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THE CRISIS OF INSTITUTIONS AND PENAL MEDIATION. FRENCH AND SPANISH EXPERIENCES

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ABSTRACT

The age of globalization, in its second and third phase (the second one already ended within the twentieth century) – which witnesses the full deployment of the productive and commercial potentialities of humanity – breaks the "boundaries" of the relationship between individual and institutions. In addition, these epochal circumstances spread a feeling of "disorientation" fueled, in turn, by the widespread complexity of heterogeneous and sometimes contradictory values.

In individualistic societies, the collective forms of control must give way to individual and individualized forms, which impact on the individual. Often, the latter are tools that exist or are born within the social context, which are disconnected from the institutional network and aimed at helping people to manage the relational conflicts that enmesh them. In this context, mediation – precisely because it is born as experience and social practice and constitutes an adequate response to the needs of the individual – can represent a new (at least for the law) and different modality of conflict regulation. This alternative modality allows institutions to move closer to the individual, recovering the dual capacity and function of promoting individual liberties and guaranteeing social order.

This research focuses on penal mediation, starting from the origin of the idea of community mediation, to get to the analysis of cases of penal mediation in France and in Spain. The main idea is that mediation can be used in all the systems in which the conflictual dynamics are manifested and that sometimes it is institutionalized for further and different purposes.

KEYWORDS: history of law; penal mediation; conflict; globalization

1. The crisis of institutions and search for alternative conflict management tools

The crisis of institutions and the consolidation of individualism, the widespread lability of consciences and the common indifference – towards the "set of values, norms, customs that with varying effectiveness define and regulate durably, regardless of the identity of individual people" (Gallino, 1993, 387) – find their causality in the social, economic and cultural change of our day.

The age of globalization, in the second and third phase (the second already concluded with the twentieth century) has determined the full deployment of the productive and commercial potential of humanity. It has broken the "boundaries" of the relationship between the individual and institutions, spreading a feeling of "disorientation", fueled by the widespread complexity of heterogeneous and sometimes contradictory values (Palermo, 2020).

The institutions – that is all those systems that have "a general regulatory value" – assume legitimacy if they are functionally to the concrete reality of civil society and consistent and adhering to collective needs. When institutions are unable to listen to these needs and give an adequate response, the individual moves away from them and de-legitimizing them.

The detachment of the individual from the institutions favors the crisis, which is talked about so much, and the need to search for tools and forms that allow to re-establish the relationship with the institutions, to avoid a definitive and total delegitimization (Palermo, 2016).

Individuals no longer recognize institutions as their derivations, capable of guaranteeing and protecting them, credible and reliable. Likewise, the rules appear empty and betray everyone's trust and desire for recognition and protection.

Hence the diaspora towards areas increasingly on the margins of legality. The conscious vision of the individual-institution relationship crisis reveals the need to search for tools that favor a path of recovery of the bond, of the sense of trust, of guarantee and of credibility.

For this reason – and to block the de-legitimization process – there is a need to combine formal regulatory control (Ross, 1901) a "soft" control, with tools that allow to create an interaction with the citizen. This brings the citizen closer to the institutions in a new perspective capable of living and operating horizontally (Palermo, 2009).

The research is therefore aimed at the re-discovery of means that "look after" the citizens, their problems, their conflicts (big and small) and that help them – in this way – to obtain recognition not only in terms of otherness, but above all of collective belonging.

In individualistic societies, the collective forms of control must give way to individual and individualized forms, which impact on the individual.

Often, the latter are tools that exist or are born within the social context, which are disconnected from the institutional network and aimed at helping people to manage the relational conflicts that enmesh them.

In this context, mediation – precisely because it is born as experience and social practice and constitutes an adequate response to the needs of the individual – can represent a different modality conflict regulation.

This alternative modality allows institutions to move closer to the individual, recovering the dual capacity and function of promoting individual liberties and guaranteeing social order.

With institutionalized mediation, a process of controlling social relations is produced no longer in terms of imposition, but of interaction.

