throughout the 20th century, in different levels of the traditional occidental Criminal Justice systems; these factors have allowed for the bloom of RJ elements in various countries:

a) Retributive currents
b) Social empowerment currents
c) Inefficiency and quest for satisfaction with the Administration of Justice
d) Reinsertion aims
e) Importance of the victim

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a) Retributive currents

The beginnings of RJ amount to currents initiated in the 60's in the United States; on one hand, the traditional judicial system was proving insufficient to economically repair the harm done to the victims, and, on the other hand, society claimed participation in matters such as criminal justice, traditionally delegated to the State.

It is important to mention that participation of victims in the anglosaxon system is less intense in procedural terms (as it is known, participation of the private accuser is an exceptional characteristic of the Spanish system in terms of comparative law); however, in practice there is a higher interest for the victim, probably so because of the vindicative aim this is imbued with.

In the US system, the initially dominant interest for the victim with a retributive aim wound down in mid-nineteenth century; from the 70's on, in the twentieth century, the concept of restitution[2] was recovered, and it was made absolutely relevant after the presidential report on this matter, *President's Task Force Final Report, 1982*. Before this report, the necessary restitution to the victim as part of the conviction was regulated in no more than 8 States. From this initiative on, multiple policy changes took place in federal and national level, gathering together rights of the victim.

b) Social empowerment currents

During the 60's, as well, new ways to understand coexistence and living in a society were developed in the United States. They resulted in initiatives that promoted empowerment of the society and the development of programs allowing citizens to participate in the Administration of Justice.

These programs are based on the belief that the parties in conflict must actively participate in its resolution and mitigate its negative consequences. They are also based, in some cases, on the will to return to local decision-making and community development. Such approaches are also seen as a means to encourage the peaceful expression of conflicts, to promote tolerance and integration, to encourage respect for diversity and to promote responsible community practices.

Thus, different forms of RJ have been developed, ones that offer communities new means of conflict resolution[3]. In many countries, the idea of par-

2 TOBOLOWSKY *et allii*, *Crime victim rights and remedies*, North Carolina, USA, 2010, pp. 153 *et seq*.

3 *Vid*. paragraph 1.3.

ticipation of the community is a commonly accepted idea; it seems that RJ practices can help strengthen the capacity of the existing system of justice, especially so when society includes components which are culturally conditioned in very different ways, affecting their vision of justice and their participation therein. This may be the case in New Zealand, where the use of circles has constituted a significant progress.

Finding a way to effectively mobilize participation in the civil society, while at the same time assuring protection for the rights and interests of victims and criminals is a fundamental challenge for participatory justice.

c) Inefficiency and quest for satisfaction with the Administration of Justice

In many countries, insatisfaction and frustration with the official system of justice have led to a demand for alternative responses to delinquency and social unrest.

The main reason for the insatisfaction is that societies have viewed the courts as the only way of resolving every conflict, and not all conflicts are identical. Every conflict has its own characteristics, specialties, context, reasons, parties, emotions and background. For this reason, when it comes to resolving a conflict, perhaps one should start with studying these factors, in order to decide on the best way for resolution, and not send it directly to the court to be resolved by the Judge.

In the so-called – famous indeed – Pound conference, "*1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*", Professor Sander indicated that the use of the most adequate resolution means for each conflict should be enabled; the concept of "multi-door courthouse" emerged thereof, each door of which would be a means of resolution, such as litigation, mediation, arbitration, expert evaluation, etc[4].

Thus, there emerged, on one hand initiatives promoting reparation and, on the other hand, initiatives promoting conflict resolution from within the community. Reparation panels would be an example of reparation initiatives.

In relation to community activity, the work of community justice centers supported by the follow-up workgroup of the Pound conference is still and al-

4 *Vid*. SANDER, "Varieties of dispute processing" (address before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice – Pound Conference, Apr. 7-9, 1976), in 70 F.R,D. 79, 1976, pp. 111 *et seq*.

ways relevant[5]. These centres, which would treat conflicts between neighbors, family members or even civil law conflicts, or minor criminal law conflicts, would be community centres created by social initiative, called "community centers" or "community boards". Currently, a big part of the mediatory activity originates in referral of cases by the courts.

d) Reinsertion aims

Many mediation and RJ programs are largely justified on the basis of the idea that the mediation process has to favor reeducation of the offender, especially when it comes to a juvenile one, and for this reason recidivism therein should be smaller compared to cases in which there is no mediation.

On the basis of several research studies from the United States[6] and the United Kingdom it has been observed that juvenile offenders who have participated in a mediation program are less likely to recidivate, and that the mediatory formulas with joint participation of victim and offender lead to a better result[7].

Studies on recidivism should probably be broadened and elaborated more in depth, since there may exist other factors which influence varying recidivism rates – such as selection of cases to be mediated, considering that, in general, mediation is only carried out when the offender seems capable of emotionally taking on the damage done, among other things.

According to the *UN Handbook on Restorative Justice*, RJ programs may offer to offenders the opportunity to:

- Assume responsibility for the offense and understand its impact on the victim;
- Express emotions, and even regret, with respect to the offense;
- Receive support in order to repair the damage caused to the victim or to oneself and to the family;
- Correct attitudes, provide restitution or reparation;
- Showing repentance to victims ("apologize" as indicated in the original text, which in Spanish could be translated as "pedir perdón", although this does not mean actually expecting an apology from the victim);

5 IZUMI, The use of ADR in criminal and juvenile delinquency cases, in *ADR for judges*, Washington, USA, 2004, pp. 202 *et seq*.

6 SCHNEIDER, "Restitution and recidivism rates of juvenile offenders: results from four experimental studies", *Criminology*, vol. 24, nº 3, 1986, pp. 553 *et seq*.

7 UMBREIT, COATES and VOS; Victim offender mediation, in *Handbook of dispute resolution*, BORDONE (coord.), pp. 455 *et seq*.

- Restoring relationship with the victim, when deemed appropriate;
- Reaching closure.

e) Importance of the victim

General criminal theory and the subsequent structures of Justice are focused on the breach of law, paying little or no attention to issues concerning the victims further than and beyond their procedural situation, such as their emotional or economic needs.

In his work Conflicts as property, in 1977, Nil Christie was defending the need to include the victim in the delivery of Justice: "criminology to some extent has amplified a process where conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property"[8].

In most criminal law systems, the victim is entitled to claim financial reparation, and is often allowed to participate in the process, without, however, being offered precisely the key role that would be necessary, emotionally speaking.

