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3E –RJ-MODEL

The 3E Model for a Restorative Justice Strategy in Europe
Greece, United Kingdom, Bulgaria, Finland, Hungary, Poland, Spain
(including research also in Turkey, the Netherlands, Denmark, Germany)
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Restorative Justice in Spain

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A. Introduction _

The Spanish legal system grounds its criminal law on the doctrine of “strict legality”, according to its continental or Romano-Germanic tradition. The principle of legality, which not only refers to substantive criminal law (criminal guarantee), but also includes a procedural or judicial guarantee and a guarantee of execution, constitutes the main limitation that derives from the rule of law in the exercise of the *ius puniendi* by the State.² In this regard, the Spanish Constitution consecrates the principle of legality of crimes and penalties, frequently expressed with the maxim *nullum crimen, nulla poena, sine lege*,³ in its Articles 25.1, 9.3, 81 and 24,⁴ being complemented by the Penal Code⁵ and the *Ley de Enjuiciamiento Criminal*, which regulates the criminal procedure.⁶ The Spanish Constitution also grants the principle of normative hierarchy (*principio de jerarquía normativa*), according to which every type of norm has a specific rank or category which is correlative to the institutional position of the organ that issues the

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□ Gordillo Santana 2007, *La justicia restaurativa y la mediación penal*, p. 98. Manzanares Samaniego 2007, *Mediación, reparación y conciliación en el derecho penal*, p. 19.

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□ Muñoz Conde and García Arán 2010, *Derecho Penal Parte General*, p. 99.

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□ Spanish Constitution, passed by the Cortes Generales in the Plenary Meetings of the Congress of Deputies and the Senate held on 31 October 1978.

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□ See *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal* (“Penal Code”), Articles 1, 2.1 and 10.

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□ See *Real Decreto de 14 de septiembre 1882, Ley de Enjuiciamiento Criminal* (“LECrím”), Articles 1, 100, 105, 271.

norm, having only the norm with superior rank the power to modify or derogate the inferior norm, but not viceversa.⁷

As a consequence of the principle of normative hierarchy and its correlative *principio de competencia*, and being it a component of the principle of legality, reference shall be made to the *reserva absoluta de ley* ("absolute reserve of law"),⁸ in the sense that criminal law must be exclusively positive law. More specifically, only written legislation adopted with the more stringent exigencies of *leyes orgánicas* ("organic acts") may define crimes and penalties,⁹ given their effect on fundamental rights.¹⁰ Since "organic acts" may only be enacted by the *Cortes Generales* (the Spanish Parliament), legislation enacted by the parliaments of the Autonomous Communities, customary rules, secondary legislation (emanating from the government) and general principles of law is expressly excluded.¹¹

In light of this and for the purposes of the present report, it is to be noted that Spain follows a system of "relative legal determination of penalties" (*determinación legal relativa de la pena*), given that the Penal Code provides a "generic penalty framework" (*marco penal genérico*) for every type of crime, with the minimum and maximum penalties, and a "concrete penalty framework" (*marco penal concreto*), which consists of

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□ Constitution, Article 9.3; Real Decreto de 24 de Julio de 1889 por el que se publica el Código Civil ("Civil Code"), Article 1.2.

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□ See Muñoz Conde and García Arán 2010, Derecho Penal Parte General, p. 101; and Quintero Olivares and Morales Prats 2011, Comentarios al Código Penal Español, p. 68.

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□ Constitution, Article 81: "(1) Organic acts are those relating to the implementation of fundamental rights and public freedoms, those approving the Statutes of Autonomy and the general electoral system and other laws provided for in the Constitution. (2) The approval, amendment or repeal of organic acts shall require the overall majority of the Members of Congress in a final vote on the bill as a whole."

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□ Muñoz Conde and García Arán 2010, Derecho Penal Parte General, pp. 103-104.

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□ Constitution, Article 149.1.6. See Rifá Soler, Richard González and Riaño Brun 2006, Derecho Procesal Penal, p. 48.

rules in the general part of the Penal Code that lead to determine the specific penalty, including mitigating and aggravating factors.¹² Thus, three phases may be identified in the individualization of penalties: the legal, the judicial and the executive, penitentiary or administrative individualization of penalties.¹³ Taking into account the rules and limitations established in the Penal Code, judges or tribunals personalize the penalty, determining its type and duration in the sentence.¹⁴ The executive individualization alludes to the changes that the penalty of deprivation of liberty may suffer during the service of the sentence, by means of the application of penitentiary benefits and the concession of probation, pursuant to the Penal Code, the *Ley Orgánica General Penitenciaria*¹⁵ and the *Reglamento Penitenciario*.¹⁶

The Spanish criminal procedure follows the dualist system of legal consequences of crimes, the so-called *vicarial* system, so that penalties, as the main punitive consequence, are applied together with "security measures" (*medidas de seguridad*).¹⁷ Pursuant to the Penal Code, security measures benefit from the same guarantees than penalties, being covered by the principle of legality and its correlative guarantees.¹⁸

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□ Penal Code, Articles 61-79.

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□ Muñoz Conde and García Arán 2010, Derecho Penal Parte General, pp. 532-534.

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□ Muñoz Conde and García Arán 2010, Derecho Penal Parte General, p. 531.

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□ Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria. It is interesting to note that this was the first criminal law to be enacted, in 1979, after the end of the Francoist dictatorship. It was adopted by consensus, given that many members of the parliament had served sentences of deprivation of liberty during the previous regime. See Giménez-Salinas Colomer and Rifá 1992, *Teoría i pràctica del dret penitenciari*.

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□ Real Decreto 190/1996, de 9 de febrero, Reglamento Penitenciario.

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□ Muñoz Conde and García Arán 2010, Derecho Penal Parte General, pp. 51-53.

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Title III of the Penal Code, which provides the general rules on the determination of penalties, classifies this type of punitive consequence, according to its character, as penalties of deprivation of liberty, of deprivation of other rights or fines,¹⁹ and, according to its gravity, which is linked to their duration, as “mild”, “less severe” and “severe” (*leves, menos graves* and *graves*).²⁰ Imprisonment, the penalty of permanent location and the personal subsidiary responsibility for non-payment of fines are penalties of deprivation of liberty.²¹ Penalties of deprivation of other rights refer to the temporal or final deprivation of rights other than the freedom of movement and include the disqualification and suspension from public office, profession or certain rights; the deprivation of the right to drive; the deprivation of the right to own and carry arms; the deprivation of the right to live in certain places, the prohibition to be near or communicate with the victim; and community work.²² In terms of fines, the “system of days-fine” (*sistema de días-multa*) was introduced to grant the possibility of individualizing penalties according to the criminal action and the economic capacity of the accused. Minimum and maximum daily amounts are determined in the Penal Code.²³

On the other hand, Title IV of the Penal Code, which regulates security measures,²⁴ provides security measures of deprivation of liberty, which consist of the internment in

¹⁹ See Giménez-Salinas Colomer 1995, *Autonomía del Derecho Penitenciario: principios informadores de la Ley General Penitenciaria*.

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²⁰ Penal Code, Article 32.

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²¹ Penal Code, Article 33.

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²² Penal Code, Article 35. See also Articles 36-38.

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²³ Penal Code, Article 39. See also Articles 40-49 and 53.

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²⁴ Penal Code, Articles 50-52.

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centres for treatment, and measures without deprivation of liberty, which include, among others, professional disqualification, restriction of paternal custody and probation.

As mentioned above, the regulation of criminal procedure is also subject to the principle of legality, being the *Ley de Enjuiciamiento Criminal* the main source of criminal procedural law. Together with the *Ley de Enjuiciamiento Criminal*, reference shall be made to the *Ley Orgánica del Poder Judicial*, which regulates the organization and functioning of the organs of the Judicial Administration and the legal regime of their members.²⁵ In addition to these two main sources, the criminal procedural system is completed by other legislation.²⁶

The promulgation of the *Ley de Enjuiciamiento Criminal* meant the introduction in the Spanish criminal procedural system of the mix accusatorial system, to the detriment of the inquisitorial system.²⁷ As a consequence, the exercise of the function of investigating and the function of trying lies in different organs, being thus the criminal procedure also divided in two main phases: the summary or instructing phase (*sumarial* or *de instrucción*) and the oral trial (*juicio oral*). Another consequence of the mix accusatorial system is the necessity of an accusation, which is exercised by the Public Prosecutor and by the private or "popular" prosecution, where appropriate.²⁸ Moreover, the principles of

²⁵ See *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*, Title II, for the applicable measures in juvenile criminal justice.

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²⁶ *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*.

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²⁷ Without being exhaustive, the most important procedural laws are: *Ley Orgánica 6/1984, de 24 de mayo, reguladora del procedimiento de "Habeas Corpus"*; *Ley Orgánica 4/1987, de 15 de julio, de la Competencia y Organización de la Jurisdicción Militar*; *Ley Orgánica 2/1987, de 18 de mayo, de Conflictos Jurisdiccionales*; *Ley Orgánica 19/1994, de 23 de diciembre, de protección a testigos y peritos en causas criminales*; *Ley Orgánica 5/1995, de 22 de mayo, del Tribunal del Jurado*; *Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita*.

