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CRIMINAL MEDIATION, AN INSTRUMENT FOR VICTIM VISIBILITY, AN COMPONENT OF CRIMINAL ACCESS TO JUSTICE (*)

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1. VICTIM-MEDIATION-RESTORATIVE JUSTICE: THREE INSEPARABLE COMPONENTS. MEDIATION AS AN INSTRUMENT FOR VICTIM VISIBILITY

Insofar as the intention is to provide legal protection, to speak of victims and of certain victims in particular, implies recalling the obscure past that enveloped them with regard to their invisibility in the criminal system as a whole. Society assumed the burden of the criminal response, through the expropriation of the victims' rights by the State in the interests of that social safeguard.

We have for centuries accepted that it was what society required –it was the conquest of civilization, ending "an eye for an eye and a tooth for a tooth" and the *lex talionis*. That was the best solution, although the outcome of these responses to that situation, owing to frustration, disenchantment and the inoperability, on occasions, of the model of social response, have prompted progress towards a more active role of victims in the criminal response and in the modulation of that response; in other words, to go beyond the preventive approach, and to incorporate resocialization or the restorative approach.

This would open a wider range of possibilities that should not be exclusively considered as previously addressed or with a particular person in mind (prevention, society; resocialization, the accused; reparation, victims).

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Rather, they should all imply together that society can act and assume the burden in the face of criminally sanctionable conduct. Undeniable steps have been taken at national and international centres that have implied progress towards achieving victim visibility.

And that progress has necessarily to include criminal mediation, which has been acquiring, over recent decades, an extended scope. It is an instrument that offers participation in some cases and with some subjects in the search for social peace through a channel other than the proceedings, and through a third party other than the judge; and with an essential role for the victim and the victimizer when reaching an agreement. In any case, and despite being a different model from the procedural one, it only makes sense if it is linked to criminal proceedings, at least in our country and up until now.

There have been many reasons that have led to its introduction in most countries, in some cases supported by the cultural dialogue entailed in the legal model; in others, because it offers efficient responses to all those involved, even the state.

Even so, it is undeniably the pro-victim movements that have in recent decades been consolidating an inescapable need to protect those that have been largely forgotten in the punitive model: to wit, the victims, and by doing so supporting instruments such as mediation, with which they, the victims, may be offered the possibility of "being" and "staying" in the criminal justice model and achieving, if appropriate, possible restoration for what they have suffered; restoration which, as we suggested, may be plural and heterogeneous.

In this context mediation is a further piece of the puzzle. It is neither the *panacea* to conflict solution, nor to possible reparation of the victim and the rehabilitation of possible criminals. Mediation is a further element of what the criminal justice system should mean. An affirmation that will not lead us back to our national model exclusively, but quite the opposite, may refer to any criminal juridical procedural system, even those in which, as a legal instrument for the protection of the public, it now consolidates.

Ever greater approximation of the criminal justice model in democratic countries has given further incentive to criminal mediation. So, even by maintaining the exclusive sovereignty of the State in criminal matters, it is today very meaningful to observe the

movement towards approximation of the different legal systems in the creation of legal means for the protection of the public. Beyond the so-called "harmonization" of legislations, it is increasingly prompting their "homogenization".

Homogeneity that should not be understood through criteria of identity, however it should be understood in relation to the essential principles at stake. It is undoubtable that there is an increasingly stronger trend towards coordination to achieve their approximation.

The protection of the public knows no boundaries today and cooperation between States is made smoother as countries continue approximating their model of state justice. Although it is true that this approximation is simpler in questions of a private, civil, mercantile, and commercial nature, it does not prevent it extending to legal settings, such as the fight against criminality and delinquency. To all of this should be added the role of international treaties and conventions, the extraordinary effort made by the European Union and the obvious influence of doctrinal movements asserting the protection of the weakest. Thus, it may be said that the first half of the 20th century was a phase in which the rights of the passive subject in the proceedings were asserted, owing to a need to consider the accused-defendant as a person and not as an object. It was in the second half of the 20th century that the relentless struggle began to give visibility to victims in the criminal justice system.

These movements in support of victims arose within a specific social, political, economic and legal context. Hardly without realizing, but swiftly, they are implicated with other movements in which people have been talking about society, the state, globalization, international security, global security, the expansion of criminal law, the Criminal Law of the enemy, in the last time the "*hate criminality*"..., upholding, less so but still to some extent, silent respect for victims, now understood not as victims of the state or society –who also exist-, but in the experiential parameters of individual victims.

They continue to be the forgotten ones. Hence, a number of decades ago, movements appeared that claimed the role of the victim and their visibility in criminal justice: on the one hand, victimology and, from there, the search for new horizons that cover the protection of the victim from the perspective of criminal Law, criminal policy and

from procedural Law, without forgetting the development of so-called Victimo-dogmatics.

It was in the 1970s when, in some countries with more impetus than in others, that movement to "rediscover" the victim began, given the state in which criminal prosecution left the latter. In brief, the victim lived in a legal vacuum[1] which implied, at least, in the framework of their consideration as a person with rights, a situation of inferiority in the procedural setting with regard to the subjects intervening in the proceedings. Even though the movement to rediscover and rehabilitate the figure of the victim occurs especially in Anglo-Saxon countries, it slowly extends little by little to most European countries, initiating a line of thought that has called for a change of perspective, of position and location of the victim in the criminal system, which essentially discovers its core element in the transition from the absence to the presence of the victim.