In countries such as the United States, the victim has various rights[9], such as to be notified on processes and their results, to be present in the process, to be heard in relation to presentation or withdrawal of an accusation, as well as in relation to plea bargaining, the judgment and suspension of the proceedings. In addition to these procedural rights, systems pointing to an economic restitution of the victim have been spreading since the presidential report in the 80s.

In western systems, rights of information, participation and protection of the victim have been spreading. In the European Union, the *2001 Framework Decision*, which we will be mentioning below, established the standing of the victim in criminal proceedings, and the *Directive* of October 2012 has come to consolidate and strengthen such standing.

The 21st century implies, in terms of Criminal Justice, an effort to approach administration of justice through a new lens: the victim's one. As we said, 20th century justice achieves the highly needed guarantee for the rights of the accused, whose fundamental freedoms may be found diminished through due

8 CHRISTIE, Conflicts as property, The British Journal of Criminology, vol. 17, n.1, 1977, p. 1 *et seq*.

9 *Vid*. TOBOLOWSKY *et allii*, *Crime victim rights and remedies*, North Carolina, USA, 2010,

process. In the 20th century, in the more developped countries the situation is evolving towards obtaining justice of a higher quality, which shall also take into account the situation of the victim.

The increasing appearance of texts on the status of the victim internationally – either in general or for certain unlawful acts that are especially significant to society nowadays, such as terrorism, violence again women or children or vulnerable groups – constitutes an expression of this new approach.

Thus, the United Nations has developed rules and basic texts concerning the victim in general, as well as concerning victims of terrorist attacks, women as victims, children as victims and, more generally, vulnerable groups as victims.

The Council of Europe has developed rules such as the *European Convention on the Compensation of Victims of violent crimes*, the Council of Europe *Conventions on prevention of terrorism, on action against human trafficking, on the protection of children against sexual exploitation and sexual abuse*, and the 2006 *Recommendation on assistance to crime victims*, the 2002 *Recommendation on the protection of women against violence*, the *Guidelines on human rights and the fight against terrorism*, adopted by the Committee of Ministers in March 2005; through the European Committee on legal co-operation, it works on the assimilation of rules by Member states.

The European Union has also shifted its focus on victims in the last decade, developing the *Green paper on compensation of crime victims* and the corresponding *2004 Directive*, and, in terms of participation in the process, the *2001 framework Decision*, replaced by a wider Directive treating the same matter, in October 2012.

Restorative justice offers benefits to the victims, such as, according to the *UN Handbook on Restorative Justice*, the possibility to:

- Directly participate in resolving the situation and establishing the consequences of the offense;
- Receive answers to their questions on the crime and the offender;
- Express oneself with respect to the impact caused to them by the offense;
- Receive restitution or reparation;
- Receive an apology;
- Restore, when deemed appropriate, a relationship with the offender;
- Reach closure.

1.2. Restorative justice models depending on the relationship with the Courts

Regarding the conceptualisations of RJ, it is interesting the Johnstone and Van Ness approach,who argue that RJ is mainly used in three different ways[10]:

- Encounter conception, where the parties met to discuss the crime, its consequences and the restoration
- Reparative conception, where the main issue is the restoration of the crime with RJ
- Transformative conception, wich focuses on the structural injustice

More specifically, and depending on the relationship between the Criminal justice system and the RJ instruments developed in a State, we may distinguish three kinds of systems[11]:

a) Systems complementary to Courts
b) Systems alternative to prosecution
c) Initiatives outside the sphere of the Justice system

a) Systems complementary to Courts

Systems hereby classified as "complementary" to Courts correspond to the more traditional criminal justice systems, which choose to bind RJ systems to the Courts. They are marked as Court-connected programs, and they may or may not belong to the system of administration of justice.

In these systems, development of a RJ process concluding with a reparation agreement may bring procedural benefits to the accused or defendant; these will usually consist in a different classification of the crime or a reduction of the proposed penalty taking into account an extenuating circumstance, or, after the judgement, the suspension or replacement[12] of the penalty, and even prison-related benefits.

The time of referral to mediation by the judicial authority may greatly vary

10 JOHNSTONE, G. and VAN NESS, D. (2007). The meaning of restorative justice. In G. Johnstone and D. Van Ness (Eds.), *The Handbook of Restorative Justice* (pp. 5-23). Cullompton: Willan Publishing, cit. By ZINSSTAG, TEUKENS and PALI, *Conferencing: a way forward for Restorative Justice in Europe*, European Forum of Restorative Justice, 2011, p. 32

11 *Vid*. Author, Sobre la mediación penal, Aranzadi, 2012.

12 See the contribution of PERULERO, "Hacia un modelo de Justicia restaurativa: la mediación penal", in *Sobre la mediación penal*, Garciandía y Soleto (dirs.), 2012.

for each program, the general idea being that the earlier the cases are referred, the better.

In anglosaxon countries where RJ is highly developed, referral may take place at different moments, depending on programs: before the accusation, after the accusation but before conviction, subsequently to conviction but before a judgment containing the penalty, subsequently to the judgment and before reintegration into society, and after incarceration and before reintegration into society. Depending on the time of referral, the body conducting it will vary: the police, the Prosecution, the Court, the prison authorities...[13]

b) Systems alternative to prosecution

There exist programs which, in terms of Criminal Justice, represent a real alternative to prosecution, thus being structured as a true alternative dispute resolution form.

In such a structure, certain crimes or crimes committed by people of certain characteristics (age, ethnicity...) may be treated through RJ processes, without entering the Criminal justice system.

In these cases, an authentic referral of cases takes place even before they could be judicially processed; they are mostly organized in countries with an anglosaxon culture. Continental States view this RJ pattern reluctantly because of their strong and traditional criminal justice systems, which belong to the State.

In the United States and Northern European countries this kind of programs are developed in some judicial districts with minors, or in cases of shoplifting. Most of them are run by the police or by public entities, and exclude recidivism.

In the case of Spain, mediation carried out in programs for minors could be said to be an alternative system when it takes place at an early moment and the case is closed, although we understand this system to be mainly complementary rather than alternative.

c) Initiatives outside the sphere of the Justice system

There is an increasing appearance of RJ initiatives with no relevance to the proceedings and to enforcement, the uppermost purpose of which is emotional restoration.

I am referring to RJ activities that can be carried out subsequently to con-

13 *Vid.* Handbook of Restorative Justice, UN.

viction, and that may or may not be relevant to the administrative status of the prisoner, such as, for example, the restorative process between an offender and a victim's family member in order to apologize for the damage caused.