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²⁸ The accusatorial system was later consecrated in the Constitution, Article 24.

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immediacy, contradiction and publicity are the basis of the oral trial, being the judicial organ free in the assessment of evidence. Likewise, the accusatorial system grants the correlation between the accusation and judgment, as well as the prohibition of *reformatio in peius*.²⁹

By contrast, juvenile criminal justice follows the so-called “formal pure accusatorial principle”, based on the superior interest of the minor and the educative intervention that is meant.³⁰ In this regard, the *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores* states that the instruction of juvenile criminal proceedings is directed by the public prosecution, deciding therefore on the admission and impulse of criminal complaints³¹ and on the possibility to desist from the initiation of proceedings, in those cases provided by the law.³² As a consequence of a legal reform of 2003,³³ victims also have the right to become a party to the proceedings, once

□ Note that in Spanish criminal procedure, the victim has the right to be party in the procedure, being represented by the so-called ‘private prosecutor’ (*acusación particular*). See LECrim, Articles 101-110. Spanish citizens, even if they were not affected by the crime, may submit a criminal complaint and exercise the so-called ‘popular action’. They may become a party to the proceedings, through the ‘popular prosecution’ (*acusación popular*). See LECrim, Article 270.

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□ Pursuant to the principle of prohibition of *reformatio in peius*, the appealed decision may not be reformed to the detriment of the accused that has filed an appeal, with the exception of those cases where the appeal has been filed or adhered to by the other parties. See Pérez-Cruz Martín, Ferreiro Baamonde, Piñol Rodríguez and Seoane Spiegelberg 2010, *Derecho Procesal Penal*, p. 923.

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□ See eg Abel Souto 2003, *Los menores, el principio acusatorio y la proporcionalidad penal en la Ley Orgánica 5/2000*, pp. 1-36.

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□ Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores, Articles 16 and 30.

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□ *Ibid.*, Article 18.

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□ Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.

initiated.³⁴ However, in case the Public Prosecutor desists from the initiation of proceedings, victims may still exercise the civil actions to which they are entitled.³⁵ In addition, the judge of the Jurisdiction of Minors (*Juez de Menores*) may not exceed the *petitum* of the accusation exercised by the Public Prosecutor or the private prosecution.³⁶

As mentioned above, the structure of the declarative part of the criminal procedure consists of several phases: the instructing, the intermediate and the oral trial phase.³⁷ Nevertheless, the procedure for the *enjuiciamiento rápido de los delitos* ("fast prosecution of crimes") and the *juicio de faltas* ("prosecution of misdemeanours") are developed in a single act (*vista*), which could be divided in different sessions. The pre-trial or instructing phase is directed at determining whether the *notitia criminis* may lead to the trial phase. In this regard, it consists of "actions to prepare for trial and to record the commission of the crime with all the circumstances that may affect its legal categorization and the guilt of perpetrators, with their preventive detention and ensuring their financial liability."³⁸ Therefore, the main object of the instructing phase is to determine whether some facts have taken place, have been committed by a certain person and have criminal character, being of special importance the adoption of cautionary measures (*medidas cautelares*), so as to guarantee the fulfilment of the future sentence.

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□ Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores, Article 25.

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□ The previous *Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores* already gave to the Public Prosecutor the monopoly on the procedural initiative and a lot of power to determine the end of the proceedings.

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□ Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores, Article 8.

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□ Moreno Catena and Cortés Domínguez 2010, *Derecho Procesal Penal*, pp. 46-49.

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□ LECrim, Article 299, regarding the *sumario* (ordinary procedure).

The instructing phase ends with a decision concluding this phase (*auto de conclusión del sumario*,³⁹ in case of *procedimiento ordinario* or “ordinary procedure”). The intermediate phase takes place before the *Audiencia Provincial*, which is also in charge of the trial phase, in the ordinary procedure,⁴⁰ or before the instructing judge, in the *procedimiento abreviado* (“abridged procedure”) or the procedure before a jury.⁴¹ This phase continues until the judicial organ issues either an *auto de sobreseimiento provisional o libre* (decision declaring the provisional or permanent stay of proceedings) or an *auto de apertura de juicio oral* (decision opening the oral trial). The latter indicates that the tribunal, upon the request of the prosecution, orders the continuation of the proceedings, because the facts are allegedly criminal and the alleged responsible for them has been identified. By means of this decision, the tribunal sends the proceedings to the prosecution for filing an indictment.⁴²

The oral trial starts with the indictment (*escrito de calificación provisional*), which is followed by the possibility of the defendant to file an answer (*escrito de defensa*). At trial all the evidence shall be produced, which is assessed by the tribunal according to the principle of “free assessment of evidence” (*principio de libre valoración de la prueba*).⁴³ The trial phase is essentially the same for all kinds of procedure⁴⁴ and is followed by the execution of the sentence.⁴⁵

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□ LECrim, Article 622.

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□ LECrim, Article 623.

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□ LECrim, Article 780.

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□ LECrim, Articles 627.4, 633, 649. This phase is simplified in cases of *procedimiento abreviado* (“abridged procedure”). See LECrim, Article 781.1.

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□ LECrim, Article 741: `

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□ LECrim, Articles 786-787.

The crisis of special prevention and of the rehabilitation model, as well as the stigmatizing effect that the current criminal system creates regarding perpetrators, and the oblivion of the rights of victims are considered, in general terms, as the main conditions that gave birth to Restorative Justice.⁴⁶ Restorative Justice is broader than victimology, in that it is not limited to the rights of victims, but also, and above all, it is based on a different conception of traditional justice -a different conception that contrasts with the crisis of criminal law, where citizens seem to have started to rely on punitive populism. Today it is difficult to share positions such as the abolitionism of the 1970s. To the contrary, Western society, led by the USA, has experienced an unstoppable increase of sentences of deprivation of liberty. Our prisons are fuller than ever and the ratio of penitentiary population per 100,000 inhabitants has reached unbelievable quotas, being Spain at the head of this unfortunate ranking.

In this scenario, Restorative Justice, by means of formulas such as conciliation, reparation or mediation, makes absolute sense. These formulas have a direct effect on the perpetrator and on the victim, as well as on the community, improving the social climate.

Given the diversity of alternatives to conflict resolution, the possibility of finding a uniform concept is generally dismissed by scholars.⁴⁷ Among the doctrinal debates on the nature of Restorative Justice, the eclectic positions consider that it is based on the conjunction of inclusive justice procedures (eg mediation, conciliation or transaction)

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□ LECrim, 985.

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□ Casanovas, Magre and Lauroba 2010, *Llibre Blanc de la Mediació a Catalunya*, p. 591. See also Giménez-Salinas i Colomer 1999, *La conciliación víctima-delincuente: hacia un derecho penal reparador*, pp. 72-75.

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□ Matellanes Rodríguez 2011, *La justicia restaurativa en el sistema penal. Reflexiones sobre la mediación*, p. 207. See also Galain Palermo 2009, *Mediación penal como forma alternativa de resolución de conflictos: la construcción de un sistema penal sin jueces*, p. 79.

directed at the result of reparation and social satisfaction (eg reparation of damages or community work).⁴⁸

Generally, a restorative process is based on different values that must be present in the adoption of the agreement: dialog, voluntary character, reparation, reintegration, participation and inclusion.⁴⁹ In this regard, the principles of Restorative Justice have been identified as follows:

1. Reparation originates within a movement seeking to care for and compensate victims and the recovering of their role in the criminal procedure. ...
2. Reparation is not only focused on achieving an individual function of the author regarding the victim, but also a peacemaker phenomenon which is peculiar of criminal law. Reparation enables the restoration of legal peace through a return to the particular perturbed situation. ...
3. A criminal law oriented to reparation is mainly a criminal law of resocialization. A reparative act implies not only the reparation to the victim but also that the admission by the offender of his guilt and a consequent step towards internalizing. ...
4. Reparation shall not be conceived as a system where offenders escape from criminal justice or where the richer may repair more easily than the poorer. ...
5. Criminal reparation may not be confused with civil liabilities to the victims, because both may not always coincide and the criteria for calculating them are not the same. ...
6. Voluntariness in repairing is a crucial point. ... reparation is only possible with the consent of the offender and victim...
7. Conciliation-mediation-reparation is not a faster form of justice ... Reparation ... is a way of introducing ... the possibility of a negotiated justice. Mediation, and confrontation are important aspects of a dynamic process between victims and offenders ...
8. Restorative justice lies in the context of criminal law and is subject to its general principles for the definition of crime, offender and victim. But the answer does not follow strictly proportional terms.⁵⁰

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□ Galain Palermo 2009, *Mediación penal como forma alternativa de resolución de conflictos: la construcción de un sistema penal sin jueces*, p. 80.