> Two ideologies currently dominate the mediation discourse – individualistic and relational. An individualist view, upon which the settlement approach is based, sees the world as made up of separate beings of equal worth, but different needs, whose human nature it is to seek satisfaction of their needs and desires. A relational framework views the world as made up of persons with diverse needs and desires but who possess a common form of consciousness that connects them to each other. Transformative models of mediation are based on this ideology (Bush and Folger, 1994). (Picard A. C., 2000)

Mediation – conducted by a third and unknown subject – is a process that aims to open channels of communication that were blocked, allowing the conflicting parties to compare their points of view and find a solution to the problem.

Mediation – as a tool for managing conflicts expressed and unexpressed – shows the need to overcome them, avoiding pathological interpretations of the conflict and, instead, reworking the critical event in terms of relational reorganization, rediscovering other communication plans.

In this way – broken the logic of the conflict and interrupted its escalation – it is possible to reach an agreement, deeply and emotionally matured and, therefore, more stable and lasting than any judicial decision.

Mediation is conceived as a resource for an informal management of the conflict between two people in terms of mutual re-discovery and re-know. Thus, it assumes the value of a tool that can be used in all systems in which conflictual dynamics occur, albeit with the necessary peculiarities and specificities that the different contexts require.

Thus, it is possible to resort to mediation in social, educational, family, cultural, penal and other conflicts.

In particular, the commission of a crime produces or feeds a conflict, a communication break between victim and offender: on the one hand, there is the victim – not recognized and not respected as a person and often relegated to his marginal and unsatisfactory procedural role – on the other hand, the offender, isolated and subjected to a labeling process, which will make him a career criminal.

A mediation process in the criminal context would build a "space" and a "time" to favor the recovery of roles in the conflict, giving the victim a central and recognized position and favoring the rapprochement of the offender with socially shared values (Bouchard, 2021, 1992; Folger, 1994; Smith and Hillenbrand, 1997; Palermo, 2005).

In this perspective, mediation favors both a "re-education" of the guilty, an aware recognition of the rules and social relations, and the possibility for the victim to assume ownership in the management of the conflict and to be recognized as a person, with all his suffering.

The need for a mediation process arises from the awareness of the inadequacy and incompleteness of the criminal process to give concrete answers to the needs of the parties. In particular, it originates above all from the need to recognize the passive subject of the crime a central role in the regulation of the conflict deriving from the crime.

Mediation, therefore, arises as a possible response to these needs, as an instrument through which "re-establish a broken relationship between several parties and not, unlike the jurisdictional act, to establish a winner and a loser, a reason and a wrong " (Bouchard, 1995).

Mediation – as a tool of non-violent regulation of the conflict, inspired by logics and communication and emotional dynamics – favors a real informal process of managing the conflict between the victim and the offender through the recognition and identification with the other and with his or her feelings.

Penal mediation, therefore, is essentially a relationship process between two people and works – as Woolpert points out (1991) – on three levels:

– As a process aimed at promoting the personal awareness of the offenders;

– As a tool aimed at increasing the self-esteem of victims and the sense of responsibility of the offenders;

– As an intervention aimed at promoting a sense of belonging to the community.

From a structural point of view, mediation is an informal process marked by different phases, during which the mediator – the equidistant third party – promotes communication between the parties, favoring discussion, the

recognition of the other as a person, with their fears and emotions, to reach an agreement for conflict management.

It is, therefore, a modality of intervention that aims to "enter the conflict", helping the parties to meet, to understand their behavior and, if possible, to agree on solutions.

This way of regulating conflicts does not replace the process, but it can well represent – in an exosystemic vision – an operational asset that can be used for managing the conflict in its complexity, which takes into account not only the declared conflict, but also that level. Conflict that has not manifested itself and which the "process" does not take into account (Galtung, 2007).

The criminal trial denies recognition to the victim, who is forced to relive the crime suffered for a long time, often the subject of attempts to blame, with the risk of not even having the damage repaired at the end. The criminal trial can protect the guilty and at the same time stigmatize him.

This model of restorative justice aims to eliminate the negative effects of the crime, through a process of recognition and self-esteem on the one hand and responsibility on the other.

The offender is no longer a passive subject recipient of a penalty, but an active subject who is asked to remedy the errors made and the damage caused by his criminal conduct (Nechita, 2009).