Restorative processes between people who do not wish criminal proceedings to be initiated by the system of justice could also be included here; this may be the case of conflict between parents and children, the latter being the offenders.

Lastly, restorative processes with no procedural relevance, but which bring about an emotional restoration, would also be included here.

1.3. Restorative justice processes

We gather here a description of different restorative processes, the use of which is spreading in recent years[14].

The most usual mediatory style RJ processes in the field of criminal law – meaning that a neutral interacts with the offender and other people, who may be the direct victim of the offense or other people from within the community, using facilitation techniques – vary, depending on the participants, the action plan and the aim.

a. VOM: victim-offender mediation

Victim-offender mediation is the most widespread RJ instrument. Obviously, participants include the offender, the victim and the mediator, and, unlike civil mediation, dialogue here is more important than agreement; the aim is to empower the victim, allowing for accountability of the offender and reparation of the damage caused[15].

The rationale for these programs is based on the restitution of the victim and rehabilitation of the offender. Furthermore, as IZUMI notes, most victims support restitution as an alternative to incarceration in property crimes, where rates of satisfaction for victims and offenders are very high[16]. This is the most widespread restorative process in Spain and the European Union countries, as well.

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14 *Ibidem*.

15 IZUMI, "The use of ADR in criminal and juvenile delinquency cases", in *ADR for Judges*, pp. 195 *et seq*.

16 *Ibidem*, p. 197.

b. Family group conference

Family group conference or community conference is a mediatory style form of facilitation which includes participation of people from the family, school and social background, in addition to the offender and the victim. The process consists in a facilitation in which people engage in conversations about the damage and about ways for achieving reparation.

These conferences can take place in community centers, schools, and even in police or child protection centres, or referral from the Court, and they can have no procedural relevance, *i.e.* the matter does not enter the justice system and the courts are not involved[17]. This model comes from New Zealand and is used in the United States, especially in cases involving minors in foster care and in general as a way of preparing hearings with the judge in the non-criminal field, but also in minor criminal matters such as shoplifting. ZINSSTAG, TEUKENS and PALI, refere to the use of Conferencing in USA and Western Europe for dealing with almost all offences, with the exception of murder[18].

c. Circle sentencing

Circle sentencing is similar to a group conference, but it involves participation of the judicial authority; the court forwards cases, and it monitors cases and compliance with the rules.

Participants may belong, as in the case of group conferences, to the social background of the victim and the offender; consensus is sought in order to understand what happened and how to achieve reparation.

It is even possible that the judge participates in the circle, but this participation does not, in principle, confer a key role or a facilitator one. The judge's activity focuses on embodying the agreed plan in the judgment, although participation may be more active when consensus is not achieved.

This model is used in some programs in the United States for unlawful acts committed by minors, but also adults, and is used for all types of crime, even against life and sexual integrity in Canada[19], and ZINSSTAG, TEUKENS y PALI describe a similar situation in other countries[20].

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17 *Ibidem*.

18 ZINSSTAG, TEUKENS and PALI, *Conferencing: a way forward for Restorative Justice in Europe*, European Forum of Restorative Justice, 2011, p. 49.

19 *Vid*. IZUMI, "The use of ADR…", *cit*., p. 200,

20 *Vid*. ZINSSTAG, TEUKENS and PALI, "Conferencing…", *cit.,* pp. 82 *et seq*.

d. Restorative justice panels

These panels are the community response to the failure of the public system to bring about reparation in the framework of the proceedings.

In the United States, these panels or groups are structured differently, although in general the victim is not included in their meetings with the offender, and the offender plays a minor role. This is considered the least restorative of processes.

Generally, once the offender admits guilt in criminal proceedings, the judge offers them access to the restorative panel, which, after meeting with them, discusses reparation with the victim. The panel is set up with participation of citizens.

This form of complementing the justice system has been rated as the least restorative, as it is focused on reparation, and the participation of victim and offender is limited, although depending on how it is carried out several restorative purposes may be reached. It is a form of organization similar to conditional release panels.

The panel has broad discretion in establishing reparation, which may be economic, but which usually combines restitution with measures such as community work, letters to the victim or apologizing.

Typically, follow-up meetings are held after about 3 months in order to monitor compliance with the measures. Have they been met, the panel congratulates the offender; otherwise, the case is forwarded to the judge to determine the sentence, which may include imprisonment[21].

e. Community mediation

We have already referred to the emergence of alternative dispute resolution and RJ forms since the 70s, and the convergence of reparative requirements and social empowerment of the 60s.

Thus, community centers working in neighborhoods and schools were created, providing training in conflict resolution to students, teachers and volunteers. The San Francisco Community boards stand out among community centers.

The follow-up workgroup of the Pound conference recommended that community centers be developed to allow a variety of methods for processing conflict and interacting with the courts of justice[22].

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21 *Vid.* IZUMI, "The use of ADR...", *cit.*, pp. 200 *et seq.*

22 TAMM and REARDON, "Warren E. Burger and the Administration of Justice", *Brigham Young University Law Review*, 1981, p. 513.

There is an estimated 500 community mediation centers in the United States, which are funded by Federal Government grants, contracts with the government (for example, in order to facilitate matters concerning foster children, such as the Concord Center in Nebraska), with the courts, or directly with mediation users, as well as by donations.

Community centers conduct mediations and facilitations in non court-connected school and neighborhood areas, but also civil and criminal law mediations and facilitations forwarded by the court[23].

2. European contributions to the development of Restorative Justice

I believe that we can find three major types of "contributions" of Europe to Restorative Justice:

- Firstly, a *legal and practical impetus from the EU and the Council of Europe*;
- Secondly, the *comparative experiences drawn from other countries*;
- Thirdly, and lastly, the *influence of strong activist NGOs*, the European Forum for Restorative Justice and the European Association of Judges for Mediation (GEMME).

2.1. Legal and practical impetus by the Council of Europe and the EU

Among regional regulation, Recommendation 99 (19) of the Council of Europe on mediation in penal matters and a subsequent study and support work on behalf of the CEPEJ have produced one of the pillars which actively sustain RJ through mediation, and which is explained and detailed in the EU regulation.

Restorative Justice is also a funding aim of the European Commission in the field of the Directorate Justice, which has, for this reason, funded numerous actions linked to mediation or RJ, as a policy in the last 10 years.

Initiatives in a European Union level are especially relevant, in addition to texts promoted by the United Nations, which are probably a result of broader international experiences, such as those of the United States and New Zealand and Australia, all of which offer a wider and more flexible approach.