The process of making the victim visible has been a long one and even today positions are found, although it is undoubtable that the presence of the victim in the field of criminal and procedural law has also progressed in the Spanish legal system, probably somewhat later than it has in other countries around us[2]. Therefore, its own demarginalisation[3] has been taking place, as pointed out by CANCIO MELIA, considering that attention to the role of the victim has to some extent been covert. Or

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[1] In the English doctrine, the victim was originally called a *legal nonentity*, to which reference is made in FATTAH, E.A., "From Crime Policy to Victim Policy. The Need for a Fundamental Policy Change", en *Annales Internationales de* Criminologie, 29 (1991), No. 112, p. 45. The same term was translated from the German as *rechtlichen Nichts*, to which reference is made in KILCHLING, M., *Opferinteressen und Strafverfolgung*, Freiburg, Edition Iuscrim (MPI), 1995, p. 1.

[2] In Spain the movement has been slower than in countries like Germany. In that country, for example, it was in the decade of the seventies, and particularly in 1976 when it was decided to improve the material situation of the victim through the approval of the *Opferentschädigungsgesetz*, although in the criminal procedural setting the victim's situation remained unaltered until 1986, when a reappraisal of the victim's role in criminal proceedings took place. An interesting evaluation on the aforementioned legal reform may be seen in KAISER, M., *Die Stellung des Verletzten im Straverfahren. Implementation und Evaluation des "Opferschutzgesetzes"*, Freiburg i. Br., 1992. New progress was made with the reform of sanctioning law through the appearance of the *Täter-Opfer-Ausgleich* (TOA) in the *Novelle zum Jugendgerischtsgesetz* de 1990, introducing into criminal proceedings the principle of opportunity, and placing the use of TOA in the specific scope of *diversion* measures. In 1994, the TOA and reparation were introduced, within the framework of substitutive sanctions, as possible ways of lowering the sentence or even dispensing with it (§ 46ª StGB and § 153b StPO). An interesting book that appeared half-way through the 1990s, a serious work in which the development and treatment in Germany are highlighted, with the different consequences implied by the introduction of the TOA and reparations on the criminal model, may be seen in KILCHLING, M., *Opferinteressen und Strafverfolgung*, cit., note 61.

[3] CANCIO MELIA, M, *Conducta de la víctima e imputación objetiva en Derecho penal. Estudio sobre los ámbitos de responsabilidad de víctima y autor en actividades arriesgadas*, Barcelona, Bosch, 2001, p. 24.

may it be said, ambushed in dogmatic institutions that are not specifically prepared for the problem.

In any case, it is not a pointless discussion in any way or one that responds to a concrete social movement. It affects questions of great importance that impact the principles and foundation of all criminal systems and criminal procedures as a whole, as well as the penitentiary regime and the outcome of certain decisions on criminal policy.

Some argue, however, that the victim in the "criminal problem" has not been overlooked, insofar as what is of interest, when an individual-victim is considered, is reparation of the damage. This has always been present in the various legal models; a simplistic opinion drawn from a classic conception of social punishment as the essential function of criminal law and from which the victim can gain nothing at all.

Nevertheless, this has not been the opinion held by the majority, especially among scholars of victimology. Thus, over recent decades a lot has been written concerning the victim, positioning the doctrine in favour or against the presence of the victim, either an active presence or absence within the context of the system. A struggle should not be waged within that pro-victim movement for the superposition of subjects and rights, but instead for the integration of victim with those that already exist, insofar as it is not a question of "reducing" the rights of criminals to "hand them over" to the victims.

It is precisely among the possible instruments that allow the legal order to integrate the rights of victims in the criminal model in which mediation is situated. It should be converted into a further element of the criminal procedural system, inspired in a will to negotiate and to search for the pacification of the conflict. With it, a diverse subjective point of view is assumed, when the model no longer turns exclusively around the criminal and the social response to anti-social behaviour, and accepts that victims are protagonists within it.

But mediation is another piece of the puzzle. It is more than one element to consider, integrated in the set of measures that involve the recovery of the victims, the integration of their interests with those of the accused and with those of society, as well as the integration of preventive, resocializing and restorative functions. It is not therefore a matter of making the interests of some prevail over others, but of

generating a criminal response –a final one, in any case- that leads to a positive evaluation of the results, not from a short-term vision, but from the long-term perspective of efficiency and satisfaction. A culture of "concession" evidently has to be cultivated, to do so.

Will this affect the *ius puniendi* of the State? There are clear legal expressions of these possible concessions in the Spanish legal order, which have meant that in some Latin-American orders they have been called exits or alternatives to the system. Perhaps, it should be considered that they are also part of the system, although not of the classic model, although they are now consolidated.

Likewise, in consequence, as soon as the intention is to unravel the deep meaning of the dogma on the neutralization of the victim, in the words of TAMARIT SUMALLA[4], which is found in surmounting self-learning, sublimation and rationalization of vengeful instincts, the minimization of violence, democratization of safety and the will to prevent the negation of the human dimension of the offender and, therefore, the rights of the offender, and due process, the right to a fair trial, as well as the option for resocialization….