Mediation – expression of the reparative paradigm (Braithwaite, 2000) – involves the victim, the offender and the community in the search for solutions to the effects of the conflict. It aims to promote the reparation of the damage, the reconciliation between the parties and the strengthening of the collective sense of security. Through this process the victim can regain control of his life and her emotions, gradually overcoming the feelings of revenge, resentment and even distrust and the inevitable paralyzing effects.

The offender, for his part, is not only the passive subject receiving the penalty; but an active party who is asked to remedy the errors made and the damage caused by criminal conduct.

Mediation, with its pervasive capacity, exercising a deterrent and responsible function, already represents an alternative way to regulate and control conflict (Carbonnier, 1992).

The need to overcome the crisis of legitimacy of the penal institutions – which more generally reflects the crisis of the social regulation mechanisms – pushes the law to accept mediation and to link it to the criminal process.

Conflicts destabilize the community and the inability of state institutions to manage them determines – as we have already highlighted – their progressive de-legitimization, a loss of credibility and an inevitable removal of the community from them.

Institutions are no longer able to respond adequately to the needs of the individual and the citizen begins to no longer recognize them, to not consider them credible, to delegitimize them.

Institutions therefore look for exogenous tools that – moving on a horizontal level – are able to be close to the needs of the individual and give satisfactory answers. They absorb these tools into their mechanisms, they make them their own. Thus the institutions and in particular the judicial system can give an adequate response to citizens.

One of these tools is the mediation that is open to this logic, precisely because of its ability to informally manage conflicts, restoring the ownership, in the search for the solution, to the parties.

Mediation is in itself a tool through which an informal control over individuals is exercised and its institutionalization responds not so much and not only to the institutional need for control, but rather to the need to recover credibility and reliability in the eyes of individuals.

Including mediation in criminal law – and in particular in the judicial universe – responds to the logic of regaining legitimacy. The penal system, in fact, is a system that for its characteristics, its rituals, its language, tends to isolate itself, producing a block of communication and interpretation, a separation with other systems, first of all the social one.

This distance delegitimizes the law, depriving it of its concrete foundation.

In the face of this crisis of legitimacy of criminal law and its inability to meet the needs of each individual, the community is organized by developing alternative tools of conflict management that, on the one hand, heighten the crisis of law and, on the other, tend to increase the power of the social system to function autonomously.

The weakening of expectations towards formal control tends to increase the space of informal control.

The attempt to institutionalize mediation expresses the will of the law and the judicial system to absorb it in order to find or recreate a new systemic equilibrium and recover legitimacy. The goal of institutionalizing mediation is to re-establish an individual-institution interaction, to exercise control over individuals and their conflicts, to recover legitimacy.

2. The history of penal mediation

The crime produces different social reactions – which have animated the debate on the functions of the penalty – from the request for punishment/elimination of the offender to the desire for his necessary re-education; from the exclusion of the guilty party to the victim's need for security.

Starting from the ancient societies, the need to punish emerged, the retributive idea, the "talio", distinguished these societies. In the third century BC Roman law introduced, in the formulation, the possibility for the accused to obtain acquittal "only if he has previously returned the thing of which he had expropriated the plaintiff or has fulfilled his obligation to do something in favor of the plaintiff" (Guarino, 1984, 195), thus sanctioning a recomposition of the social fracture.

In truth, the Code of Hammurabi (1700 BC) had already provided for the "restitution" for some crimes against property and, the whole subsequent period up to the Middle Ages was characterized by elaborate systems of "compensation".

The Reign of William the Conqueror can be considered the turning point for a transition from a justice centered on restitution to one centered on the State. In 1116 Henry I – son of William – issued laws that assigned to the Sovereign the control over some crimes that jeopardized the king's peace (fire, robbery, murder) and, therefore, had to pass under his jurisdiction.

As time goes by, "a new model of crime – emerged – in which the main parties were the state and the offender, while the real victim was deprived of any significant role. This new focus of the penal system ... entailed, over time, the attribution of a new primary objective of the sentence, that of reducing the likelihood of further crimes being committed, and this through deterrence, neutralization and, more recently, re-education" (Gatti, Marugo, 1994, 135).

With the Enlightenment, the state assumes the criminal aspect itself: the person who has broken a social pact deserves an adequate punishment, determined by the outcome of a fair trial.