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23 *The State of Community Mediation-2011* reports an association of more than 400 US Based programs. National Association for Community Mediation. Nafcm.org. *Vid*. also IZUMI, "The use of ADR…", *cit*., p. 203.

Among the UN texts, Resolution 2002/12 of 24 July 2002, 37th plenary meeting, entitled "Basic principles on the use of Restorative Justice programmes in criminal matters", is a result of previous resolutions and the Vienna Declaration. In this Resolution, the basic concepts of RJ are described in a very accurate and flexible way, and principles of use are listed in the same way, establishing guidelines which allow for deviation from the general criteria when deemed appropriate, safeguarding, in any case, the rights established by national regulation relating to the victim and the offender.

2.1.1. Recommendations of the Council of Europe and the work of CEPEJ

As Perulero indicates, various Recommendations of the Council of Europe urge States to introduce specific reparation measures and even to develop victim-offender mediation systems.[24]

Since the 80s, the Council of Europe has been issuing Recommendations insisting on the relevance of the victim in criminal proceedings, such as nº R (85) 11, R (87) 18 , R (87) 21, R (87) 20, R (889 6, R (929 16, R (95) 12, R (98) 1, and, more recently, R (2006) 8, which replaces R (87) 21, but it is in Recommendation nº R (99) 19 of 15 September 1999 of the Committee of Ministers of the Council of Europe, on mediation in penal matters, where an effort has been made to give impetus to mediation in this field among Member states.

The Recommendation promotes development of penal mediation by Member states on the basis of the principles listed in the Annex to the Recommendation, which includes 34 guides or principles that could serve as a guide to the States with various aims; general principles of mediation, ethical duties of mediators, safeguards for protection of the victim, quality of the mediation…

The Council of Europe, through CEPEJ, the European Commission on the Efficiency of Justice, has carried out a significant follow-up of the level of implementation of the Recommendation (99) 19, and as a result of this several documents have been published; among these, it is worth mentioning the *Analysis on assessment of the impact of Council of Europe recommendations concerning mediation* and the *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*.

The content of the report on the impact of the Recommendations on mediation, CEPEJ (2007) 12, is very negative: most States do not fill in questionnaires,

24 PERULERO, "Hacia un modelo de Justicia restaurativa: Mediación penal", and also ROMERA, "Principios y modelo de mediación en el ámbito penal" in *Sobre la mediación penal*, Garciandía y Soleto (dirs.), 2012.

and information is very limited. The limited impact of the Recommendation, as well as the general situation of mistrust and lack of information of citizens, users of justice and, above all, of the judges, are highlighted as a basic conclusion in regard with the Recommendation concerning mediation on penal matters.

The Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, CEPEJ (2007) 13, establish criteria concerning three concepts: availability, accessibility and awareness.

Relating to availability, support of States for mediation projects is addressed, as well as the role of judges and prosecutors, and also of other authorities and NGOs, of lawyers, whose codes of conduct must include a duty or recommendation to suggest mediation to their clients, the quality of mediation systems, and mediator qualification, among other issues.

Concerning accessibility, it is noted that mediation should not be used if there is a risk that a disadvantage is caused for either party, among other things, such as the cost of mediation which should be for free.

Lastly, concerning mediation awareness, CEPEJ indicates that there is a need to extend awareness of mediation for the general public, for victims and offenders, the police, the judges and prosecutors, lawyers and social workers.

In the year 2012, a *Report on the Quality of Justice* (with data from 2010) was published, including a chapter on mediation, and where one can see the inadequacy of data (for example, there is no data on Spain and Germany), and small impact of penal mediation in terms of numbers. Only Belgium, the Netherlands and Poland offer figures, but obviously the reality is very different, as other countries have also developed a state of mediation.

2.1.2. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012

Concerning the European Union, since 2001 we have relevant rules which mention victim-offender mediation, in the *Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JAI)*, namely in article 10:

> *"Penal mediation in the course of criminal proceedings*
>
> *1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.*
>
> *2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account."*

These rules, very brief, have recently been replaced by the *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime*, and replacing Council Framework Decision 2001/220/JAI.

Article 12 of the 2012 Directive[25]:

> *"Right to safeguards in the context of restorative justice services*
>
> *1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*
>
> *(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;*
>
> *(b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;*
>
> *(c) the offender has acknowledged the basic facts of the case;*

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25 Draft Directive. Art. 11. *1. Member States shall establish standards to safeguard the victim from intimidation or further victimization, to be applied when providing mediation or other restorative justice services. Such standards should as a minimum include the following:*

a) mediation or restorative justice services are used only if they are in the interest of the victim, and based on free and informed consent; this consent may be withdrawn at any time;

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

c) the suspected or accused person or offender must have accepted responsibility for their act;

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

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

2. Member States shall facilitate the referral of cases to mediation or other restorative justice services, including through the establishment of protocols on the conditions for referral."

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

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

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

The phrasing of the draft Directive was not favorably received by RJ practitioners and scholars[26], precisely because of obstructing the development of Restorative Justice, because of introducing some distorting elements and because of figuring an underlying mistrust of the institution.

After arduous preparation, the final phrasing of the Directive has improved but there is still some criticism to be made, since it seems Restorative Justice is excluded in cases where the victim is not willing to participate.

Restorative justice versus penal mediation

In much the same way as the 2001 Framework decision, the 2011 draft Directive expressly referred to mediation in the title of its article 11 *"Right to safeguards in the context of mediation and other restorative justice services"*; in the final phrasing, this reference was removed, replaced by a more general reference to Restorative Justice, whereby article 12 provides for "*Right to safeguards in the context of restorative justice services*".

Several changes have been made in the same regard, in order to refer to RJ in general, such as in paragraph 2 of the abovementioned article, which affirms the idea that working on RJ implies a broader and better established field compared to mediation.

Measures versus standards

The wording of the Directive improves the phrasing of the draft, since it no longer provides, in paragraph 1, for *standards*, as previously indicated by the draft, but rather for *measures*, safeguarding the situation of the victim, on one hand, and highlighting the importance of the quality of reparative justice services, on the other hand.

Possibly, the new approach – probably a more advanced one – brought

26 *Vid.* in this regard the views expressed by the European Forum for Restorative Justice in www.euroforumrj.org

about by the 2012 Directive in relation to the 2001 one, could be due to that the 2001 decision can be said to be outdated, and that States do not need mediation to be promoted by European rules, and also that legislation in the second decade of the century should aim to specify procedural aspects of mediation.