And that is how a new conception emerges based on restitutive and restorative philosophy, which evidently implies a new mode of reworking criminal justice. If differs from that which grants the possibility to the criminal of responding to victims, becoming responsible for the reparation of the damage that might have been caused. BRAITHWAITE notes, however, going much further, that it is converted into a different style of life, given that not only is it conceived of as a contribution to the reform of the criminal justice system, but that it is a means of transforming the legal system as a whole, our life style, our conduct in the workplace and the way our politicians behave[5]. This author therefore conceives of restorative justice as an intellectual and political project that is much more ambitious than it has normally

[4] TAMARIT SUMALLA, J.M., "Hasta que punto cabe pensar victomologicamente el sistema penal?", in *Estudios de Victimologia. Actas del I Congreso espanol de victimologia*, cit., p. 31.
[5] BRAITHWAITE, J., "Principles of Restorative Justice", in *Restorative Justice &Criminal Justice. Competing or reconciliable paradigms?*, (VON HIRSCH, A/ROBERTS,J ed), Oxford, Prtland, Hart Publishing, 2003, p. 1.

been considered[6]. This author begins with the conception of the need to act as opposed to what he calls "preventive injustice"[7].

There are, nevertheless, those that consider in the doctrine that retributive justice and reparative or restitutive are both species of distributive justice. Both are generally proposed as ways of acknowledging in an intelligible way the moral meaning of individual autonomy. This leads us to consider that through these species the distribution of existing rights are redistributed before the facts occur, insofar as may be possible[8]. The substitution by one of the other is not the aim, but rather the effort to arrive at an integral view of retributive and restitutive justice[9].

In this way, it does include that acknowledgement of the distribution of existing rights before the facts occur, all the more so when through restorative justice a negative legal consequence is also imposed on the perpetrator of the criminal acts. This might consist of returning what was robbed, an expression of remorse, economic compensation of the victims, but in all cases, a consequence that has a clearly retributive effect[10].

Precisely because restorative justice is a form of retribution, it therefore becomes essential to find a moral justification, as well as to subject it to a profound legal reform that delimits *in extenso* its nature and the intensity of restorative justice[11].

In reality, reworking criminal justice in that way is nothing but an echo from the past, in as much as the separation of civil from criminal proceedings implied the subordination of the individual interests under consideration to the public interest, in such a way that over the centuries, the separation between both rose to a crescendo, making it unthinkable to consider reparation of the victim alongside criminal or procedural efficacy.

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[6] BRAITHWAITE, J., "Principles of Restorative Justice", cit., p. 18. He also stresses added value that turns it into a path to encourage the public to respect and to believe in justice.
[7] BRAITHWAITE, J., "Principles of Restorative Justice…, cit., p. 5.
[8] WATSON/BOUCHERAT/DAVIS, "Reparation for retributivists", in *Victims, offenders and community* (WRIGHT/GALAWAY), London, Sage Publications, 1989, p. 220.
[9] SHERMAN, L.W/STRANG.H., *Restorative justice: the evidence*, London, The Smith Institute, 2007, p. 52.
[10] Likewise, the English doctrine DUFF, A., "Restoration and Retribution", in *Restorative Justice & Criminal Justice. Competing or reconciliable paradigms?*, (VON HIRSCH, A/ROBERTS, J ed), cit., p. 54.
[11] In similar terms see DIGNAN, J., "Towards a Systemic Model of restorative Justice: Reflections on the Concept, its Context and the Need for Clear Constraints", in *Restorative Justice &Criminal Justice. Competing or reconciliable paradigms?*, (VON HIRSCH, A/ROBERTS,J ed), cit., p. 138.

It was well into the 20th century when reparation as a way of reducing the sentence or as a possible reason for dismissal of the proceedings began, at least timidly, to be introduced, even though in practice that possibility was more theoretical than real[12]. However, over the passage of time, certain changes have been taking place, which have supported the recuperation and de-neutralization of the victim, and the resurgence of reparation, the emergence of compensation in criminal policy. So, a firm commitment now exists in the doctrine and in criminological movements in support of restorative justice, which responds to a doctrinal effort of integration, both of victims and perpetrators of criminal acts as well as of the community and society, and even Criminal Law itself and its "reinterpretation" in the light of the incorporation of restorative justice in its various manifestations[13].

It is not the case, as some authors have made clear, that the offence, no longer a social offence, turns into nothing more than an individual conflict, the revival of the victim's interests against the backdrop of the disappearance of social interest, but rather the coexistence of both in relation to certain facts and conducts that are sanctioned in the Penal Code.

This has also reminded certain authors of a Platonic dialogue which, in addition, may undoubtedly entail a significant moral message that, in short, confuses law and morals. This has some foundation, if it is assumed that there are certain roots of restorative justice in religious beliefs (reference is made to concepts such as guilt, mistrust, and separation, which may be surmounted in an atmosphere of recovery founded on communication). Hence, links are made to Judaic theology, to Christianity and to the philosophy of Confucius[14].

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[12] An interesting reflection on the history and evolution over the centuries in the German model, and special reference to the 20th century may be seen in STEFFEN, M., *Der Tater-Opfer-Ausgleich und die Wiedergutmachung. Historische Bezuge und moderne Ausgestaltung*, Aachen, Shaker Verlag, 2005, especially pp. 61-62.

[13] These questions developed *ad extensum* and a real effort to integrate these concepts through the application of *restorative justice* in DOMENIG, C., *Restorative Justiceund integrative Symbolik. Moglichkeiten eines integrativenUmgangs mit Kriminalitat und die Bedeutung von Symbolik in dessen Umsetzung*, Bern/Stuttgart/Wien, Ed. Haupt, 2008, especially, p. 138-152.

[14] HIGHTON/ÁLVAREZGREGORIO, *Resolución alternativa de disputas y sistema penal*, cit., p. 79-80. These authors consider that for Confucius the best solution to a disagreement was achieved by moral persuasion and agreement, more than by coercion; moreover, the prophets of the Old Testament were those that solved conflicts, without overlooking the role of the apostles in the New Testament, the apostles, who expressed the need to solve conflicts within the congregation instead of bringing them before secular courts.