This great promise, not kept over time, has created that sense of dissatisfaction that has fueled the search for new alternatives.

Thus, as early as the 1960s, some American jurists with anthropological training turned their attention to the practices of other cultures[1], noting how in simple societies the moment of resolution of the conflict took place within the community, encouraging the meeting of the parties on a so-called "neutral ground".

In 1974 in Canada in Ontario, the Victim Offender Reconcilation Programs (V.O.R.P.S.[2]) were applied for the first time, real mediation programs,

[1] Gibbs (1963, 1967) dealt with the forms of conflict resolution used by the Kpelle people (Liberia); Marcus (1979) at the small Friendly Island community; Gulliver (1969) devoted himself to the forms of mediation used in the villages of Tanzania; Lubman (1967) looked at the ancient Chinese tradition; Griffiths and Belleau (1993) carried out research to this effect on the aboriginal communities of Canada. In fact, in these simple and primitive tribal organizations the resolution of conflicts is entrusted to the representatives of the Community.

[2] VORPS have four stages: "taking charge", "case selection" and then "evaluation", to ensure

which provided for the possibility of meeting, face to face, between victim and offender, facilitated by a mediator, belonging to the local community.

A few years after the first Canadian experience, in 1977 in San Francisco, community mediation processes began to be initiated.

Thus, the first example of Community Board was born with the intention of intervening in conflict situations in order to prevent the commission of crimes.

It still represents today a significant example of mediation deeply rooted in the life of the community.

The path included three phases: in the first – so called Casework– the operator listened separately to the parties and instructed the case; in the second – so called Hearing – each party expounded their truths and points of view to the other in the presence of three or five mediators, trying to reach an agreement; in the third phase – so called follow up – a third group of mediators verified whether the agreement reached had held up over time.

In Europe, neighborhood mediation experiences arrived in 1980, when the *Boutiques de droit*[3] appeared on the outskirts of Lyon, in which everything was bet on basic community energies, capable of giving social quality to the territory even in the conditions of its own greater degradation and marginality.

The attention that this project is paid to the conditions of social degradation in order to recover common spaces and strengthen the social bond is certainly prevalent over the concrete interest in conflict management techniques.

However, this peculiarity is at the same time also its limitation.

In fact, the management of small daily conflicts has often given way to the needs of broader social policies[4].

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that it is appropriate for mediation. Accepted the case it is assigned to a volunteer from the local community, trained in mediation. In the second phase, the mediator meets the victim and the perpetrator of the crime, presents the program, listens to the version of events given by each party. Mediator explicitly asks for consent to meet with the other party and evaluates the various possibilities of "restitution" with the victim. Then, in the third phase, the joint meeting between victim and offender follows. In the fourth phase, after the mediator's report, monitoring and follow-up are carried out. This pattern characterizes the forms of direct mediation, carried out at the meeting between the parties.

[3] The *Boutiques de droit* together with the Center de Mediation et de Formation a la Mediation (CMFM) highlight the need to recreate and recompose that minimal sociality that is compromised by the laceration of the social fabric (such as, for example, in the de-graded neighborhoods, etc.) "in short, community mediation is replaced by social mediation" (Lugnano, 2003, 24).

[4] Today in France the reform law of the code of criminal procedure of 04/01/1993, in article 41, provides for the right to decide, after a preliminary agreement with the parties, to resort to mediation, with the aim of ensuring reparation damage to the victim, to put an end to the conflict resulting from the infringement and to contribute to the reintegration of the perpetrator.

In the search for alternative conflict management models of the criminal justice system, there are various solutions that favored now the reparative aspect towards the victim (as in the US restitution), now that reconciliation between perpetrator and victim.

Today, societies are no longer characterized by the use of top-down political strategies, but tend towards "open" politics.

The penal system is also affected by these transformations. Thus, even the penal sanction becomes ineffective and unable to guarantee safety and prevention.

Society is no longer able to feel protected and there is a process that oscillates from the sense of helplessness of the victims – sometimes real and sometimes potential – to a generalized feeling of insecurity.