However, the reality does not currently support such an argument, since, on one hand, penal mediation has only been consolidated in some countries, and, on the other hand, a detailed regulation of mediation could be an obstacle for its development.

Going into too much detail in a framework text such as a Directive in relation to something as flexible as mediation or RJ ought to be is not the most adequate thing to do, since each State, and even, each Court or judicial district shall specifically develop the legal, ethical and practical environment of the mediation. The details relating to the mediation process are to adapt to all structural needs and to offer flexibility for a possible readjustment to the circumstances.

Replacing the terms "establish standards" by "take measures" during processing of the Directive is not a trivial issue. The previous wording meant a necessary regulating activity on behalf of States, and this is contrary to the spirit and aim of RJ, which does not have to be limited by rules, since it needs to be able to adapt to the needs of each field, each case and each moment. In general, in countries which have more and better experience in RJ, regulation through rules is very rare, while in least advanced countries if regulation exists it is wider; for this reason, the final wording of the Directive is a huge success for the good development of RJ.

This same idea has led to changing paragraph 2 of article 12 of the draft, finally referring to the establishment of "procedures or guidelines" to make referral easier.

Participation of the victim in the Restorative Justice process

One of the problems during the passing procedure of the Directive was that it could be understood by readers that paragraph 1.a) establishes participation of the victim in the RJ process as a necessary element. This could exclude RJ process with surrogates or without victim.

This requirement is based on the need for the victim's consensus, which may be withdrawn at any time during the process.

Such a limitation, although it could initially make some sense, is not justi-

fied: at times the attitude of the victim does not allow constructive participation in the mediation process; and, in other cases, for example, when there is no specific victim, the offender would be deprived of the possibility to obtain the personal and procedural benefits which come with the mediation agreement.

In practice, in many mediation programs a mediation will continue when this is observed to be beneficial to the offender and non participation of the victim responds to elements which are not significant to the mediation process; for example, the victim is afraid and does not want to maintain any relation with the offender, or wants no contact with the issue at hand, etc. We also referred to the absence of a specific victim, for example, in crimes related to drug trafficking, or other crimes in which the victim does not exist or is not available (because of living in another district or State, etc.). In these cases, it is quite usual that the mediation or RJ process continues with the participation of a "surrogate", that is, a person replacing the position of the victim in the restorative process. Also, in case mediation has begun and the victim no longer wishes to participate, the process can be continued with the participants deemed appropriate by the mediator, and the victim being informed about the issues that shall be agreed on with the mediator.

It seems that the Directive goes beyond its original purpose, and that it tackles matters which will have to be decided upon and regulated by other operators, such as the States themselves, or even the courts, mediator organizations, etc. Excluding issues related to mediation is negative for its development, since in practice a given case will be evaluated at different times by different operators and the issue of appropriateness of the conflict resolution method for the specific conflict needs to persist during the entire process.

The Directive regulates the standing of the victim in Restorative Justice, but RJ can also be developed and regulated when the victim does not participate, such as in cases similar to the ones we mentioned. However, the wording of the Directive can be received by States as an absolute regulation of RJ, above all in those States with less know-how and experience in this field.

Acknowledgment of the facts

In paragraph c of article 12 of the Directive it is noted that "*the offender has acknowledged the basic facts of the case*". This matter has fuelled a big debate throughout processing of the Directive, since a strong requirement of acknowledgment covering the facts and intention, or even the penalty that could be imposed, could prevent the development of many restorative processes.

The word of the draft Directive was too litigation oriented in this regard, indicating that *"the suspected or accused person or offender must have accepted responsibility for their act"*.

In general, most RJ programs require some grade of acknowledgment of the facts in order to begin the process, and a process ended successfully will normally mean that the offender acknowledges their responsibility during the process or in the reparation agreement; in this regard, the wording of the Directive is much more accurate than the draft was, and broadens the spectrum of cases that are possibly susceptible of starting a RJ process.

Voluntary and confidential character versus res judicata

According to paragraphs d and e, agreements are arrived at voluntarily and may be taken into account in any further proceedings, while discussions shall be confidential, except in cases of public interest that are included in the national regulation or ethical limitations.

It seems that the mediation agreement is not protected by the confidentiality prevailing in mediation sessions, a reasonable issue if we take into account the tinge of public interest in this matter taking us away from the available area which in the private field allows for confidentiality to extend to the agreement or even to the fact of having reached an agreement.

The possibility of linking the agreement to other proceedings is not to be understood as an *ex legem* consequence of the *res judicata*[27].

Paragraph d simply establishes non confidentiality on its existence and content in other possible proceedings, obtaining in each case the importance awarded to specific circumstances in each States, being this co-defendant testimony, witness testimony, confession... depending on the requirements of the different legal orders and jurisprudence.

Appropriateness of the case versus generalization

In paragraph 2 of article 12, the final phrasing includes a reference to case referral "as appropriate". This contains the idea of appropriateness of the case to the RJ process, moving away from the traditional automatism that criminal proceedings are imbued with; we shall refer to this matter below.

27 *Res judicata* can produce a material effect on future procedures: a fact declared so by the resolution of the first procedure can be assessed as a fact on a second procedure without the need to develop further evidence over that fact.

2.2. Comparative experience drawn from other countries

In Europe, we have great variability in relation to the development of RJ; among Northern European countries, such as Norway, we can find experiences in the 70s that are pioneers on a global level; others, such as the United Kingdom, have many ongoing programs; the Central European countries have worked, in recent times, on RJ, with positive results [28]; and, lastly, it is in Southern European countries where a greater resistance can be observed with regard to introduction of mediation or RJ programs, and where, in general, basic elements are not adequately regulated, sometimes underregulated but –and more harmful- sometimes tending to overregulation.

Concerning the pioneer, Norway, mediation between victim and offender has been developed since the 70s, first with juvenile offenders and then incorporating cases of adults in the programs. As in most countries, the system is monitored by the Prosecutor, and in order to start a restorative process there has to be a strong evidence of guilt.

Since 1991, RJ has been regulated, first in the National Mediation Service Act, then in the code of procedure (1998), the Execution of Sentences Act (2001) and the Penal Code (2003), and in other, more flexible rules, such as notices of the State Prosecutor's Office, and orientation guides explaining to legal operators which crimes are more adequate for mediation to be attempted, such as theft or vandalism[29].