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□ Ibid. There is a common agreement among Spanish scholars on the values or principles of restorative justice. See eg Larrauri Pijoan 2004, *Tendencias actuales de la justicia restauradora*, pp. 443-449.

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□ Translation of the authors' of Giménez-Salinas Colomer 1999, *La mediación: una visión desde el derecho comparado*, pp. 94-96. See also Gordillo Santana 2007, *La justicia restaurativa y la mediación penal*, pp. 69-72.

Given that in Spain not only judges, but also the Public Prosecution, are subject to the principle of legality, it is necessary that legality recognizes and creates spaces where a regulated principle of opportunity could be applied, and, therefore, that the criminal action could be exercised under some discretion, with the possibility of desisting from the initiation or continuation of criminal proceedings.⁵¹ In this sense, the introduction by the legislator of institutions that imply an alternative to penalties (mediation, reparation, community work) has been undertaken through the regulation of the criminal procedure, under the legitimacy of criminal policies oriented towards the interests of victims.⁵²

It can be asserted that a model of restorative justice was introduced for the first time in Spain, although in an informal manner, in 1990, with the incipient Mediation and Reparation Programme within the framework of juvenile criminal justice, which was implemented in Catalonia by the *Direcció General de Mesures Penals Alternatives i de Justícia Juvenil* of the *Generalitat de Catalunya* ("General Direction of Alternative Criminal Measures and Juvenile Justice" of the Government of Catalonia, or "DGMPAJJ"),⁵³ without a specific set of regulations. One must take into account that after the Spanish Constitution of 1978, the territory of Spain was divided into Self-Governing Communities. Former State competencies were transferred to the Self-Governing Communities, among others Social and Child Services, which entails that the situation concerning juvenile crime varies from one Community to another. Transfer of

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□ Manzanares Samariego 2007, *Mediación, reparación y conciliación en el derecho penal*, p. 19. Note that the principle of officiality refers to "that criteria that derives from a public interest identified by law, by which the procedure, its object, the procedural acts and the judgment are not subject to the discretionary power of the legal subjects in terms of the protection of their rights and legitimate interests, but they depend on the public interest that it is evidenced to the tribunal ... before true situations subject to taxative cases legally determined" (Authors' translation of Manzanares Samaniego, 2007, *Mediación, reparación y conciliación en el derecho penal*, p. 20).

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□ Galain Palermo 2009, *Mediación penal como forma alternativa de resolución de conflictos: la construcción de un sistema penal sin jueces*, p. 75.

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□ Gordillo Santana 2007, *La justicia restaurativa y la mediación penal*, p. 325.

competencies concerning minors took place in 1981. The Minors Policy was considered progressive, leading to the closing down of major institutions and the creation of small groups or Family houses, their treatment on an open-system basis and with source families.

The example of Catalonia was followed within the area of juvenile justice, in Madrid, in the Basque Country, and later in other Autonomous Communities. A legal basis was provided to all Spanish territory in 1992, with the promulgation of the *Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores*, which led to a reform of juvenile courts. This law provided a legal basis for the extrajudicial reparation of damages to the victim, as it became a formula to dismiss criminal proceedings from the very beginning. The following was stated:

Considering the nature of the offence, the circumstances and conditions of the minor, of whether the offence has been perpetrated with violence and intimidation, or whether the minor has repaired or undertakes to repair the damages suffered by the victim, the judge may file all the proceedings, following a proposal submitted by the Public Prosecutor.⁵⁴

Proceedings therefore would commence upon request of the Public Prosecutor, who would apply the principle of opportunity. Proceedings would be therefore stayed if the circumstances so warranted it, thus ensuring the compensation of the victim and the avoidance of a criminal verdict. A second formula also envisaged by the aforementioned law was an out-of-court reparation in which the verdict would be suspended. That is, once the proceedings had concluded. In this regard, mediation became one of the main forms of reaction of justice to juvenile criminality.⁵⁵

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□ Authors' translation of *Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores*, Article 2.2.6.

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□ See *Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores*, Articles 15.1.6 and 16.3; Casanovas, Magre and Lauroba 2010, *Llibre Blanc de la Mediació a Catalunya*, p. 597.

A bigger reform in terms of restorative justice was achieved in 2000, with the promulgation of the *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*, wherefore mediation and reparation were provided with a clear, precise and complete legal backing for minors under the age of 18, and when applicable for those with ages between 18 and 21. The principle of opportunity was introduced in juvenile criminal justice, linked to the achievement of a conciliatory or reparatory agreement between the minor offender and the victim.⁵⁶

Regarding the ordinary or adult criminal justice, it is to be taken into account that the Penal Code adopted in 1995 introduced certain provisions oriented towards restorative justice. These provisions refer mainly to the introduction of a mitigating factor, and on the substitution of the penalty of deprivation of liberty and the suspension of the execution of this type of penalty, in cases of previous reparation.

Taking as a reference the reforms adopted in juvenile justice, the Department of Justice of the *Generalitat de Catalunya* initiated different initiatives to promote mediation between offenders and victims within the ordinary penal justice. The key factors that enabled the pursuit of these initiatives were, on the one hand, the fact that the power (*competencia*) for the execution of measures in community, as provided in the Penal Code, depended on the former *Direcció General de Justícia Juvenil* of the *Generalitat de Catalunya* ("General Direction of Juvenile Justice" of the Government of Catalonia or "DGJJ"), which became later the DGMPAJJ, and, on the other hand, the accumulated experience of mediators, technical teams and professionals of "open regime" (*medio abierto*) of the former DGJJ, in terms of juvenile criminal and family mediation and in terms of the execution of measures without deprivation of liberty.

In this regard, a first experience on criminal mediation for adults was initiated in 1998 in Catalonia. In 2000, the Department of Justice of the *Generalitat de Catalunya* signed an agreement for the execution of the programme *Servicio de Mediación y Reparación Penal de Adultos* ("Service of Criminal Mediation and Reparation of Adults") with the *Associació Catalana de Mediació i Arbitratge* ("Catalan Society for Mediation and

Arbitration"). Since 2004, as a result of a public concourse, the programme is being ruled by the *Associació pel Benestar i el Desenvolupament* ("Society for Welfare and Development"), under the supervision of the DGMPAJJ. The service is located in the premises of the *Juzgados de Instrucción y de lo Penal de Barcelona* ("Instructing and Criminal Courts of Barcelona") and with delegations in the capitals of the Catalan provinces. In the sphere of adult criminal justice, Catalonia has continued working with this programme.

On the other hand, the *Consejo General del Poder Judicial*⁵⁷ has also been a clear supporter of mediation in ordinary criminal justice. In this regard, it has coordinated and developed first experiences of criminal mediation in those instructing and penal courts – around 40 courts- that voluntarily joined a protocol created by the *Consejo*. This has led to the preparation of a *protocolo mínimo de actuación en mediación penal* ("minimum protocol of proceeding in criminal mediation") for judges, public prosecutors, lawyers and mediators. Moreover, the *Consejo* organizes regularly courses and seminars on the topic. In its recent *Plan de Modernización de la Justicia*, the *Consejo* referred specifically to mediation as an effective instrument of conflict resolution, identifying all the Spanish courts that are currently offering penal mediation.⁵⁸ In addition, the *Escuela Judicial* ("Judicial School") has been offering complementary education on mediation since the academic year 1999/2000, within the two years programme that judges must undertake before they enter into active service, as well as within the programmes on continuous education for judges already in active service.

The lack of implementation by Spain of Council Framework Decision of 15 March 2001, on the standing of victims in criminal proceedings (2001/220/JHA),⁵⁹ and, in particular,

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□ The *Consejo General del Poder Judicial* is an organ without judicial character, for the autonomous regulation of judicial power. Its main object is to guarantee the independence of judges in the exercise of their judicial functions. See <http://www.poderjudicial.es> Last accessed 3 August 2011.

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□ See report at <http://www.poderjudicial.es/cgpj/es/Temas/Mediacion> Last accessed 2 October 2011.

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□ Article 10: "(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

of its Article 10 on the impulse of penal mediation, has led to a very fragmented and unregulated system regarding ordinary criminal justice, where regional or local administrations have taken the lead and established services of mediation that are being offered to specific courts.⁶⁰ However, these mediation programmes do not have any legal basis to apply the principle of opportunity.⁶¹ Some legal framework is certainly given in juvenile criminal justice, however, mediation is still an unknown legal institution in the Spanish criminal law for adults, without being mentioned by the Penal Code nor by the special criminal laws. This, of course, does not mean that reparation to the victim does not imply numerous effects as a mitigating factor, or with the concession of other benefits to the offender. In this context, Spain counts with experience in the area of minors, the recent and isolated experiences promoted by the *Consejo* and by or in collaboration with certain Autonomous Communities, and the international regulations on the matter.