I can, therefore, with Hulsman underline "the need to reconsider the issue of crime by examining it in a new perspective, which highlights the problematic nature of illicit behavior and which considers it as the result of a conflict between two people, with the aim of face it and resolve it in a constructive way, above all through the tools of mediation and reconciliation, rather than through the intervention of the bureaucratic and repressive apparatus of the State, returning the management of the conflict to the direct protagonists ..." (Gatti, Marugo, 1994, 154).

3. Penal mediation in France and Spain: Examples of institutionalization

One of the risks of the institutionalization of penal mediation is the loss of its promotional character of private autonomy. Mediation would end up becoming a "reward" if it is successful or a "threat" if the parties do not agree to participate in the mediation process or if it fails[5].

Let's think – for example – of what happened in France, where the first attempts to absorb mediation into the penal system went through the granting of funding to victim organizations more dedicated to mediation. Then in October 1992 the Ministry of Justice issued an orientation note on penal mediation, which started the institutionalization process, which ended with the reform law of the criminal procedure code of 04/01/1993.

Based on art. 6 – supplementary to art. 41 c.p.p. – the Public Prosecutor is expressly authorized to decide, after preliminary agreement with the parties, to make use of mediation, in order to ensure the restoration of damage to the vic-

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The positive outcome of the mediation is a reason for dismissal by the PM.

[5] In fact, when mediation is included in the judicial process as a regulatory instrument, if the parties agree on start this process, the law rewards them, for example, with dismissal, extenuating circumstances, etc. If, on the other hand, the parties do not want to resort to mediation or if it fails, the law punishes them or threatens to punish them.

tim, to put an end to the conflict and to contribute to the reintegration of the perpetrator of the crime. In fact, the successful outcome of the mediation – which ends with a written agreement – is the cause of dismissal of the crime by the prosecutor.

The French experience, however, dates back to 1980, a period in which some districts of Lyon began to create the "*Boutiques de droit*" which, according to their main inspiration (Bonafé-Schimitt, 1992), were already doing social mediation.

They underline the need to reconstruct spheres of sociality in places where the rupture of the social fabric is more evident – degraded neighborhoods, etc. – and the greater the failure of traditional methods of conflict regulation.

The *Boutiques de droit* identify in their neighborhood the most suitable place in which to institutionalize and regulate daily conflicts. This attention to the degraded conditions represents the characteristic and, at the same time, the limit of the Lyon project. In fact, the social contextualization of the conflict – which broadens the attention to a broader sphere of social policies – risks not giving proper attention to the recomposition of the single conflict.

The *boutiques* also have the task of "mediation / knowledge", informing the user about all the tools available to them to resolve their disputes, including mediation itself.

By virtue of this link between legal information and mediation, the cases taken into consideration by the *boutiques* come from the community and not from the transmission of the notification by the judicial authority.

In Spain, informal experimental mediation has also become an integral part of the criminal process (Cruz Márquez, 2007).

> The use of penal mediation implies a change of mentality in an already highly Court-centred society that considers Courts se the only way to solve conflicts. Criminal law aims to clarify whether the alleged facts existed or not, and what is the defendant's degree of responsibility. Mediation has a different approach: it pursues the victim and the offender's own recognition of a conflict, seeking to achieve a restoration settlement that allows the victim to be satisfied, and the perpetrator to be reintegrated into society. (de Paredes Gallardo, 2015, 48)

The first experiences of mediation were carried out in Catalonia, where in 1989 a commission was set up – within the Department of Justice of the Generalitat de Catalunya, a regional government body – with the task of drafting a juvenile penal mediation project. In May 1990, the mediation program for crimes committed by minors began operating in Catalonia, alt-

hough it was not provided for by the law in force, the law of 11 June 1948 of the Juvenile Court.

The regulatory support for this choice was then identified in the recommendations of the Council of Europe, in the laws of other European countries, in the United Nations Minimum Rules on the Administration of Justice and in the United Nations Convention on the Rights of the Child.

Mediation encountered two obstacles in entering the juvenile criminal trial: the need for the consent of the two parties and the fact that the 1948 law considered 16-year-old boys not to be charged and, therefore, unable to give consent to participate in a path of mediation. For this the judge gave it in their place.

From 1990 to 1992, around 1200 cases were dealt with through mediation.