In brief, following this conceptual foundation, it appears to advocate a more humanitarian idea of justice. This idea has greater acceptance in certain communities or marginal groups, opposed to systems of state governance, owing to their consideration that the imposition of power is illegitimate and, therefore, the measures and consequences of the application of classic criminal justice offers no guarantees of any sort to them. Restorative justice programmes have worked very well with such groups, especially among Maori, Eskimo and Aborigine communities in New Zealand, Canada and Australia, and among marginal groups in the U.S.A., with highly satisfactory results, because they include the group or the community's own elements, converting the dialogue and consensus into mechanisms that seek to give the system greater credibility.

Together with that pacifist philosophy coming from other cultures and a religious conception, it is undeniable that standpoints found in *labelling* theory or the implications of the *abolitionist or the minimalist* philosophies of criminal law, even of the most radical critical criminology, have necessarily brought a certain degree of change into the criminal model that could bring a less reductionist and more integrative philosophy of the individual into criminal justice. This inspiration, however, was not so much to do with the survival of both interests, but more to do with placing the interests of victims over and above social interests; it was thought that social interests had been highly protected and individuals, citizens, people had been forgotten.

Its first impulse, to defend elements of restorative justice and the mediation process, was nothing other than to run away from criminal law as it had been conceived, as a repressive law. The incorporation of criminal responses in a less aggressive, less repressive, and more constructive ideology, was seen later on as a -negative- possibility of the expansion of criminal law. So, in the beginning, although the criminal law minimalists and abolitionists looked favourably upon criminal mediation, their position changed, when they considered that these instrumental means of dialogue and pacification also assisted the maximization of the criminal response.

The acceptance of these manifestations of restorative justice reached a highpoint in common-law countries. It was given significant impetus at the end of the 1970s in the

U.S.A.[15], since when it has not ceased to expand and to defend itself against various national and international bodies. So-called conferencing or circles in Australia, Canada and New Zealand should also be mentioned, which were intended to conciliate specific practices of the Aborigines with an interest in providing a solution to the conflict that would be positive for both victim and offender[16]. These experiences sought to incorporate greater participation of the community in procedural modality, beyond the victim and the perpetrator (circle of people), offering participation to these specific groups and communities, and integrating them in society. The projects were followed by various European initiatives, especially those belonging to the common-law model, and more particularly in England and Wales[17], and subsequently in Germany[18], France[19], Norway Finland[20], although with different objectives and also with varying results.

In brief, it should be affirmed that, in reality, restorative justice came about as a result of a set of experimental programmes –in their majority in the world of juvenile delinquency and in conflicts that could involve groups and communities- which sought responses to the weaknesses and the limitations of existing criminal justice.

The aim of those programmes was precisely to assess the application of these reparative concepts and the positive and negative effects that they could provoke in the subjects and in the system.

Precisely for that reason it is very curious to observe that, sooner or later, the incorporation of restorative justice in all countries occurs as a consequence of pilot-projects and not as a consequence of legislative changes or previous jurisprudence. But in all of them, victim or victims and mediation are intrinsically linked, whence the need to give visibility to these subjects, "the others", the invisible ones in the criminal "case", and to do so through various criminal procedural channels as well as other

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[15] ZEHR, H., "Justice paradigma shift? Values and visions in the reform process", *Mediation Quarterly*, vol. 12, n. 3, 1995, Jossey Bass Publishers, p. 207 to 216.
[16] BAZEMORE, G/UMBREIT, M., "A Comparison of four Restorative Conferencing Models", in *Juvenile Justice Bulletin*, Department of Federal Justice of EUA, February 2001, pp. 1 and ff.
[17] MONTESINOS GARCIA, A., "Mediacion penal en Inglaterra y Gales", in *Mediación penal para adultos. Una realidad en los ordenamientos jurídicos*, Valencia, Tirant lo Blanch, 2009, p. 85-124.
[18] A specific section is dedicated to developments of the German doctrine *infra.*
[19] BONAFÉ-SCHMITT, J.P., "Alternatives to the judicial model", in *Mediation and criminal justice. Victims, offenders and community* (WRIGHT/GALAWAY), cit., pp. 178-194. Also, see ETXEBERRIA GURIDI, F., "El modelo francés de mediación penal", in *Mediacion penal para adultos, cit.,* p. 181-234.
[20] DAVIS, G., *Mediation and reparation in Criminal Justice*, Routledge, 1992, p. 16.; and In ERVO, L., "Mediación en los países escandinavos", in *Mediación penal para adultos,* cit., pp. 125-180.

procedures that attend to the different asymmetries of the facts-subjects that might intervene. Mediation is an instrument to fulfil restorative justice within the framework of the legal protection of citizens, and especially the citizens that are victims of criminal acts.

2. MEANING OF MEDIATION AND WAY TO THE LEGAL INCORPORATE

Mediation is not a process but an extrajurisdictional procedure, by virtue of which the victim and offender voluntarily acknowledges the capacity to participate in the resolution of "their" criminal conflict, which exists. With the intervention of a third party, the mediator, this re-establishes the earlier situation of the crime and respect for the legal order, as well as giving satisfaction to the victim and the acknowledgement of such activity by the victimizer.

It is a means of conflict management, instrumentalized through dialogue and supporting the reconstruction of social peace broken by the criminal act, which minimizes state violence and, in consequence, returns a leading role to civil society.