B. Legal Frame of Restorative Justice

Regarding the specific provisions of the Penal Code, reference shall be made, in the first place, to Article 21.5, which provides reparation as a mitigating factor of criminal liability. Accordingly, a mitigating factor may be conceded “[i]f the perpetrator has repaired the

agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.” Article 17: “Each Member State shall bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision: -regarding Article 10, 22 March 2006...”.

Spain did not implemented the Council Framework Decision of 15 March 2001, but it was declared in the Spanish parliament on 9 July 2004 that “it is a question that is being dealt with within the legal reform of the *Ley de Enjuiciamiento Criminal*, where the adequacy of its introduction will be examined, as well as the types of crimes where it could be applied, the determination of mediators, its effects and consequences”. Nevertheless, this legal reform has not gone forward. See Manzanares Samaniego 2008, *La mediación penal*, p. 7.

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□ The mediation programmes in Valencia, Catalonia, La Rioja and Madrid are commonly mentioned as examples.

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□ Manzanares Samaniego 2008, *La Mediación Penal*, p. 11.

damages to the victim, or diminished their effects, in any moment of the proceedings and before the celebration of the oral trial.⁶² This mitigating factor is generic, namely, it applies to all types of criminal offences, and can be considered as a consequence of a victim-oriented criminal policy. The Supreme Court has stated:

[T]his mitigating factor aims at the promotion of support and help to victims, so that the responsible for the crime contributes to the reparation of the damages of all kinds caused by the crime, from the perspective of a criminal policy oriented towards victimology, where attention to the victim plays a preponderant role in the criminal reaction. For that, it is necessary to prioritize those who behave in a way that satisfies the general interest, because protection of the interests of victims is not considered any more as a strictly private matter, of civil liability, but as a community interest.⁶³

The Court has further asserted:

Mainly reasons of criminal policy oriented towards the protection of victims of any type of crimes support the decision of the legislator to introduce a mitigating factor of the sentence regarding acts by the perpetrator of total or partial reparation of the damages of the crime. Not to mention that it may also be taken into account that a lower necessity of the penalty derives from the acknowledgment of the facts, as a sign of rehabilitation that may accompany reparation, even though the mitigating factor of Article 21(5) does not require it. Regardless of any subjective element of this conduct, given that a particular feeling or attitude of repentance is not demanded, it is essential for the application of this mitigating factor that reparation can be considered relevant according to the circumstances of the case and of the perpetrator.⁶⁴

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□ Authors' translation of Penal Code, Article 21.5.

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□ Authors' translation of *Tribunal Supremo (Sala de lo Penal), Sentencia número 428/2011, de 12 mayo*.

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□ Authors' translation of *Tribunal Supremo (Sala de lo Penal), Sentencia número 179/2007, 7 marzo*. See also eg *Tribunal Supremo (Sala de lo Penal), Sentencia número 683/2007, 17 julio*; *Tribunal Supremo (Sala de lo Penal), Sentencia número 1071/2006, 25 octubre*.

From these quotations, it is possible to determine the objective elements of this mitigating factor. Reparation must take place before the date of initiation of the oral trial.⁶⁵ However, the reparation produced during the celebration of the trial may lead to the application of the analogical mitigating factor provided in Article 21(7) of the Penal Code.⁶⁶

Being subjective factors such as repentance excluded,⁶⁷ reparation may take place via restitution, compensation of damages or moral or symbolic reparation. However, some judgements of the Supreme Court have required the so-called "actus contrarius" of the crime, where it is "decisive to exteriorize a will of acknowledgement of the infringed norm."⁶⁸ The Supreme Court has stated that:

[T]he substantial element of this mitigating factor consists of the reparation of damages caused by the crime or diminishing their effects, in a broaden sense of reparation that goes beyond the meaning that is given to this expression in Article 110 of the Penal Code, given that Article 110 refers exclusively to civil liability, which is different from criminal liability that affects the mitigating factor. Any form of reparation of damages or of diminishing their effects, by means of restitution, compensation of damages, moral reparation or even symbolic reparation may fall within the mitigating factor.⁶⁹

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□ See eg *Tribunal Supremo (Sala de lo Penal), Sentencia número 1006/2006, 20 octubre.*

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□ Manzanares Samaniego 2009, *La mediación, la reparación y la conciliación en el derecho penal español*, p. 3

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□ Tribunal Supremo (Sala de lo Penal), *Sentencia número 428/2011, de 12 mayo.* See also eg Tribunal Supremo (Sala de lo Penal), *Sentencia número 1006/2006, 20 octubre.*

68

□ *Ibid.*

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□ Authors' translation of *Tribunal Supremo (Sala de lo Penal), Sentencia número 2/2007, 16 enero.* See also eg *Tribunal Supremo (Sala de lo Penal), Sentencia número 216/2001, 19 febrero* and *Tribunal Supremo (Sala de lo Penal), Sentencia número 794/2002, 30 abril.*

From a subjective perspective, the mitigating factor regards only a personal conduct of the offender, being excluded:

- 1.- payments made by insurance companies according to a mandatory insurance;
- 2.- conceding a guarantee or caution which has been requested by the court;
- 3.- conducts imposed by the Administration;
- 4.- the mere information of the existence of goods that are being searched, when these goods have been found necessarily.⁷⁰

In addition, the reparatory acts of the offender must be significant in relation to the type of crime committed, so that it is not possible to apply the mitigating factor in apparent acts or small reparations.⁷¹ The economic capacity of the offender is not determinant, even though it is a relevant information to take into account. Moreover, a real and true reparation is not equal to a complete reparation, as long as the offender has made a real effort, as the diminishing of the effects of the crime are also accepted. However, this will be relevant for determining the intensity of the mitigating factor, which may be applied as ordinary or qualified.⁷²

In light of this, it is common to apply this mitigating factor to the agreements celebrated between the offender and the victim, by which the offender makes a payment for the damages caused to the victim.⁷³ Jurisprudence requires the payment to have been effective before the oral trial for the application of the mitigating factor. Therefore, as it had been mentioned above, it does not accept, as reparation, the simple provision to the victim with a bank guarantee. In this regard, the Supreme Court considers:

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□ Authors' translation of *Tribunal Supremo (Sala de lo Penal), Sentencia número 1006/2006, 20 octubre.*

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□ See *Tribunal Supremo (Sala de lo Penal), Sentencia número 179/2007, 7 marzo.* See also eg *Tribunal Supremo (Sala de lo Penal), Sentencia número 1002/2004, 16 septiembre; Tribunal Supremo (Sala de lo Penal), Sentencia número 145/2007, 28 febrero; Tribunal Supremo (Sala de lo Penal), Sentencia número 179/2007, 7 marzo; Tribunal Supremo (Sala de lo Penal), Sentencia número 683/2007, 17 julio.*

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□ *Tribunal Supremo (Sala de lo Penal), Sentencia número 1006/2006, 20 octubre.*

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□ *Tribunal Supremo (Sala de lo Penal), Sentencia número 6/2008, 23 enero.*

Reparation cannot be confused with conceding a caution regarding the civil liability, which is a legal obligation of any alleged responsible for a criminal offence... from a subjective perspective, the mitigating factor regards the personal conduct of the offender, excluding, among other cases, the constitution of the caution required by the Court.⁷⁴

Interestingly, the Supreme Court has referred to the participation of the offender in a programme of penal mediation for the application of the mitigating factor of reparation. In a case, decided in 2006, the offender had participated together with the victim in a mediation programme coordinated by the *Subdirecció General de Medis Oberts i Mesures Penals Alternatives* of the *Generalitat de Catalunya* ("General Sub-direction of Open Regime and Alternative Criminal Measures" of the Government of Catalonia). This public body had filed a report informing that:

[the offender] manifests its repentance for the caused injuries to ... [the victim], who never had the intention to cause any damage, and, in addition, he expresses his apologies. ... [the victim] accepts the apologies. Both parties, with the signature of this agreement, considered this conflict as finished. ... [the victim] considers that has been repaired after this process of mediation."⁷⁵

Given the requirements for the application of the mitigating factor, the Supreme Court considered:

[T]he mere participation of the offender in a voluntary programme of penal mediation, even with a positive result, does not mean an effective reparation. The victim renounced from the beginning to any kind of compensation. Therefore it is irrelevant that there are no damages to repair or that the existing damages have been renounced, given that in any of the cases the possibility of reparation has not been offered and actually no reparation has taken place.⁷⁶

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□ Authors' translation of *Tribunal Supremo (Sala de lo Penal)*, *Sentencia número 580/2011*, 14 junio.

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□ Authors' translation of *Tribunal Supremo (Sala de lo Penal)*, *Sentencia número 1006/2006*, 20 octubre.