Subsequently, under the pretext of an "urgent" reform – dictated by the declaration of unconstitutionality of art. 15 of the 1948 law (judgment 36/91) – Law No. 4 of June 5, 1992, was introduced, which amended only a few articles of the '48 law, causing contradictions in the new text.

The new law introduced some fundamental principles for the protection of minors.

First of all, the principle of the best interests of the child, which implies respect for the child's personality and its development processes. Therefore the measures to be applied must respect the educational needs[6] of the minor and the entire criminal process must respond to pedagogical and not merely punitive purposes[7].

Another fundamental principle introduced was that minimal intervention, to be applied not only during the process, but above all as a tool to favor the decriminalization of deviant behavior. This principle provides that the judge has "ample powers to agree with the conclusion of the trial in order to avoid, as far as possible, the afflictive effects that it can produce on the minor".

It thus recognizes the possibility for the public prosecutor not to prosecute certain crimes if accompanied by certain circumstances, such as the minor gravity of the facts, and for the juvenile court to dismiss the case or decide in favor of the suspension of the sentence for a fixed period.

Furthermore, for the first time the law introduced in Spain the so-called "*Principio de oportunidad*" [8], by virtue of which the public prosecutor, in the

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[6] In this regard, a technical group intervenes with the task of reporting on the educational and family condition of the child as well as on the environmental conditions.

[7] In this direction, for example, the suspension of the process and the out-of-court reparation of the damage is envisaged when the further development of the process could harm the educational needs of the minor.

[8] The principle of expediency is also provided for in international law. In this regard, Article 11.2 of the Beijing Rules states that "the police, the prosecutor or other services responsible for

face of a crime report, can freely decide in favor or not of the prosecution without any kind of control.

In the name of this principle[9], mediation was introduced, as a path that, ending with the repair of the damage[10], provided the fiscal minister with a valid reason not to prosecute.

The mediation process, aimed at repairing the damage, can also be hypothesized at a later time, as an alternative to the execution of the provision established by the judge in the sentence[11]. In this case, the suspension of the sentence is therefore functional to the execution of the reparation. In fact, if the reparation is not carried out, the judge executes the sentence. The law in question has annulled the absolute discretion of the juvenile jurisdiction, recognizing for the first time the constitutional guarantees, with a view to the re-education of the minor.

Despite its limitations and its provisional nature, it has the great merit of having determined the transition from a positivist and corrective model (which inspired the 1948 law) to one that is guarantee, empowering, and aimed at the re-education of the juvenile, according to the Recommendations of the Council of Europe.

On January 1, 2001, Law No. 5 of Jan. 12, 2000 on the criminal liability of the child went into effect. It is a law that for the first time deals with juvenile justice in a comprehensive way and provides rules of substantive, procedural and penitentiary law.

This law explicitly refers to mediation and also provides for the reconciliation and reparation of damages.

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juvenile delinquency will have the power to decide such cases at their discretion, without resorting to formal proceedings, according to the criteria established for such cases. purposes in the respective legal systems and also in harmony with the principles contained in these rules".

[9] Indeed the article. 15.6 of the aforementioned law provides that during the investigation "considering the lack of gravity of the facts, conditions and circumstances of the minor, the fact that there has been no violence or intimidation, or that the minor has repaired or committed to repair the damage caused to the victim, the judge, on the proposal of the public prosecutor, closes every action".

[10] The possibility of repairing the victim's damage was foreseen for the first time by Law n.4 / 1992.

[11] Article 16.3 of the law provides that "the juvenile judge, taking into account the nature of the facts, ex officio or at the request of the public prosecutor or lawyer, may evaluate the suspension of the sentence for a specified period of up to two years provided that, by mutual agreement, the child, duly assisted, and the victims have accepted an out-of-court appeal proposal. This possibility can be granted if the victims, duly cited, do not express their opposition or these are manifestly unfounded. To this end, the judge, having consulted the technical group, the public prosecutor and the lawyer, must reasonably assess, from the point of view of the minor's interest only, the pedagogical and educational significance of the proposed reparation […]. If the minor does not make reparation, the suspension of the sentence will be revoked and the measure established by the judge will be fulfilled".