The United Kingdom is also among the countries which have started with pilot programs early, dating back to 1979. In the UK there are various RJ programs and tools, a great diversity of RJ projects, a lot broader than in the other countries. There are even programs developed by the Ministry of Internal Affairs, and this includes criminal conflict diversion programs, although referral and reintegration ones, too[30]. One can notice the commitment to flex-

28 *Vid*. Information concerning Restorative Justice in Northern and Central European countries in the document *European Best Practices of Restorative Justice in the Criminal Procedure*, 2010.

29 *Vid*. ERVO, "La conciliación en materia penal en los países escandinavos", in *La mediación penal para adultos*, Barona Vilar (dir.), pp. 148 *et seq*.

30 *Vid*. the interesting work of MONTESINOS in *La mediación penal para adultos*, Barona Vilar (dir.), concerning mediation in the United Kingdom, as well as *Sobre la mediación penal*, Garciandía y Soleto (dirs.), and CEPEJ document CEPEJ-GT-MED(2007)6 Restorative Justice: the Government's strategy: Contribution by the United Kingdom.

ibility and the reluctance to regulate mediation in this country, which is probably the one that has understood and developed RJ in the best way in Europe.

France began mediation practices in the 80s, with a law of 1993 regulating mediation and another one of 2004 boosting the institution.

In Belgium, programs with juvenile offenders were initiated in the 70s, although there was no express regulation. Victim-offender mediation was first regulated in 1994, and at present the prosecutor and court may refer cases with regard to all unlawful acts. In the Belgian case, mediation is possible even during police inquiry, controlled by the prosecutor, thus established as a real alternative to the process. For court-connected mediation, the system is controlled by a liaison prosecutor, a special advisor and a case manager. The development of RJ in Belgium is a model for the rest of continental countries.

In Germany, victim-offender mediation began in 1984 with juvenile offenders and in minor cases, and is currently well-developed, but operators indicate prosecutors show little trust in the institution[31].

In Austria, the beginning of pilot programs dates back to 1980 with juvenile offenders, extending in the 90s to cover adults, officially regulated in 1999 for crimes entailing less than 5 years of imprisonment[32].

2.3. Activity of non-governmental organizations

In the European field there are two NGOs whose activity has contributed in the development of mediation and RJ, favoring sharing of know-how, support for new projects and influence on national regulation and practice.

GEMME is the *European Association of Judges for Mediation*[33] its aims include studying mediation systems, sharing experiences among judges and promoting research and dissemination initiatives.

Most European countries have a section in GEMME, which has in many cases been the principal driving force behind development of mediation in these countries. This has been the case of the Spanish section of GEMME, which in turn has been established as a national association. Judges have car-

31 BARONA, "Situación de la justicia restaurativa y la mediación penal en Alemania", in Mediación penal para adultos (Barona dir.), p. 235 *et seq*.

32 *Vid.* MIERS, *An International review of Restorative Justice*, Crime Reduction Research Series, Home Office, UK, 2001, pp. 7 *et seq*.

33 http://www.gemme.eu/, GEMME, principally consisting of judges, prosecutors and clerks, also includes some mediation practicioners and scholars.

ried out a dissemination work and have provided support to different mediation initiatives conducted in Spain, participating actively therein.

The *European Forum for Restorative Justice*[34] consists of researchers, practitioners, judges, prosecutors, and in general, operators who are in contact with RJ. This organization, unlike GEMME, specializes in criminal matters, develops a high level in literature and experimenting and promotes the dissemination of knowledge, the sharing of experiences and of research, training and dissemination initiatives.

According to the European Forum of RJ, Restorative Justice needs are currently educating society to accept RJ, generalizing the training for judges and legal practitioners for acceptance and proper use, allocating of resources to development of programs, assuring quality in the development of programs and expanding the use of RJ instruments beyond mediation.

3. Resistance of South continental systems to Restorative Justice and criteria in Restorative Justice

The formalistic legal culture that affects Sourthern European countries is widely known, and, facing Restorative Justice, we can find a number of objections from the operators[35].

The first objection that RJ is faced with comes from those defending that it is not a right method to treat issues that are of interest to Criminal Law. Their main argument is based on the idea that the State holds the right to punish, and is therefore the only entity with a right to enforce criminal law. The reason lies in that the State has the duty to safeguard security, and the victim's attitude is but an insignificant issue; the State has to punish each time it is informed that a crime has been committed.

Within this approach, leaving decision in the hands of the victim is impossible, since the imposition and enforcement of punishment are actions belonging to the State on the basis of the need to safeguard security, and in order to assure that no crime is left unpunished, or that there is no "privati-

34 http://www.euforumrj.org/

35 In the Report "The Restorative Justice: an agenda for Europe. Supporting the implementation of restorative justice in the South of Europe", p. 81 and following, the principal challenges for RJ development in South Europe, concerning the legal system, are described: formalistic legal culture, positivism and mandatory prosecution. CASADO CORONAS *et allii* and European Forum for Restorative Justice, 2008.

zation of justice" which would give rise to impunity of the people with more economic resources, that is, to sum up, safeguarding equality of citizens before the law.

However, we consider that these opinions disregard basic elements of RJ.

The importance attributed to the victim in the 21st century is obvious, and in any case, RJ allows for an improvement in relation to criminal proceedings, above all with regard to the victim. If RJ programs are well designed, privatization of justice – meaning that those with a greater purchasing power could avoid criminal penalties in exchange for higher compensations – will in no way be allowed; on the contrary, only participation based on the willingness to repair the damage caused to the victim, mostly in emotional terms, is allowed.

3.1. Resistance of South Europe systems to Restorative Justice

Furthermore, moving beyond this initial exclusionary vision, we can gather objections of operators of traditional justice to restorative justice in two big groups:

- The tendency of continental systems to apply principles of the criminal justice process and the criminal justice proceedings to RJ
- The tendency to exhaustively or broadly regulate mediation and RJ

3.1.1. Tendency to apply procedural principles to Restorative Justice

We believe there is a tendency to apply procedural principles to RJ, such as the principle of legality, the principle of equality, the bilateral structure principle and the right to a defense, and that this tendency is erroneous.

Thus, for example, some people consider that, on the basis of applying the principle of legality, punishment of unlawful acts belongs to the State, through the Courts of Justice, and that it is not possible to modify the elements of the proceedings as a consequence of RJ activities, since this would violate the principle of legality.

This argument means ignoring the practice of both Criminal Justice and Restorative Justice: on one hand, in practice, a large part of unlawful acts are not persecuted, both because of lack of economic means and because of rationality.