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The criteria followed by the Supreme Court in this case, therefore, indicated that reparation in the sense of Article 21(5) of the Penal Code must consist of a positive action by the offender, being insufficient the mere participation of the offender in a programme of penal mediation, if no reduction of the damages has been accredited. In this regard, it considered mere moral satisfaction of the victim as insufficient.⁷⁷ The criteria of the jurisprudence on the acceptance of moral or symbolic reparation, which is certainly not uniform, has a clear effect on the process of mediation. In any case, the option to apply the analogical mitigating factor of Article 21(7) of the Penal Code also remains open.⁷⁸

As mentioned above, the mitigating factor may be applied by courts as “ordinary” or as “qualified”, depending the latter on the existence of “special intensity” in the reparation to the victim, according to the personal conditions of the offender, the factual background and any other elements that help to assess his or her conduct.⁷⁹ According to the jurisprudence of the Supreme Court, the mere payment of civil liabilities is not sufficient,⁸⁰ even more when it is not accredited that the accused had to do an extraordinary effort or sacrifice to cover the damages.⁸¹ It is interesting to note that the

⁷⁷ □ Authors’ translation of *Tribunal Supremo (Sala de lo Penal), Sentencia número 1006/2006, 20 octubre*.

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⁷⁸ □ The same criteria was followed by the *Audiencia Provincial* of Barcelona in 2001. See *Audiencia Provincial de Barcelona (Sección 10), Sentencia 11 diciembre 2001*.

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⁷⁹ □ Manzanares Samaniego 2009, *La mediación, la reparación y la conciliación en el derecho penal español*, p. 3.

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⁸⁰ □ Tribunal Supremo (Sala de lo Penal), *Sentencia número 179/2007, 7 marzo*.

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⁸¹ □ See *Tribunal Supremo (Sala de lo Penal), Sentencia número 580/2011, 14 junio*. See also eg *Tribunal Supremo (Sala de lo Penal), Sentencia número 136/2007, 8 febrero*.

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□ Tribunal Supremo (Sala de lo Penal), *Sentencia número 428/2011, 12 mayo*.

Supreme Court has applied the mitigation in a “qualified” manner in cases where the accused not only paid damages, but also expressed his or her apologies to the victim. According to the Supreme Court, this reflects an attitude of recognition of the legal order and a moral reparation, which is more relevant for the Court than the mere economic reparation.⁸²

On the other hand, the Penal Code also includes forgiveness by victims as an extinctive cause of criminal liability.⁸³ While in countries with penal mediation forgiveness could be given as a result of a mediation process, in Spain, forgiveness is only relevant and assessed by judges and tribunals as long as it is introduced and accredited in the criminal proceedings according to certain legal conditions. This does not exclude, obviously, that forgiveness may actually be the result of a mediation process. In this regard, the legal conditions that must be present in the act of forgiving are the following: (i) it must be given in an express manner and before sentencing; (ii) the judge or tribunal must hear the victim before sentencing; (iii) in cases of minor or disabled victims, the judge or tribunal may reject the forgiveness given by their legal representatives, upon hearing the Public Prosecutor and their legal representative.⁸⁴ The provision on extinction of criminal liability refers to the special part of the Penal Code in order to determine the types of crimes affected by this consequence. In this regard, the types of crimes that benefit from this extinctive cause are the crime of discovering and revealing secrets,⁸⁵ defamation (*calumnia* and *injuria*)⁸⁶ and the crime of negligent

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□ Tribunal Supremo (Sala de lo Penal), Sentencia número 50/2008, 29 enero.

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□ Penal Code, Article 130.1.5.

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□ Penal Code, Article 130.1.5.

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□ Penal Code, Articles 197 and 201.3.

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□ Penal Code, Article 215.3.

damages,⁸⁷ as well as misdemeanours of threats, coercion, insults and humiliations⁸⁸ and some misdemeanours of grave negligence with injuries.⁸⁹

It is also to be noted that many provisions in the special part of the Penal Code, for certain types of crimes, regard reparation of damages as "specific mitigating factors". Some examples are the crimes against ordination of territory and urbanism,⁹⁰ crimes against historical heritage,⁹¹ crimes against natural resources and environment⁹² and crimes regarding the protection of vegetation and fauna.⁹³ There are also cases where the undertaking of reparation constitutes an absolutive excuse that excludes the imposition of a penalty for the crime committed. An example of this absolutive excuse is the "regularisation" for tax crimes,⁹⁴ for crimes against the Social Security⁹⁵ and for fraud

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□ Penal Code, Article 267.

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□ Penal Code, Article 620.

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□ Penal Code, Article 621.

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□ Penal Code, Articles 319-320, in relation to Article 340.

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□ Penal Code, Articles 321 and 323, in relation to Article 340.

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□ Penal Code, Articles 325-331, in relation to Article 340.

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□ Penal Code, Articles 332-337, in relation to Article 340.

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□ Penal Code, Article 305.4.

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□ Penal Code, Article 307.3.

of public subsidies.⁹⁶ Along the same lines, it is to be observed that the Penal Code provides for the crime of defamation that, in case of acknowledgement by the accused of the falsehood of his or her statements and retraction, the judge or tribunal shall mitigate the sentence. In such cases, the judge or tribunal shall order that the testimony of the retraction is given to the victim and, upon the request by the victim, order its publication.⁹⁷ The Penal Code includes as reparation of damages for this sort of crimes the publication or divulgation of the sentence, being the expenses covered by the convicted person.⁹⁸

On the other hand, mediation may be specially relevant for those crimes whose prosecution requires a *querella*.⁹⁹ In the case of defamation (*calumnia* and *injuria*), the *querella* shall not be admitted, without accrediting that the complainant has held or has tried to hold an act of conciliation with the offender.¹⁰⁰ Conciliation takes place before a judge of the civil jurisdiction and has some similarities with mediation. The judge chairs the act of mediation and must seek for an agreement between the parties. Therefore, even if it is not mentioned in the legislation, mediation could be a means to the

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□ Penal Code, Article 308.4.

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□ Penal Code, Article 214.

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□ Penal Code, Article 216.

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□ The *querella* is a procedural act that implies the exercise of a criminal action. It may be filed by the victim (private prosecution), a person that was not affected by the crime (popular prosecution) or the Public Prosecutor, and they become parties to the proceedings. This type of criminal complaint is different from the type of criminal complaint known as *denuncia*, which only communicates the *notitia criminis* to the judicial authorities, Public Prosecutor or police, without becoming the complainant automatically a party to the proceedings. See Rifà Soler, Richard González and Riaño Brun 2006, Derecho Procesal Penal, pp. 210-214.

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□ LECrim, Article 804.

achievement of forgiveness or of an agreement before the initiation of criminal proceedings.¹⁰¹

It is also important to refer to the provisions that incorporate the Restorative Justice perspective after the sentencing stage. The provisions on the suspension of the execution of penalties of deprivation of liberty are regulated in Articles 80-87 of the Penal Code. In this sense, courts may suspend the execution of such kind of penalties, without affecting the civil liability *ex delicto*, only upon the fulfilment of the following criteria: (i) that the offender does not have criminal records, excluding crimes with negligence; (ii) that the sentence is, in total, not superior to two years; and, more importantly (iii) that the offender has satisfied the civil liabilities, except if the court, after hearing the victim and the Public Prosecutor, declares the total or partial impossibility of the accused to satisfy them.¹⁰² In addition, the judge or tribunal may condition the suspension to the fulfilment of certain obligations, which may include “the participation in programmes that are educative, labour, cultural, on driver education, sexual, of defence of the environment, of protection of animals and similar”,¹⁰³ or any “other obligations that the judge or tribunal consider adequate for the social rehabilitation of the convicted, with his or her previous acceptance”.¹⁰⁴ In this regard, the judge or tribunal may impose, in certain cases, mediation and reparation as obligations for the social rehabilitation of the convicted.

Another relevant provision that incorporates Restorative Justice after the sentencing stage but before the execution of the sentence is Article 88 of the Penal Code, according to which judges or tribunals may substitute, under certain circumstances, penalties of

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□ Manzanares Samaniego 2009, La mediación, la reparación y la conciliación en el derecho penal español, pp. 5-6.

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□ Penal Code, Article 81.

103

□ Penal Code, Article 83.1.5.

104

□ Penal Code, Article 83.1.6.

deprivation of liberty that do not exceed a year for a fine or community work, or, in cases of penalties of deprivation of liberty that do not exceed six months for a penalty of permanent location. The adoption of this measure depends, among other circumstances, on the efforts made by the convicted to repair damages.¹⁰⁵

The Penal Code includes the concession of pardons among the extinctive causes of criminal liability.¹⁰⁶ This option is open to all types of crimes,¹⁰⁷ once the sentence is final.¹⁰⁸ The restorative aspects of this institution are found, for example, in the fact that its concession shall not include the civil liability.¹⁰⁹ Likewise, the “causation of no damage to a third person or to his or her rights”, which may include damages to the victim, and “the hearing of the victim, when the crime committed may only be prosecuted *ex parte*”, are necessary and previous conditions for the concession of pardons.¹¹⁰ They may be complemented with “other conditions that justice, equity or public utility dictate.”¹¹¹ These provisions may lead the government to examine the adequacy of imposing some restorative measures.