All in all, it is undoubtable that it will lead to increased trust in the justice administration. Its incorporation entails an inflection of the classic conception of criminal justice, insofar as the idea of "conflict" appears once again, of subjects that participate in its composition –victim and victimizer-, the main actors; through it, priority is given to the reparation of damage and the special prevention over general prevention and retribution[21].

Finally, it is the State itself that gives up part of the prosecution of behaviours through the intervention and collaboration of subjects involved in the criminal offence. This neither affects the principle of the exclusivity of criminal jurisdiction, nor the state monopoly over *ius puniendi*, given that the courts will control the results of mediation and those which, where applicable, will or will not attribute juridical efficacy to what is agreed through mediation. It is therefore turned into a means to respond to criminality. The elements that will allow us to naturalize mediation are as follows:

[21] See these points in BARONA VILAR, S. *Mediación Penal. Fundamento, fines y régimen jurídico,* Valencia, Tirant lo Blanch, 2011.

1º) Mediation is a modality for the legal protection of the citizen. Together with legal protection, the legal order more or less develops or should develop an interesting range of protective modalities that are more or less structured and/or regulated by specific regulations. The variables are very large, within the state and regional framework, but mediation is one of these modalities. Even with its limitations also in criminal matters, we should turn to mediation as an instrument in the exercise of freedom[22].

2º) Mediation is based on liberty or the free will of the parties to submit to it. This means that those who come to criminal mediation -victim and offender- freely do so, which means neither corruption nor coercion.

This note raises certain confusion with the affirmation of the principle of officialdom that governs the law. The question of whether mediation should be a chosen option for the parties, avoiding the criminal process, avoiding the penal process, or whether such a decision was needed it should be the result of a prior recommendation of those that assume control of the criminal recommendation in the legal order.

Thus, it has to be determined whether a person is referred to mediation by the judge or the prosecutor, according to the model and the procedural moment in question, or whether there may be a possibility of the same subjects that are involved, deciding whether or not to follow this procedure.

In some legal orders, exclusive attribution, with regard to the initiation of the mediation procedure, is given to the prosecutor, as happens in the example of France[23]. It appears more coherent with the essential principles that characterize the exercise of *ius puniendi* of the state that the parties be referred to mediation by the director of the criminal proceedings. However, in order not to frustrate possible initiatives of the parties, which might be accepted in the framework of the search for

[22] All of which, assuming that the option of absolute liberty is not possible in criminal matters, although the legal order may establish channels that differ from the integral and exclusive criminal procedure, which precisely support, complement and strengthen it. It is undoubtable that, at present, with a single criminal channel –criminal proceedings- the model, as it was basically set up in the 19th century, is exhausted, has no more to give of itself, and needs, as well as substantial procedural reforms, the incorporation of other techniques and procedures to complement it. Criminal mediation can be turned into the best ally of this new model of criminal justice, an interesting procedure to give greater credibility to the justice system. I would stress that it is a procedural instrument that serves the proceedings, it is an instrument of criminal protection, which is why I consider that the procedure of mediation is the instrument of the instrument.

[23] On the French model, see ETXEBERRIA GURIDI, J.F., "El modelo francés de mediación penal", in the collective works *La mediación penal para adultos*, (Ed. BARONA VILAR), cit., pp. 200-201.

social peace and credibility in the system, a possible intermediary situation could be upheld in which, even at the proposal of the parties, should represent the final official decision on whether or not to move on to the mediation process.

One model that could be extrapolated to the Spanish legal order is, in this sense, the German one, which establishes that, in principle, the Prosecutor should decide on the advisability to refer the case to mediation or, on the contrary, to uphold the accusation in the criminal proceeding. However, the court can in the same way decide to refer the case to mediation, provided that the accusation has yet to be formalized: in the pre-trial phase (art. 153a.1, 1 and 5 of the StPO and art. 45.2 and 3 Penal Code of minors). There would even be a possibility in the trial phase, of the judge suspending the hearing and referring the parties to mediation (art. 155a of the StPO).

Thus, the regulation in Germany does all it can, so that reparation can avoid the public interest in the prosecution of the facts and the subsequent, foreseeable criminal conviction. The possibility has also been raised in the German order of the police selecting the cases to take to mediation, although with various detractors. And what happens if it is officially or unofficially agreed between the parties? Without negating the viability of the idea, the question centres on the value that can be given to the agreement adopted in mediation[24], leaving the juridical-procedural efficacy of that agreement for the prosecutor and the judge to accept, who will assess whether they to decide to continue with the proceeding or, on the contrary, to dismiss it[25].

3º) Mediation is a procedure, not a proceeding. Even though proceeding and procedure have the same etymological root in Latin (*prōcēdere*), procedure exists in any legal activity, which is the formal way in which it is carried forward, and proceeding refers only to the exercise of the function of judging and enforcing judgments in an irrevocable way, which is nothing other than the jurisdictional function (art. 117.3 CE).

[24] This denomination is that given in Germany to these possible criminal mediations, which take place with the bilateral agreement of the victim and the perpetrator to accept mediation, and not by referral from an organ of public prosecution.

[25] BANNENBERG, Britta, *Wiedergutmachung in der Strafrechtspraxis. Eine empirisch-kriminologische Untersuchung von Täter-Opfer-Ausgleichsprojekte in der Bundesrepublik Deutschland*, Bonn, Forum Verlag Godesberg, 1993, p. 23-24. See also the author's chapter "Situacion de la justicia restaurativa y la mediacion penal en Alemania", in the collective work *La mediación penal para adultos*, (Ed. BARONA VILAR), cit., p. 268-270.