On the other hand, in almost all legal orders there exist mechanisms for making criminal proceedings more flexible, allowing for the use of restorative instruments which can have an impact on the proceedings even when no RJ form is expressly regulated. Specifically in the Spanish case, plea bargaining – of increasing importance in recent times – embraces anglosaxon tendencies to deemphasize the principle of legality and to replace it by the principle of discretionary prosecution with legal limitations.

Some also believe that mediation or RJ demand a bilateral structure, meaning that if the victim does not agree to participate, or in case there is no victim, it is not possible to carry out the activity. This idea could be reinforced with a narrow understanding of paragraph (a) of art. 12 of the 2012 Directive.

This position goes against logic and the practice of many programs: in many cases there is no victim, or the victim does not want to participate in the mediation process, for whatever reasons, however there is regret and the willingness to repair on behalf of the offender, and many programs allow for mediation or the restorative method deemed adequate, sometimes with participation of a person who will act as a substitute of the victim. Other times, the restorative process is developed with a facilitator and the result is notified to the victim. On other occasions, the offender of a certain victim is unknown or is not available and other offenders of similar crimes act as surrogate offenders in the mediation, with the objective of carrying out reparative activities towards strangers, people who have not been their victims but who have also suffered an offense. It would be a pity to exclude numerous cases for which RJ is still a positive instrument, on the basis of this erroneous interpretation.

Moreover, interpreting the principle of equality, it is believed that RJ has to be regulated as a right, as part of the criminal proceedings, and that everyone should have a right of access to RJ, in all cases and in the entire national territory.

RJ instruments have to be considered as elements which are to be used only when certain conditions are met, and not in all cases: for example, the existence of a strong evidence of guilt, such as an *in flagrante delicto* or acknowledgment of the facts, the willingness to restore, the lack of recidivism etc. will favor that a restorative process begin, and this is something that has to be assessed in each case.

Moreover, legislation on RJ as a right for everyone in all judicial districts would be absurd, for the aforementioned reasons, but also a matter hard to put in practice.

One of the major advantages of RJ is adaptability of its processes to the necessities of each local, judicial, and cultural *milieu*, and generalizing the right of access to RJ could be at odds with this.

We believe that it is more appropriate to regulate the possibility of developing RJ instruments, as well as their efficacy in the proceedings, and, on the other hand, to make sure there are policies aimed at promoting RJ across the entire national territory, offering to all citizens the possibility of access to such instruments, should the circumstances be adequate.

We are referring to a vision similar to that of the right to an effective remedy: if, according to the Spanish Constitutional Court, citizens are entitled to a judgment on the merits as long as the procedural prerequisites are met, citizens will be entitled to participate in a RJ process if the adequate circumstances occur.

Lastly, as a point of resistance to RJ, some people believe that the applicable right of defense, particularly the right not to incriminate oneself, is violated by participation of the defendant or the accused in a restorative process.

Obviously, if RJ processes are conducted with no respect for the fundamental rights of the parties, and, above all, of the defendant or accused, they would result in nothing more but failure. On the contrary, RJ programs require, in practice, the concurrence of a strong evidence of guilt, such as an *in flagrante delicto*, acknowledgment of facts, a defense which is not based on denial of the acts, mutual aggression, etc. Furthermore, all operators of the restorative process and the criminal proceedings in general will monitor respect for fundamental rights.

In any case, it is obvious that development of RJ programs has to pay special attention to what may have an impact on the rights of the accused, assuring confidentiality in all levels, even when the RJ process is unsuccessful. The initiation and development of a RJ process is a circumstance which should be preferably not communicated to the Court rendering the judgment if the RJ process is unsuccessful and the defense of the offender is not going to admit the facts[36]

3.1.2. Tendency to regulate comprehensively

In the assimilation of a new institution such as mediation by legal systems, a tendency can be observed, consisting in regulating RJ circumstances in a way that is analogous to a legal rule. See, for example, the tendency to establish definitions, processes, rights, exclusion of crimes or circumstances for dealing with RJ. This kind of regulation produces a lack of flexibility in RJ instruments, which may entail their inefficacy.

This tendency can probably be explained on the basis of a lack of awareness of RJ in general, as well as a legal view awarding a key role to the principle of legality and the principle of equality in the field of Criminal justice.

Often, we can find systems that exclude RJ or mediation for serious matters such as crimes, or serious crimes, or in cases where the victim withdraws their participation, or at enforcement stage. Such exclusion may be reasonable for some cases, but there will still be others where mediation or another RJ instrument may be the most appropriate way to have an impact on the conflict.

On the contrary, instead of regulation it is much more appropriate to establish referral and working methods by means of other flexible instruments, such as protocols or internal Court rules or rules specific to the RJ services, allowing for appropriateness to the background circumstances and to the specific case, and which enabling modifications – should there be any – in a flexible way.

This is a common tension in continental systems, especially in Southern countries, a lot more prone to overregulating institutions of legal relevance.

36 It is the same idea that balances the right to negotiate and the right to plead innocent, and the unawareness of the Court with regard to the dealings between defense and prosecutor in case the agreement is not reached. If the Court is aware that the defense tried to negotiate, its neutrality could be affected if the negotations fail and the Court has to resolve the case.

On the contrary, anglosaxon systems accept variability and flexibility of regulation of RJ systems in the various programs[37].

It is a great error to apply traditional justice criteria, procedural principles of proceedings, to an activity of an eminently diverging nature, and doing so may lead to an inefficacy or withdrawal of restorative instruments, and even to obtaining negative results.

On the contrary, we consider that *a different series of principles should be applied in RJ in terms of its relation to the proceedings*, given it is shaped in a way dramatically different to traditional Justice.

3.2. Criteria for use in Restorative Justice

We understand that criteria for use of RJ could be encompassed in two categories:

- Adequacy of the RJ procedure to the specific conflict
- Protection of participants, especially the victim

3.2.1. Adequacy of the RJ procedure to the specific conflict

The principle of appropriateness or adequacy of the RJ procedure to the specific conflict, which would be opposed to this of a right to mediation, is a basic principle which in turn includes the principle of protection of the parties.

Protection of parties, especially the victim, is a fundamental principle entailing interruption and termination of the restorative process in case there is a risk of secondary victimization or severe damage to the parties.

In contrast to the right that the citizen may have to a resolution by the Courts, which may entail the right to a judgment on the merits, should the procedural conditions be met, it is not possible to establish an absolute right to mediation or to RJ: in the same way that the right to a resolution is assured when the procedural conditions are met, the parties will have a right to mediation or to participation in a RJ process when the necessary prerequisites are fulfilled; those will consist in that the legal requirements and the prerequisites of the program are met, in case there is a service able to take on the subject.