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□ Penal Code, Article 88.

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□ Penal Code, Article 130.1.4.

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□ *Ley de 18 de junio de 1870, del Indulto*, Article 1.

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□ *Ley de 18 de junio de 1870, del Indulto*, Article 2.1.

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□ *Ley de 18 de junio de 1870, del Indulto*, Article 6.

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□ Authors' translation of *Ley de 18 de junio de 1870, del Indulto*, Articles 15 and 17.

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□ Authors' translation of *Ley de 18 de junio de 1870, del Indulto*, Article 16.

It is also relevant to mention the provisions regulating the procedure for the concession of pardons, which includes the hearing of victims¹¹² and the issuance of a report by the sentencing tribunal, which may refer to “the attitude of the convicted posterior to the execution of the sentence, and specially the evidence of his or her repentance, as well as whether there is a victim, and whether the pardon affects the rights of third persons”.¹¹³ All these aspects affect in some way victims. In this sense, it can be asserted that this institution is inspired by the principle of humanity and it follows a criminal policy based on the principle of necessity of penalties.¹¹⁴

Regarding the correctional level, the Penal Code includes Restorative Justice measures in order to achieve the probation stage. For having access to probation, Article 90 requires, among other conditions, a good behaviour on the side of the offender and an individual and favourable prognostication of his or her social rehabilitation issued by the experts appointed by the *Juez de Vigilancia Penitenciaria* (“Judge of Penitentiary Vigilance”) The voluntary participation of the convicted in the adoption of a reparatory agreement and the voluntary participation of the victim for the compensation or reduction of damages may be considered, in certain cases, as an example of “good behaviour”.¹¹⁵ In addition, the voluntary reparation may lead to a favourable prognosis of social rehabilitation.¹¹⁶ In

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□ *Ley de 18 de junio de 1870, del Indulto*, Article 24.

113

□ *Ley de 18 de junio de 1870, del Indulto*, Article 25.

114

□ Freire Pérez 2011, *Experiencias de mediación penal en el ámbito de la justicia penal de adultos*. Amparo normativo e institucional, p. 264.

115

□ *Ibid.*, pp. 263-264.

116

□ *Ibid.*, pp. 263-264.

addition, the Penal Code, in a reform of 2003,¹¹⁷ introduced that this condition could not be fulfilled if the convicted had not satisfied the civil responsibility *ex delicto*.¹¹⁸

At the same time, the Penal Code refers to Article 72(5) of the *Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria*, on the grades of penitentiary treatment. This provision states that the classification or progression to the third degree of treatment, in an "open regime" (*medio abierto*), requires, among other conditions, that the convicted has satisfied the civil liability *ex delicto*. The following circumstances must also be assessed: the conduct followed by the convicted towards restitution, reparation or compensation of the material and moral damages; the personal and economic conditions of the convicted; the guarantees for the future satisfaction of civil liability; the assessment of the economic capacity that the convicted would have achieved with the commission of the crime and, where appropriate, the damages caused to the public service, together with the character of the damages, the number of victims and their condition.

Upon the service of the sentence, Article 136 of the Penal Code, on cancellation of criminal records, contains, upon the reform of 2003, the following requirement: "After satisfying the civil liability *ex delicto*, except in cases of bankruptcy declared by the sentencing judge or tribunal and unless the convicted has improved his or her economic situation."

Therefore, in terms of adult or ordinary criminal justice, a flexible interpretation of the Penal Code may lead to the conclusion that the reparation of damages achieved by means of a mediation process, undertaken in the pre-trial stage, trial stage, before or after sentencing, makes possible certain benefits for the offender. Even during the service of the sentence, reparation is relevant to obtain the third penitentiary degree (open regime) or probation, the cancellation of criminal records or to facilitate the concession of pardons.

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□ Ley Orgánica 7/2003, de 30 de junio, de medidas de reforma para el cumplimiento íntegro y efectivo de las penas.

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□ Penal Code, Article 90.1.

The jurisdiction of minors formally includes the concept of restorative justice, mediation, conciliation and reparation. Indeed, only the *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores* has incorporated so far penal mediation and the principle of opportunity to Spanish criminal legislation, so that the Public Prosecutor has a margin of discretion to desist from the continuation of the case or to declare the stay of proceedings in cases of "less severe" crimes¹¹⁹ or misdemeanours.¹²⁰ Within this margin of discretion, mediation or conciliation play an important role. Its Article 19, entitled "declaration of stay of the proceedings because of conciliation or reparation between the minor and the victim", defines "conciliation" and "reparation". The former takes place "when the minor acknowledges the caused damages and apologizes to the victim for them, who at the same time accepts the apologies". "Reparation" is defined as "the committal of the minor with the victim to undertake certain actions for the benefit of the victim or community, and its subsequent undertaking", notwithstanding the agreement between the parties on civil liabilities.¹²¹ The *Real Decreto 1774/2004, de 30 de Julio, Reglamento de Responsabilidad Penal de los Menores* ("Royal Decree 1774/2004, of 30 July, Regulation on Criminal Liability of Minors") complements and develops the application of Article 19.¹²²

In terms of juvenile criminal justice, it is also relevant to refer to Article 51(3), on substitution of measures, where it provides that "conciliation between the minor and the victim that takes place at any point may release the minor from the measure imposed by the judge, upon proposal by the Public Prosecutor or by the defence counsel, and after

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□ See Penal Code, Article 33.3.

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□ *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*, Article 19.1.

121

□ *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*, Article 19.2.

122

□ *Real Decreto 1774/2004, de 30 de julio, Reglamento de Responsabilidad Penal de los Menores*, Article 5.

hearing the technical teams and the representatives of the public entities of protection and reform of minors”.

It has been considered that the regulation of mediation in juvenile justice could be a basis for developing mediation in the ordinary criminal system.¹²³ In this sense, the *Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género* (“Organic Act 1/2004, of 28 December, of Measures of Integral Protection against Gender Violence”) represented a counterpoint. Article 44(5), on jurisdiction of the *Juzgados de Violencia sobre la Mujer* (“Courts of Violence against Women”) expressly excludes mediation from cases of gender violence. This prohibition has been very criticized. Most of the doctrine has considered, in this regard, that mediation could be an adequate option in such cases.¹²⁴

C. Actual Situation of Restorative Justice

This rubric focuses on the actual situation of Restorative Justice in Catalonia. Since the 1980s the powers on justice have been transferred to the Autonomous Communities. In this area, the *Generalitat de Catalunya*, through its Department of Justice, has become the autonomous government that has developed more exhaustively policies on alternative penal measures and, particularly on Restorative Justice.

As the graphic below demonstrates, an increase in the demand of alternative penal measures has taken place in the last years in Catalonia:

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
APM	669	657	818	1.347	3.931	5.019	5.412	11.630	16.687	17.319

123

□ Manzaneres Samaniego 2009, *La mediación, la reparación y la conciliación en el derecho penal español*, p. 6.

124

□ *Ibid.*

As mentioned above, in terms of juvenile criminal justice, the work to implement programmes of alternative penal measures started in 1989, when a commission of professionals of the *Servei de Medi Obert* ("Service of Open Regime") of the DGJJ was created in order to outline a project that made possible the application of programmes of conciliation and reparation in juvenile justice. In this regard, in May 1990 a project of conciliation – reparation and the community work was implemented,¹²⁵ enabling the introduction of a model of juvenile justice in Catalonia. This model was followed by all the State, with the promulgation two years later of the *Ley Orgánica 4/1992, de 5 de junio, Reguladora de la Competencia y el Procedimiento de los Juzgados de Menores*. The enactment of this law meant the introduction of reparation to victims as a form of *desjudicialización* and the introduction of community work within the catalog of security measures. When the *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, which meant a change of the penal system, entered into force on 25 May 1996, the conditions for the execution of new alternative measures to the deprivation of liberty already existed.

From the beginning, the Department of Justice of the *Generalitat de Catalunya* facilitated teams of professionals to the judicial organs with seat all over the Catalan territory, in order to meet the needs of technical counselling and of execution of these measures. In Barcelona, the programme of execution of alternative penal measures is managed by an external entity since 2001. In Girona, Lleida, Tarragona, Terres de l'Ebre and Alt Pirineu, this management lies in the social services in penal matters.

Penal mediation and reparation are services offered by the *Direcció General d'Execució Penal a la Comunitat i de Justícia Juvenil* of the *Generalitat de Catalunya* ("General Direction of Penal Execution in the Community and Juvenile Justice" of the Government of Catalonia). By means of a confidential process of dialog and communication chaired by an impartial mediator, the defendant, accused or convicted of a crime or misdemeanour and the victim participate voluntarily, with the aim of achieving an

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□ Casanovas, Díaz, Magre, and Poblet (2009), *Materials del Llibre Blanc de la Mediació a Catalunya*.

adequate reparation of the damages caused and a solution to the conflict from a perspective that must be fair and balanced to the interests of both parties.