In the case of mediation, we are not facing a jurisdictional function, as the mediator does not act in a heterocompositive way *supra partes*, but autocompositively or *intra partes*. The decision of the mediator is not imposed, unlike the judge exercising a jurisdictional function through the proceedings.

Instead, the mediator works with the parties, bringing them together, helping them to define their positions and their interests, which are not always the same; a task that is performed on the basis of neutrality, winning over the confidence of the parties as the procedure advances and without the formal ties of a judicial proceeding.

This procedure is not ended with a decision that is imposed by the mediator, but through a written agreement, which makes known whether or not an agreement was reached between the parties upon its conclusion, without any reference to a binding decision with the effect of a firm judgment (*res iudicata*).

That is no obstacle to the need to give legal power to the outcome of the activity, all the more so if it is a question of the result of a pact of consensus, given the legal consequences that might ensue if they were incorporated into the relevant criminal proceedings. That incorporation into the proceedings and its subsequent homologation is what will convert the result of the mediation into a judicial decision, with its corresponding procedural efficacy.

It is essential that this procedure be flexible and not very formal, which does nothing to prevent the definition of rules in the procedure that involve such guarantees as, for example, the establishment of timeframes. It should likewise respect essential rights to equality, contradiction, defence and the presumption of innocence, in such a way that these qualities of informality, flexibility and non-rigidity are no more than a way of proceeding that assists the essential principle of the intervention of the parties within mediation in any modality of protection that is really effective for the public[26]. The guarantees should be present so that, as VON SCHLIEFFEN[27] considers, mediation should not be considered a channel that counters classic criminal justice or a solution that enters into competition with criminal proceedings, but one that is equally inscribed in the essence of justice.

[26] TRANKLE, S., *Im Schatten des Strafrechts*, cit., p. 43.
[27] VON SCHLIEFFEN, K., "Mediation im Rechtsstaat –Chancen einer neuen Konfliktordnung", in HAFT, F./VON SCHLIEFFEN, K. (ed), *Handbuch Mediation,* Manchen, 2002, p. 176.

4) It is a perfect complement to the criminal proceeding. It appears reasonable to think of that need to integrate mediation into the criminal justice model[28], which means one can not be absolutely free when defining the mediation model that is wanted, but rather that it should necessarily be made conditional upon the subsequent criminal proceeding, or on one that is pending, or one that has already ended, or with the enforcement of the criminal conviction.

In consequence, although the efficacy of a criminal mediation procedure can come to change the development of a criminal proceeding, it can minimize it or it can suspend it and even transform the content of the criminal conviction in the proceedings. That is not to say that we face an alternative channel, but, quite the contrary, a complementary instrument of the courts.

Obviously this principle links directly in to others such as official participation or control, whether by referral from the judge or the prosecutor, or by the same judicial control over the agreement reached in mediation.

All in all, there is no change for the substitution of one model by another[29], however there is a "more or less peaceful" coexistence of both systems, the retributive model having a greater presence, especially with regard to its organization and development. Attention must be paid, in this case, to the essential idea: to assess and to ponder what both, victim and offender, will reciprocally receive. Thus, the possible reduction or transformation of the legal consequence for perpetrating the act is directly proportional to the possible benefit that the victim may obtain through a reparative mechanism, either morally or materially.

Thus, mediation entails a change in the model of social reaction to the offence, but not a negation of the existing model. Quite the opposite, it demands what some authors have called in the doctrine the model of cooperation, the product of the sociological concept of reflexive law, which should lead to both functions living together as

[28] On that need for the integration of concepts and their legal incorporation and in criminal policy on restorative justice, and with it the need for criminal mediation, see the work by DOMENIG, C., *Restorative Justice und integrative Symbolik. Moglichkeiten eines integrativen Umgangs mit Kriminalitat und die Bedeutung von Symbolik in dessen Umsetzung*, Bern/Stuttgart/Wien, Haupt ed., 2008. In general, the whole work is a proposal for integration, although for points raised here, pp. 324-326 are of special interest.

[29] Despite the consideration by some authors, such as *la vía penal del siglo XXI*, GALAWAY, B., "Prospects", in *Mediation and Criminal Justice (Victims, Offenders and Community),* (WRIGHT/GALAWAY, ed), Bristol, 1989, p. 275.

perfect bedfellows, determining the criteria that should serve to go to one or another channel.

Moreover, as WALGRAVE[30] points out, this model of integrated justice is only possible in the legal order and as a response of the state, and that insofar as "if the state disappears, there would be no rights, depending in each case on the goodwill of others, or on one's own capacity to compete against others and, in this case, in order to oppress them. If only states existed, there would be no trust, and the others would be considered rivals, a threat to their own territory. All states would end by falling into anarchy or tyranny."

5º) Mediation is founded on the tripartite intervention of subjects: they find themselves in a linear position in their behaviour, without the mediator or neutral and impartial third party standing over the subjects that resort to this procedure.

Thus, on the one hand, victim and person that has suffered the consequences of the offence and victimizer that is the presumed perpetrator of the criminal acts.

And, on the other hand, between them, is the mediator, who is the person that will try to approximate the victim and victimizer, so that they can explain arguments that can reach a solution to a situation generated by the possible commission of the criminal act.

The success of mediation is necessarily the opportunity it gives to subjects to be heard, and the techniques for contradiction will vary accordingly: through simultaneous dialogue or face-to-face confrontation, or successively on a one-to-one basis.