37 Even if the procedures are flexible, SHAPLAND *et allii* "Situating restorative justice within criminal justice", in *Theoretical criminology*, Sage, 2006, p. 510, explain that RJ within the criminal system cannot be characterized as completely informal as opposed to other restorative justice settings.

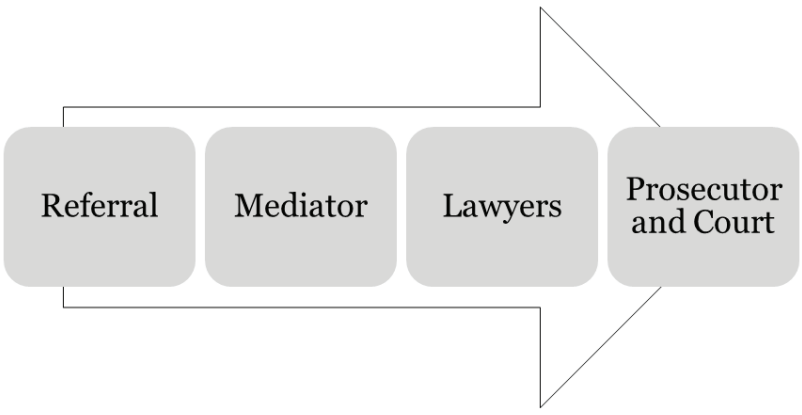
Even if there is not a right to mediation or RJ, governements should assure access to RJ services in the whole territory, understanding that the adequacy of the RJ procedure to every possible case has to be controlled in different stages by different operators.

As appropriateness or adequacy circumstances taken into account by many programs, we could indicate the following:

- Offender's capacity and attitude
  - Good faith and ability to admit responsibility, to be evaluated by different operators, such as members of the referring court, the mediator, the psychosocial teams.
- Victim's capacity and attitude
- Adequacy *stricto sensu*
  - Lack of recidivism
  - Appropriate participation of the parties
  - Participation of third parties
  - Instrument efficacy in the conflict

3.2.2. Protection of participants, especially the victim

In practice, operators look at adequacy of the RJ process for the conflict in several moments. Here I describe, for example, the control system of many mediation programs in Spain, in the majority of which mediation is designed as a tool that is complementary to the Courts.



Time in which legal operators control adequacy or appropriateness in Victim-Offender Mediation in programs in Spain.

Firstly, forwarding or referring a case to mediation is generally not automatic when it comes to criminal matters; normally, court operators – that is, the Judge, the Clerk, staff of the judiciary – control, jointly or individually, compliance with a series of factors, such as the apparent guilt, like the existence of an *in flagrante delicto* or defense which is not based on denial of the criminal acts, lack of recidivism and the offender's attitude.

The matter of apparent guilt is tricky in terms of defense of the accused, for which reason most programs take over mediation or RJ cases when there is an *in flagrante delicto,* or when defense of the accused is based on a criterion other than non participation in the punishable facts.

In most programs, participation in RJ processes is not allowed when the offender is a habitual offender or a repeat one. This is justified on the fact that RJ is not established as an automatic benefit for the offender, but rather as a form of restoration and re-education, which is normally not achievable for habitual offenders. Another important reason is the existence of limited resources for RJ procedures; establishing priorities, for cases in which mediation would have more impact and success, would provide the program with a higher efficiency rate. However, as I was indicating earlier, excluding such circumstances by policy could in practice exclude the use of mediation or other restorative methods for cases in which operators will estimate them to be highly useful and positive; for this reason, it is more adequate to establish such criteria in guidance documents or protocols for developing RJ, and they may be general or, even better, specific for each judicial district or Court.

Secondly, in the field of criminal law, the mediator controls victim protection and appropriateness of the process, taking into account the circumstances to which we referred earlier, and primarily the defendant's ability to assume the responsibility and the defendant's lack of intent to harm the victim.

The mediator performs a continuous monitoring of the viability of the mediation or other restorative process and the appropriateness of the process to the circumstances. Thus, if, for example, they believe that the offender does not intend to empathize with the victim or to take responsibility, they may terminate the procedure with no result; the mediator can also do so if they consider that there is a danger of victimizing the victim, or even if they consider that the victim's attitude is not adequate.

For legal operators it is hard to accept ceding power to the mediator, who practices a profession or performs a function which is new and strange to most jurists.

Thirdly, the lawyer of the parties has the corresponding duties of protecting the interests of their clients, ensuring that mediation and its results fall within the law and respect the rights of the participants.

Lastly, when the prosecutor, lawyer, judge or other legal operator incorporate the reparation agreement or other specific agreement into the proceedings, they further check the appropriateness of the mediation for the matter, and, above all, the legal consequences of the reparation agreement.

4. Conclusions

The origin and major development of RJ corresponds to the anglosaxon countries, mainly the United States and Canada, with an increasing role of New Zealand and the United Kingdom over the last years.

The international, namely European, contributions are being decisive for the development of RJ in the European countries that are more resistant to change, such as the Southern European countries.

The Council of Europe is the pioneer international organization in promoting mediation in various fields, including the criminal one; however, its efforts have not had a great impact on national practices. The European Union, with its victim-related rules, is directly influencing States, above all by means of instruments such as the recent Directive of October 2012, but also by means of policies supporting research and national actions relating to RJ.

NGOs such as GEMME or the European Forum for Restorative Justice are organizations which have participated and do participate actively in the dissemination of mediation and RJ, bringing together experiences and knowledge necessary to their development.

Concerning situation of RJ in the various countries, we can observe that in most cases programs began with regard to crimes committed by juvenile offenders, and have been evolving to develop programs for adults.

In most programs, cases are referred previously to trial, and one can observe an increasing tendency to refer cases at the stage of trial or enforcement, as well.

In conclusion, it can also be said that in countries where victim-offender mediation (VOM) is consolidated other RJ tools are being introduced, and a better understanding is gained by scholars, legal practitioners and even citizens. These countries include the United Kingdom, Norway, the Netherlands and Belgium.

Resistance of the most conservative countries – legally speaking – such as Spain, before the relative novelty of mediation or RJ, is based on the lack of awareness of the basics of this subject.

Taking into account the need to regulate the traditional proceedings, and the application of the traditional principles, the applicable principles in the field of RJ are those of adequacy, flexibility, minimum regulation and protection of participants in the process, especially the victim.