The *Ley Organica* of January 12, 2000 No. 5 (LORP), in regulating the criminal responsibility of minors[12], provides for the need to take into account not only the interests of the minor perpetrator of the crime, but also of the victim, both in judicial proceedings and in those out of court (Armenta-Deu, 2018).

For the first time in Spanish legal history, "the mediation functions" and the so-called "Indirect mediation" are expressly provided for.

In fact, the new law provides for the possibility of accessing mediation at two different moments in the process: during the instruction phase and during the execution of the sentence.

During the investigation phase, Article 19.2 – entitled "Dismissal of the case for conciliation or reparation between the minor and the victim" – defines what is meant by conciliation and reparation and the benefits that can derive from it.

In particular, the second paragraph, as amended by *Ley Organica* 8/2006, Dec. 4, 2006 provides that:

> A efectos de lo dispuesto en el apartado anterior, se entenderá producida la conciliación cuando el menor reconozca el daño causado y se disculpe ante la víctima, y ésta acepte sus disculpas, y se entenderá por reparación el compromiso asumido por el menor con la víctima o perjudicado de realizar determinadas acciones en beneficio de aquéllos o de la comunidad, seguido de su realización efectiva. Todo ello sin perjuicio del acuerdo al que hayan llegado las partes en relación con la responsabilidad civil.

The provision provides the extra-judicial way to resolve the conflict through the path of conciliation, reparation and criminal mediation.

To determine this exit of the minor from the juvenile criminal trial, the following requirements must be met:

– The lack of violence or serious intimidation in criminal acts and whether it is a less serious crime;

– The recognition of the minor of a "certain participation" in the criminal action;

– The proposal – by the technical group – of a mediation project accepted by the minor and the victim;

– The actual carrying out of the remedial or mediation activity by the minor.

The fulfillment of the minor of the remedial activity will lead to the loss of his criminal responsibility with the consequent dismissal of the case.

[12] While the l. 4/92 took care of children aged twelve to sixteen, the law 5/2000 is intended to be applied to minors from fourteen to eighteen.

A particular feature of the provision in question is the provision of the so-called indirect mediation, in which there is no encounter between victim and offender.

Art. 19.4 in fact provides for the particular case in which – for reasons unrelated to the will of the offending minor – it is not possible to reconcile or carry out the commitments of reparation towards the victim. There are cases, for example, in which the parties have not been able to contact the victim – (because they do not know him/her or the victim does not answer letters or telephone calls) – or the victim does not want to participate.

In these cases the law attributes value to the minor's remedial commitment: the child's simple will to repair the victim can prevent his / her entry into the criminal trial.

The conciliation of the minor with the victim – at any time in which the agreement between the parties referred to in article 19 of this law takes place – will also be effective during the execution of the measure provided for by the sentence.

In fact, Article 51 – today no longer in the second, but in the third paragraph following the amendment made by the L.O. 8/2006, Dec. 4, 2006 – provides for the possibility that the conciliation between the parties may lapse the envisaged measure, if it is an expression of reproach and reproach of the offender's conduct (unlike the provisions of the '92 law).

In this case, mediation is conceived as an alternative to the continuation of the execution of the same and this role is somewhat unusual and, as regards the objectives pursued by mediation, somewhat useless.

In fact, legal practitioners consider the instruction phase of the criminal trial the natural space for mediation – because it is exempt from the prejudices and mistrust that comes with the later phase of the trial – and defend mediation as a useful tool for avoiding the execution of the sentence.

On the other hand, in the case provided for by article 51.3 of the law, mediation fails to prevent the minor from either the criminal trial or the execution, even if partial, of the sentence.

Conciliation and damage reparation are conceived as an out-of-court conflict resolution tool, albeit embedded in the criminal process. In the mediation provided for in the investigation phase, the public prosecutor represents the legality on the basis of which the mediator acts, while in the cases envisaged in the execution phase the judge acts as guarantor.

In the reform on civil and mercantile mediation – introduced by Organic Law 5/2012 – several articles have also been extended to penal mediation.

They establish the general principles that apply to all types of mediation: willingness, equality of the parties and impartiality of the mediator, neutrality, confidentiality, secrecy and gratuity.

Therefore, a full institutionalization of mediation took place in Spain only in the criminal trial against minors.