Equally, linked to this idea of the subjective tripartite formulation of this mediation procedure is the requirement for mediator neutrality[31], which reflects the need of the third party that intervenes to do so with criteria of impartiality, in other words, not to favour one of the parties over and above the other[32].

Rather than being a *mere* spectator, on the contrary, this implies meeting the parties, calming angry moods, acting as an impartial guide in the discussion and ensuring that

[30] WALGRAVE, L., "Imposing Restoration Instead of Inflicting Pain: Reflections on the judicial reaction to crime", in *Restorative Justice &Criminal Justice. Competing or reconciliable paradigms?*, (VON HIRSCH, A/ROBERTS,J ed), cit., p. 76.
[31] TRANKLE, S., *Im Schatten des Strafrechts*, cit., p. 43 and 64-66.
[32] DI CHIARA, *Scenari processuali per l'intervento di mediazione: Una panoramica sulle fonti,* in *Rivista italiana di Diritto e Procedura Penale,* fascícolo 2, April-June, 2004, p. 501 and ff.

everybody has the same opportunities to speak. It even means, at all times respectful of the requirement for confidentiality in support of the mediator's neutrality, that information may be transmitted from one to the other, adapting what is expressed by each party from a negative to a positive language.

It is equally possible for third parties to intervene in the mediation process collaborating with either, being neither victim nor victimizer, without that upsetting the idea of bilateralism.

Asymmetry has to be avoided that can be generated as a consequence of any participation of third parties, which means due caution should be taken. Communication is relevant, and in certain cases the intervention of the legal counsel of the subjects that go to mediation, and especially the lawyer of the possible victimizer, given that even when the possible intervention of counsel in the procedure is still questioned, it is undeniable that the presence of counsel should be permitted, all the more so if procedural legal validity is accorded to the mediation agreement, which might affect the victimizer's legal and procedural situation.

6) Grounded in the principle of confidentiality. This principle is the essence of mediation, such that the debates, affirmations or allegations made by the parties should not be shared with the judge, who will only receive the final document, which is something like a signed record of the agreements that have or have not been reached between the parties.

This is the reason why, after the corresponding information has been shared with the parties on what going to mediation actually means, with its consequences and connections with the criminal proceeding, the mediator will ask them to sign a confidentiality statement.

This maintains the possibility that at any time either of the parties may abandon the mediation and return to the criminal proceedings, without the information shared in confidence by the parties to mediation having any incriminatory value at all; logically of course unless both agreed to use certain affirmations, expressions or statements made by them either orally or in writing as evidence.

The contrary would mean a clear attack on the right to the presumption of innocence (art. 24 SC), and would –obviously- provoke great suspicion in the presumed offender towards participation in the mediation process. Although, when it is affirmed that the

parties might be in agreement in taking the documentation to the proceedings, it should be done by both and not unilaterally[33], otherwise it would lose all sense. Likewise, as a consequence of the above, the mediator may never be called to the proceedings as either a witness or an expert witness, and remains exempt from the duty of reporting a crime as a consequence of professional secrecy.

7) Mediation should be free accepted. I understand that it should be free owing to the public nature of criminal law, with due respect to the principle of equality expressed in article 14 of the Constitution.

Were it otherwise, we would establish models for the rich and models for the poor, institutions that are more beneficial or less so in accordance with the economic resources of the parties to the proceedings and, in short, we would turn mediation into an instrument that supports two tier criminal proceedings.

Another question related to these considerations is the possibility of perverse practices that might be associated with proceedings that are declared free, with a view to opting for those procedures voluntarily, which, precisely because they are free, could lead to the prolongation of the criminal proceedings.

The legislator will, where applicable, determine exceptions, arising from fraudulent conduct, which entail an economic cost and are exceptions to the principle of free public services.

3. LIMITS OR NOT LIMITS BY MEDIATION

One of the questions raised in the doctrine and in criminal policy concerns the determination of limits to mediation.

Mediation, the participation of victims within it, the incorporation of reparation for juridical-penal consequences, either as the alleviation of the crime or as a *tertium genus* between measures and sentences, raises some questions. Are there no limits? Is it possible to go to mediation and participate in mediation, whoever the victims and whatever the criminally sanctionable acts? Should this be limited in the legal order limit?

[33] GONZALEZ CANO, I., "La mediación penal en España", in the collective work *La mediación penal para adultos*, (Ed. BARONA VILAR), cit., p. 33-34.

The solutions that are found in other legal orders can throw some light on possible positions, although, beforehand, I should make it clear that in my opinion, seeking to separate favourable and unfavourable circumstances, or legally established limits is extremely complex. In any case, it would offer an excessively rigid solution that would leave out other situations that are not recommendable and would exclude others that might nevertheless be recommendable.

One of the most commonly heard opinions concerns the severity of the act. When the facts are considered serious, it is not recommendable that victims work in mediation with possible authors. In this case, far from considering the victims, it is only the merely objective criterion that is assessed: i.e. offences that merit a severe sentence.

This criterion, however, does not always respond to the question of why or why not mediation. If the answer that is put forward here is that the juridical-penal consequence is paramount and social censure is so great that it is not possible to incorporate criteria on reparation and resocialization, then it may be justified.

But we know all too well that there are, on occasions, really atrocious facts, meriting severe punishment. This has happened with crimes of terrorism, in which the victims have suffered harm because of the loss of a loved one and the way in which that happened, involving a very negative emotional component[34]. These have, however, recently been the object of mediation, not with the purpose of resocialization or reformulation of the sentence, but of the internal "reconstitution" of the victims and of those convicted. We face very complex sentences, but in which the victims themselves have voluntarily accepted to form part of those mediation projects in a prison.