The teams of Penal Mediation and Reparation, territorially distributed, consist of professionals of the areas of psychology, social work, anthropology, law as well as other humanist and legal sciences, with a special training on penal mediation and reparation. Those teams deal with the demands of participation in the programme of penal mediation and with the *oficios* ("orders") of mediation issued by the judicial organs with seat in Catalonia.

The programme of Penal Mediation and Reparation provides the following benefits to the parties: (i) the possibility to solve a conflict according to their interests and necessities, making possible that each party listens to the other and is listened, increasing their feelings of being part and responsible for the situation; (ii) the possibility of repairing the damages (economic, moral reparation or by means of a personal action, etc.), promoting a feeling of personal responsibility, the knowledge of the consequences of the criminal action, and the future commitment; and (iii) the possibility of the victim to have the damages repaired and recovering the personal tranquillity. With regard to the community, the benefits are: (i) the restoration of social peace; and (ii) approaching justice to citizens. The main consequence of the implementation of such programmes for the administration of justice is the reduction of the number of criminal proceedings.

It is to be observed that different types of penal mediation may be applied (joint mediation, indirect mediation, extensive mediation, multi-parties mediation and mediation of groups), with a specific methodology and procedure. The procedure generally starts with the reception of the request of mediation and the allocation of a mediator, according to the territorial criteria. It is followed by the preliminary study by the mediator of the judicial information and the administrative file, in case of previous records, and by the planning of the adequate interventions. An interview takes place, subsequently, between the mediator and each party, so as to assess the viability of mediation. If this is the case, a procedure of mediation starts with interviews with both parties or in an indirect way, which may lead to an agreement. Once the procedure is finished, a report is transferred to the judicial organ with jurisdiction. In case of

agreement, the document with the agreement is attached to the report, so that it is taken into account in the proceedings.

Reference shall be made to the figure of the so-called *delegat d'execució de mesures* ("delegate of execution of measures"), who is in charge of the control and socio-educative support during the service of the measure by the offender. The main functions of this position are the following: (i) to grant the adequate service of penalties, measures and/or imposed obligations; (ii) to keep the judicial organ with jurisdiction informed about the fulfilment and evolution of the measure; (iii) to facilitate the social integration of the offender, by monitoring and giving socio-educative support; (iv) to facilitate the existence of socio-communitarian resources according to the necessities of the population; and, finally, (v) to create involvement and awareness within the community regarding procedures of execution of alternative penal measures.

The system, programmes and services that are being implemented can be considered to be both offender and victim focused. The system makes possible to focus on any of the parties to the mediation procedure and in any procedural moment. Therefore, it is possible after filing the criminal complaint and before the trial, during the trial, during the sentencing or at the correctional level. Thus, mediation may be requested by victims, as well as by defendants, accused or convicted for any crime or misdemeanour (with the exception of gender crimes), where a reparation is possible, but also by their legal counsels, Public Prosecutors, the judicial organs that have the jurisdiction to deal with the case, security forces, technical teams in penitentiary centres (in case of provisional detention or conviction, if it is a case of penal mediation) and other services, such as the penal counselling teams, offices of attention to victims, offices of attention to citizens and teams of alternative penal measures.

The Teams of Penal Mediation and Reparation may be governmental or non-governmental. The governmental Teams of Penal Mediation and Reparation belong to the DGEPCJJ, and, in particular to its General Sub-direction known as *Subdirecció General de Reparació i Execució Penal a la Comunitat – Àrea de Reparació i d'Atenció a la Víctima* ("General Sub-direction of Penal Reparation and Execution to the Community – Area of Reparation and Attention to the Victim") of the *Generalitat de Catalunya*. There are five teams of Penal Mediation and Reparation: for Barcelona, Girona, Lleida,

Tarragona and Terres de l'Ebre. The non-governmental teams are the following associations: *Associació per a la Promoció i la Inserció Professional (APIP)*, *Associació Social Andròmines*, *Fundació l'Heura Tarragona*, *INTRESS*, *Discapacitats Intel·lectuals de Catalunya (DINCAT)* and *Fundació Privada ARED*, in addition to the volunteer organizations Red Cross – Catalonia, *Associació CEDRE per a la Promoció Social* and the *Fundació Autònoma Solidària*.

STATISTICS IN CATALONIA (2011)- Juvenile Justice

People attended by the services of Juvenile Justice: 6.888

Male: 5.641

Female: 1.212

People attended by the Mediation services: 18'74% (1.291)

Number of Mediations conducted: 2.187 (82'34% with a positive result)

The Penal Mediation and Reparation programme presents the following evolution per type of programme (technical counselling, mediation, open regime and internment)¹²⁶:

The following graphic presents the historical evolution of the mediation programmes, in relation to measures of open regime and internment:

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□ Source: Estadística bàsica justícia juvenil 2011. Centre d'Estudis Jurídics i Formació Especialitzada, Departament de Justícia, Generalitat de Catalunya.

The next Graphics shows the number of mediation programmes that have been conducted and their result:

D. The Key-Practitioners of Restorative Justice

In terms of adult or ordinary criminal justice, the inexistence of legislation regulating criminal mediation in Spain has also led to the inexistence of an “statute of the mediator”, which could regulate this profession uniformly and for every type of mediation. Neither has the profession of mediator an specific code of conduct. In this regard, criminal mediation must refer to the European Code of Conduct for Mediators, which was developed with the assistance of the European Commission and was launched at a conference in Brussels on 2 July 2004,¹²⁷ and to the legislation on civil mediation that has been enacted by the parliaments of the Autonomous Communities and which regulate the principles of mediation, its procedure, as well as the organization and registry of professionals, the conditions for accessing to the profession and the applicable disciplinary regime.¹²⁸ Such regional regulations refer to the professional

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□ The Code of Conduct is at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm Last accessed 9 October 2011.

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□ See *Ley del Principado de Asturias 3/2007, de 23 de marzo, de Mediación Familiar (Boletín Oficial del Principado de Asturias 9 abril 2007, número 6270)*; *Ley 15/2003m de 8 de abril, de la mediación familiar (Boletín Oficial de Canarias 6 de mayo de 2003, número 85)*; *Ley 1/2006, de 6 de abril, de mediación familiar de Castilla y León (Boletín Oficial del Estado 3 mayo 2006, número 105)*; *Ley 4/2001, de 31 de mayo, reguladora de la Mediación Familiar (Boletín Oficial del Estado 2 junio 2001, número 157)*; *Ley 4/2005, de 24 de mayo, del Servicio Social Especializado de Mediación Familiar (Boletín Oficial del Estado 25 agosto 2005, número 203)*; *Ley 18/2006, de 22 de noviembre, de Mediación Familiar (Boletín Oficial del Estado 20 diciembre 2006, número 303)*; *Ley 7/2001, de 26 de noviembre, reguladora de la mediación familiar, en el ámbito de la Comunidad Valenciana (Boletín Oficial del Estado 19 diciembre 2001, número 303)*; *Ley 15/2003, de 22 de julio, de mediación en el ámbito del derecho privado (Boletín Oficial del Estado 17 agosto 2009, número 198)*; *Ley 1/2009, de 27 de febrero, reguladora de la Mediación Familiar en la Comunidad Autónoma de Andalucía (Boletín Oficial de la Junta de Andalucía 13 marzo 2009, número 50)*; *Ley 1/2007, de 21 de febrero, de Mediación Familiar de la Comunidad de Madrid (Boletín Oficial de la*

associations of mediators that at the same time practice another profession,¹²⁹ which would be the case, for example, of lawyers, psychologists, social workers or pedagogues, and who are subject to the code of conducts of their respective professions.

As mentioned above, in the case of Catalonia, mediation in adult criminal justice is a service offered by the DGEPCJJ, through teams of Penal Mediation and Reparation (*equips de Mediació i Reparació Penal*), territorially distributed, and integrated by professionals with different backgrounds. Mediation in criminal cases may be requested, in addition to victims and offenders, by the legal counsels of both parties, the Public Prosecutor, the judicial organ that is knowing the proceedings, security forces, technical teams of penitentiary centres (for provisionally detained and for convicted), and other services, such as offices of attention to the victim. In this regard, mediation may be requested at any point of the proceedings, after the filing of the criminal complaint and before the beginning of the trial, as well as during the trial or at the correctional level.¹³⁰

Therefore, the role of judges is limited to the possible issuance of an order (*oficio*) to request the application of a mediation process to the criminal proceedings that they are dealing with. Judges shall not intervene as mediators in any conflict, given that Judicial Power and mediation are complementary and alternative solutions, follow a very different idiosyncrasy,¹³¹ being the role of judges constitutionally limited to the exercise

Comunidad de Madrid 5 marzo 2007, número 54); Ley 1/2008, de 8 de febrero, de Mediación Familiar (Boletín Oficial del País Vasco 18 febrero 2008, número 34).