The situation is different, however, as regards the applicability of a mediation process in the ordinary criminal trial. In fact, there is no legislative provision that establishes the use of mediation in the presence of a crime committed by an adult.

In November 1998 a pioneering experience began throughout Spain: an annual pilot program of mediation within the jurisdiction for adults in four Catalan provinces: Barcelona, Tarragona, Lerida and Gerona.

The *Program de mediación y reparación en la jurisdicció penal* still applies today. It is based on the conviction that "the importance of punishment and, in general, of traditional criminal sanctions, must give way to the possibility of the parties participating in the solution of the conflict and in the reconstruction of social peace".

The Barcelona Penal Mediation Office – for both minors and adults – is physically located within the judicial structures, where the criminal trial takes place. Mediators are also functionally placed in the Justice Department.

Thus, mediation not only has a preventive role in penal policy and in the *atenciò a vìctima*, but substantially it is also a possible formal instrument of social control.

To reserve an "exo-systemic" position for penal mediation – in which it stands as an alternative to the criminal system, in terms of deflation or rather decriminalization in practice – means attributing to it the function of promoting an internal rationalization of criminal law, with a view to progressively marginalizing the criminal response to the benefit of the remaining instruments of social control.

Instead, with the current tendency to give it an "internal-systemic" location – in which it represents a "stabilizing variant" of the penal system – mediation will end up remaining "tangled" in the regulatory tangles of the penal system and "institutionalized" as a new one form of formal social control. In this case, mediation will be deprived of its very essence.

The institutionalization of mediation would end up distorting it to the point of making it ineffective.

In fact, by its very nature, mediation is an informal process and its "forced" insertion into the judicial universe would hardly allow it to preserve its peculiarities.

It could hardly keep that voluntary and spontaneous character that today guarantees the ability to manage the conflict in its complexity made up of a manifest and a latent level.

Mediation silently would no longer present itself as a proposal, but as an imposition and, consequently, the refusal to start this path or its failure would end up, as we have already pointed out, to be sanctioned.

It would also lose the characteristic of an informal path that acts and moves to that emotional level that the judicial universe ignores. Mediation – debased in a schematic logical-rational process – would be deprived of its strength and effectiveness.

4. Conclusions

Faced with this crisis of the legitimacy of criminal law and its inability to meet the needs of each individual, the community organizes itself by developing alternative conflict management tools. These tools on the one hand, exacerbate the crisis of law and on the other tend to increase the power of the social system to function autonomously.

The weakening of expectations towards formal control tends to increase the space of informal control.

The perspective of institutionalizing criminal mediation is to re-establish an individual-institution interaction, exercise control over individuals, their conflicts, how to manage them and the social risks of these conflicts, recover and strengthen the legitimacy of the criminal system.

Mediation is open for this purpose because it expresses the desire and the will to change management procedures to restore ownership of the conflict and its "solution" to the parties involved.

Giving mediation a legal and formal role, however, means giving up this powerful tool of social control – powerful as it is based on consent and produces behaviors – to the criminal system and the related judicial universe, with a consequent distortion of the same.

The vision of mediation – as a path aimed at restoring the conflict to its legitimate owners, attributing a central role to the victim – breaks down to kick off a renewed operation focused once again only on the offender, from a criminal political perspective.

Mediation is, moreover, by its very nature an informal and voluntary process and its "forced" insertion into the judicial universe would hardly be able to preserve these peculiarities.

It would be a real dissimulation, operated thanks to subtle, soft means of domination over individuals, which would not eliminate the formal judicial bureaucracy, but would create a new and parallel one and would produce the formation of a new group of informal justice professionals (mediators).

In addition, the Spanish and French experiences highlight the regulatory tendency to reduce its use for the sole purpose of reparation and reconcilia-

tion, reducing the very meaning of mediation, its spirit. Mediation can lead to reconciliation between the parties, but this is not the main objective, just as it is not the repair of the damage.

These are further effects of that communication path that should be inspired by a logic of responsibility and recognition of the other in a perspective of privatization of the conflict.

Institutionalized penal mediation would end up losing that character of willingness and spontaneity that today guarantees the ability to manage the conflict in its complexity – made up of a manifest and a latent level – because silently mediation would no longer present itself as a free choice, but as a flattering and conditioning proposal.

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