Another criterion that has been used is the criminal modality or if you prefer the protected legal good. Accordingly, certain acts, misdemeanours or offences are more likely to lead to mediation. Offences against patrimony are mentioned here, as well as bodily harm, offences against freedom such as threats or coercion, defamation such as slander and libel, and offences against the family rights and obligations such as non-payment of maintenance, and likewise offences against public health could be included. It is not always true and on occasions, as in the case of offences against

[34] BARONA VILAR, S., "Mediation *post sententiam* bei terroristischen Straftaten", *Zeitschrift für die gesamte Strafwissenschaftrecht,* De Gruyter, dezember, 2015.

public order, the public interest that is at stake is greater than in other types of offences.

It is true that in these cases the victims may have a greater willingness to mediate with the possible perpetrators of the act, but that should not necessarily be so. In some cases, those that assume that point of view are paying attention to cases in which the proceedings are concluding because of a agreed sentence and there are, therefore, agreements. But the victims do not intervene in the agreed sentences, which is why it should not be forgotten that the subjective factor should be considered alongside the objective factor.

It has been sustained that certain circumstances have been called into question in countries where a legal tradition exists around mediation, largely because of the preferential consideration of the subjects: in some cases by victimizers and in others, by victims. So:

-In the cases of mediation with repeat offenders, it has been sustained that such a possibility should be rejected. Mediation is "a goodness" that is attributed in the legal order to those with a willingness to change, so –they sustain- it makes no sense to favour those that repeat the offence.

If the idea is found within this argument that mediation will gratify whoever decides to change, with the hefty paternalistic component that it entails, it may happen that, with a view to the expansion of criminal law, a person who is not necessarily a habitual criminal might become a repeat offender whose punishable criminal acts might not even affect that same legal good. Establishing a regulation would be too rigid to respond to the possible casuistry and above all could prevent the victim from going to mediation in these cases.

-In the so-called offences of danger, when collective legal goods are protected. It has been argued that in this case there are nameless or collective victims and that it is not possible to "sit them down" at the mediation table.

The experience of Anglo-Saxon countries allows us to say that this is possible and that in these cases what has been called the symbolic victim appears, who may be represented by associations, groups, and entities that defend and protect the collective interests that are at stake.

-Another of the circumstances that raises doubts about the viability of mediation is the plurality of subjects, those cases in which various people are found alongside the victims and various other people alongside the defendants.

The complex circumstances of the question are undeniable, which involve different techniques the results of which, in case of an agreement, will generate evident diversity and asymmetry. Does this mean that they should be excluded from mediation? I do not believe so.

It means that it will be more difficult to go to mediation, because they must all be willing to do so. Mediation should serve to restrict or even limit the objective of the proceedings, both with regard to the criminal acts in the accusation and with regard to those responsible for them.

It is not a matter of arranging the instrumentality of mediation in the proceedings, as happens in civil mediation, however it should be valued, under the assumption that all the subjects were in agreement to go to mediation, thereby minimizing the complexity that the proceedings might entail.

-Mediation is questioned with victims who are minors, people living with disabilities, elderly people, etc.

In this case, the reason is found in their vulnerability. The need for the equilibrium of the parties in the mediation procedure is undeniable and perhaps in cases such as the one that concerns us here, this situation remains open to debate.

It is no obstacle to the thought that they can intervene in the criminal proceedings in much the same way that they can “avail themselves” of the people that complement their capacities and guide them, or help them. It is very probably one of the cases in which the judges or prosecutors will exclude them from mediation, due to the intrinsic vulnerability that they possess, which would call into question the real meaning of mediation that might provoke a greater feeling of vulnerability, were it possible.

-Another of the circumstances for which mediation has been refused is in cases of gender violence. This exclusion is supported in our legal order under LO 1/2004, of 28 December, on Measures of Integral Protection against Gender Violence, in which article 44.5 prohibits it. What is the reason in this case?

Evidently, it is understood that equality does not exist, because the victim is made to submit to the victimizer with a significant emotional dependency in the majority of cases. It is evident that many of the circumstances in which these arguments arise are precisely so. However, I could understand certain exceptions to this imperative regulation of exclusion, given that it could be useful (provided that equality –the will of the victim- may be guaranteed) under the circumstances of distancing orders as a sentence, when it is question of episodic or isolated violence. It would, to my mind, be a decision that should be upheld through a case-by-case assessment, in order to avoid for the legal protection of the victim of gender violence, the instrumentalization of the victim in the name of gender justice, preventing access to other channels or avenues that other victims might have.

In conclusion, I understand that we are at a great crossroads in which it has some time ago been possible, to reach absolutely unimaginable heights when seeking to reassert the visibility of the victims in criminal protection and to achieve once again a sort of de-expropriation of their rights with regard to the State.

However, the incorporation of the victim in the proceeding, in criminal law, especially through reparative justice, and in mediation, is reaching contrary extremes.

That the legislator should almost convert victims into an object, defining and classifying them, and limiting, restricting or expanding the use of their rights, to the style of "Brave New World" by A. Huxley, can be nothing other than very worrying.

Of course, with regard to mediation, in my opinion, it should not be limited in legal terms, but instead let those that live the experience of "criminal prosecution" in the social and democratic state be the ones that recommend or otherwise the possible referral of "those" victims to mediation.

On the basis of that referral, the essential work will be in the hands of the criminal mediator who should demonstrate capability and skill not only to be a "mediator" but to be a "good mediator", knowledgeable of the law that underpins the task.