This legislation can be accessed http://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Normativa_y_jurisprudencia/Leyes_Autonomicas Last accessed 11 October 2011.

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□ For instance, Article 22 of the *Ley 15/2003, de 22 de julio, de mediación en el ámbito del derecho privado (Boletín Oficial del Estado 17 agosto 2009, número 198).*

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□ See <http://www20.gencat.cat/portal/site/Justicia/menuitem.51bb51de98b3c1b6bd6b6410b0c0e1a0/?vgnextoid=6803f31f87203110VgnVCM1000008d0c1e0aRCRD&vgnnextchannel=6803f31f87203110VgnVCM1000008d0c1e0aRCRD&vgnnextfmt=default> Last accessed 11 October 2011.

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of judicial authority, both in “ruling and having judgments executed”.¹³² In this regard, it is interesting to note that, the *Protocolo para la implantación de la mediación familiar intrajudicial en los juzgados y tribunales que conocen de procesos de familia* (“Protocol for the introduction of family mediation in courts and tribunals that deal with proceedings of family law”) considers judges as the key figure in the introduction of mediation in proceedings of family law and recommends that judges know the methodology of mediation, its utility and necessity. According to the Protocol, judges would have a triple role in intra-judicial mediation: to promote necessary agreements for the introduction of the mediation service; to assess those cases where it is advisable to conduct a mediation process and the procedural point to undertake it; and to advice citizens to attend to a first interview for judicial proximity.¹³³ This perspective has been criticised in that it may be acceptable that judges inform the parties on the alternative of mediation, as well as on other alternatives, but judges should not become active promoters of mediation, since that would restrain the free will of the parties, which is the basis of mediation.¹³⁴

Likewise, this Protocol states that the Public Prosecutor may have an important role in cases of family mediation, in that it may take the initiative of working with mediation and suggesting the application of this alternative in specific cases. It also points out that the Public Prosecutor must be informed of the development of the mediation process.¹³⁵

¹³² □ Martín Diz 2010, *La mediación: sistema complementario de administración de justicia*, p. 210.

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□ Constitution, Article 117.

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□ *Protocolo para la implantación de la mediación familiar intrajudicial en los juzgados y tribunales que conocen de procesos de familia*, Consejo General del Poder Judicial, May 2008, Section 4. http://www.poderjudicial.es/stfls/PODERJUDICIAL/DOCTRINA/FICHERO/PROTOCOLO%20CIVIL_1.0.0.pdf Last accessed 11 October 2011.

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□ Martín Diz 2010, *La mediación: sistema complementario de administración de justicia*, p. 211.

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□ *Protocolo para la implantación de la mediación familiar intrajudicial en los juzgados y tribunales que conocen de procesos de familia*, Consejo General del Poder Judicial, May 2008, Section 4.

Nevertheless, the legal inexistence of mediation for criminal matters, regarding adult criminal justice, impedes any intervention of the Public Prosecutor. An exception is the juvenile criminal justice, where, according to Article 19 of the *Ley Orgánica 5/2000, de 12 de neero, reguladora de la responsabilidad penal de los menores*, some functions are given to the Public Prosecutor in the process of mediation, such as, for example, decide on continuation of the proceedings, upon the fulfilment by the minor of the conciliation and reparation agreement.

The *Libro Blanco de la Justicia*, also adopted by the CGPJ, asserts the “decisive” role of lawyers in avoiding the initiation of proceedings, namely, their function as filters of cases that may be finally judicially decided¹³⁶ and the “particular interest that deserves, as a proposal, the tendency to promote the intervention of lawyers in activities of mediation, transaction and arbitration, as essential commitments for limiting the number of cases that are brought before courts and tribunals.”¹³⁷

Table of Key-Practitioners in Spain

AUTONOMOUS COMMUNITY	OFICIAL SERVICE	VOLOUNTARY SERVICE
Andalucía	6 Criminal Courts	Enlace Association Mediamos Solucion@ AFIMA
Aragón	6 Lower Courts and/or Trial Courts	¿Hablamos? Association
Castilla y León	4 Lower Courts and/or Trial Courts 3 Criminal Courts	Promedia Association AMEPAX
Catalunya	34 Lower Courts and/or	Equips de Mediació I

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□ Authors’ translation of *Libro Blanco de la Justicia*, adopted by the Plenary of the *Consejo General del Poder Judicial* on 08 September 1997, Section 3.1.

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□ *Ibid.*, Section 3.4.

	Trial Courts 1 Criminal Court	Reparació Penal
Comunidad Valenciana	1 Criminal Court 1 Section of the District Court	
Madrid	2 Trial Courts	Asociación para la Pacificación de Conflictos en Madrid
Navarra	2 Trial Courts 1 Criminal Court	ANAME Association
País Vasco	30 Lower Courts and/or Trial Courts 9 Criminal Courts 1 Section of the District Court	Servicio de Mediación Intrajudicial del País Vasco

E. Evaluation and Recommendations

The Spanish legal system is grounded in a strict conception of the principle of legality and its correlative guarantees, so that it embraces the system of penalties and of security measures. Indeed, a security measure could not be superior to the penal framework provided by the Penal Code.

Spain follows a mix accusatorial system, which implies, among others, the separation of the functions of investigating and of prosecuting and trying in two different judicial organs and the necessity of an accusation (by the Public Prosecution, and by the private or popular prosecution, where appropriate). However, the jurisdiction of minors represents an exception to this system and has adopted the “formal pure accusatorial system”, which implies that the instruction of the juvenile criminal proceedings is directed by the Public Prosecution, who decides on the admission and impulse of the criminal complaints and on the possibility to desist from the initiation of proceedings in those cases provided by law.

This difference is one of the reasons –although not the only one- why the principle of opportunity and the measures of Restorative Justice by means of figures such as

reparation, conciliation or mediation, have been implemented in juvenile criminal justice and not in adult or ordinary criminal justice.

In terms of the jurisdiction of minors, the concept of Restorative Justice and of mediation are formally included in the *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*, Article 19, for minors under the age of 18. By means of Article 19, penal mediation and the principle of opportunity are introduced and linked to the achievement of a conciliatory or reparatory agreement between the minor offender and the victim, so that the Public Prosecutor has a margin of discretion to desist from the continuation of the case or to declare the stay of proceedings in cases of "less severe" crimes or misdemeanours. Article 19 provides that a technical team shall chair the mediation procedure between the minor offender and the victim and inform the Public Prosecutor about the agreement and its fulfilment.

By contrast, mediation is not formally part of adult or ordinary criminal justice, although a flexible interpretation of the Penal Code may lead to conclude that reparation of damages or conciliation achieved by means of mediation, conducted at the pre-trial stage, trial stage, before or after sentencing, provides certain benefits to the offender. These provisions refer to: (i) the existence of a mitigating factor in case of reparation to the victim before the celebration of the trial (Article 21.5 of the Penal Code) or during the celebration of the trial (analogical mitigating factor of Article 21.7 of the Penal Code); (ii) the inclusion of forgiveness by victims that takes place before sentencing as an extinctive cause of criminal liability (Article 130.1.5 of the Penal Code) for certain types of crimes; (iii) the inclusion of reparation of damages as a "special mitigating factor" or as an "absolatory excuse" for certain types of crimes; (iv) the necessity that the victim conducts an act of conciliation with the offender as a pre-condition for the filing of a criminal complaint in cases of defamation (Article 804 of the *Ley de Enjuiciamiento Criminal*); (v) relevant for the phase after sentencing are the provisions regarding the suspension of the execution of penalties of deprivation of liberty (Articles 80-87 of the Penal Code) and the provisions on substitution of penalties of deprivation of liberty (Article 88 of the Penal Code); (vi) the conditions for the concession of pardons, as an extinctive cause of criminal liability (Article 130.1.4 of the Penal Code and *Ley de 18 de junio de 1870, del Indulto*); (vii) at the correctional stage, the provisions on the requirements to access probation (Article 90 of the Penal Code) and on the grades of

penitentiary treatment (*Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria*); (viii) the necessity of having satisfied the civil liability *ex delicto* for the cancellation of criminal records (Article 136 of the Penal Code).

However, Spain has not introduced penal mediation in its legislation yet and, therefore, the Council Framework Decision of 15 March 2001, on the standing of victims in criminal proceedings (2001/220/JHA) is still pending to be implemented. This situation has led to a fragmented and unregulated system regarding adult or ordinary criminal justice, where the regional administrations have established services of mediation that are being offered to specific courts. However, these mediation programmes lack any legal basis to apply the principle of opportunity, although, according to the provisions mentioned in the previous paragraph, reparation and conciliation still imply numerous benefits to the offender.

Given this fragmented scenario where every Autonomous Community has implemented its own system of penal execution, it is difficult to provide a global account of penal mediation in Spain. As a result, the present report has focused on the evolution of the penal mediation and reparation services offered in Catalonia, where the programme has been implemented for more than ten years.

F. ANNEX

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