

# THE RESTORATIVE JUSTICE PROCESS IN THE WAKE OF THE GLOBAL PANDEMIC

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## Abstract

*The COVID-19 pandemic has completely changed the way we relate, both personally and socially, and at work. Isolation, confinement, restrictions or fear of contagion have led to the need to adapt to a virtual reality. And so, although many sectors have been paralyzed, many others are experiencing an express maturation thanks to the phenomenon of the Internet.*

*In the field of justice, it has also been proposed to implement the judicial processes in a telematic way. However, the Spanish system is not yet ready to face virtual reality. Spain is suffering a significant collapse in the courts, due to the unprecedented health crisis. It is therefore necessary to promote alternative processes of conflict resolution, embodied in restorative justice, as an expeditious and effective way out of this saturation of the judicial system. To this end, it is vital to have sufficient regulatory support to regulate such reparation processes, such as criminal mediation, which lacks systematic regulation in our legal system, as well as to enable online sessions in order for us to embrace the new virtual reality defined after the pandemic.*

**Keywords:** *Restorative Justice, repair, pandemic, mediation, virtual reality.*

## 1. Introduction

This research work is about criminal mediation, an institution of great importance incardinated in Restorative Justice, which is opposed to Retributive Justice, and whose objective is the satisfaction of all parties to the process, that is, from the point of view of the victim of the crime as well as from the point of view of the rehabilitation of the perpetrator.

The interest that it arouses is none other than the lack of an express regulation in Spain that recognizes this institution in the field of criminal law, unlike other countries of the European Union that do regulate in a satisfactory way the criminal mediation.

It must be said that, for the study of research, it is at least necessary to refer to European legislation in order to determine how Restorative Justice is inserted into the different legal systems of the Member States, and analyze how it could be done in Spain.

It is true that many authors have delved into the application of alternative conflict resolution processes and, especially, on mediation. However, in the field of criminal law, it does not take off.

## 2. Content

It is a reality that in recent years the Spanish judicial system has been especially collapsed. The high litigation present in Spanish society is a well-documented fact. The General Council of the Judiciary (CGPJ) has already highlighted on numerous occasions the existing congestion in the courts and tribunals of the country. That defendants wait many years to

receive a judgment or for it to be carried out is the harsh reality of the Spanish judicial system. And unfortunately it seems that the Spanish are going to continue condemned to have a slow and absolutely saturated judicial system.

Improving the functioning of the Administration of Justice is the key in a State of Law, as the UN assures, and although it should have already been dealt with urgently by the authorities, the need increases even more in this current context of global health crisis produced by COVID-19 in which we find ourselves.

The justice has been and continues to be the great forgotten by the State and, after the pandemic, it has been retested. The Administration of Justice is suffering a significant slowdown due to this unprecedented health crisis. The collapse of the courts, the delay in the issuance of judicial decisions, the lack of confidence of citizens in a system where they see neither the right to an effective judicial protection nor the right to obtain a judicial response without unacceptable delay; together with the increase in litigation after the confinement, leads us to think about the need to promote alternatives conflict resolution systems.

It is at least a priority to encourage other procedures that manage to resolve conflicts between the parties from a higher quality of Justice. An agile way out of this saturation of the traditional judicial system is, without a doubt, mediation.

The resource of mediation, along with other figures such as arbitration or conciliation, were erected as substitute instruments for the ordinary process, whose main objective was none other than to lighten the weight borne by the courts.

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It is true that these strategies have been reaching greater diffusion over the years. An example of this is the approval of the report on the draft law to promote mediation. However, this practice has not yet taken off.

Perhaps the lack of knowledge, the lack of mediators or the lack of confidence in the effectiveness of these methods are the causes that impede their growth process and that can explain the limited success of mediation in Spain.

In the criminal sphere, the lack of security of the crime victim that the mediation procedure does not entail a danger to her security or a risk of suffering further material or moral damage has to be added.

However, and bringing up the data provided by the Judicial Statistics Section of the General Council of the Judiciary on mediations, the resolution rate, which relates the volumen of income with the resolution capacity, is encouraging. For this reason, it is considered vital a modernization of the Administration of Justice, which bets more on these alternative dispute resolution mechanisms.

In this line, and supporting the idea of promoting these procedures, three possible proposals are worth highlighting: favoring criminal mediation and betting on an express regulation; firstly; including mediation in the content of the Free Legal Assistance, secondly; and, finally, promoting the sessions electronically.

Regarding the first proposal, the legislator has dedicated and focused his attention on developing mediation especially in civil and commercial sphere. And it seems that he has forgotten about criminal mediation.

We found an isolated sentence such as the one issued by the provincial Court of Madrid, Section 17, 621/2015, of September 16 (Appeal 6037/2013), which transversely contemplated the criminal mediation procedure. Nevertheless, the reality is that, despite a theoretical basis is placed, there is a lack of a true legal regulation of the institution in Spain.

The reform of the Penal Code has already allowed the legislative entry of mediation, but there is still a long way to go before the judicial authorities consider it a legitimate, adequate and effective figure.

We are witnessing how European legislation (the Framework Decision of the Council of the European Union of March 15 /2001/220/JAI, regarding the status of the victim in criminal proceedings; and then Directive 2012/29/EU of the European Parliament and the European Council of October 25, 2012, which establishes minimum standards on the rights, support and protection of crime victims, which has set a serie of guidelines for the implementation of Justice Restorative in the members countries of the European Union) has already endowed mediations with a specific regulation (Italy, Germany or Netherlands, among others), and it is undoubtedly that it's a key instrument for society and the fabric of the judicial system.

Not only does it manage to minimize the criminal response, but it also contributes to the task of

Restorative Justice: it facilitates the rehabilitation of the culprit and the compensation of the victim.

Therefore, it can be considered necessary to give greater visibility to this practice and face an express regulation of criminal mediation, which ensures the safety of the crime victim and promotes the principles that allow to achieve the guarantees of Modern Criminal Law.

Regarding the second proposal, it is vital that mediation is going to be included within the content of Free Legal Assistance (AJG), which is already regulated in Law 1/1996, of January 10, on Free Legal Assistance.

As well is established in its Statement of Motives, the objective of this law in none other that to regulate a free justice system that allows citizens who prove insufficient resources to litigate, to provide themselves with the necessary professionals in order to access to the effective judicial protection and see their rights and legitimate interests adequately defended.

Article 119 of the constitutional text provides that Justice will be free when the law so provides and, in any case, with respect to those who prove insufficient resources to litigate. Our Supreme Norm designs a regulatory framework for the right to judicial and effective protection in which integrates a service activity aimed at providing the necessary means to make this right real for all the citizens.

Within the content of this right, article 6 of mentioned law refers to the advice and guidance prior to the initiation of the process, the defense and representation by a lawyer, expert assistance, the substantial reduction of the cost for obtaining deeds, notarial documents, custom duties and those who emanating from the Public Registries, which may be accurate for the parties in the process.

However, if we star from dispensing the same treatment of the judicial process to alternative dispute resolution systems, making these and equally valid option, it will soon be necessary to expand the material content of the AJG. Since the defendants who opt for the mediation resource will also have to face those amounts that this system inevitably entails, such as the mediators' fees, management or administration expenses, among others, despite the fact that the cost of the process is cheaper than the judicial procedure.

The Court of Justice of the European Union in the judgement of June 14, 2007 (case C-75/16, Livio Menini and Maria Antonia Rampanelli / Banco Popolare Società Cooperativa), established that for the mediation to be compatible with the principle of effective judicial protection, among other conditions, should not cause expenses or, in any case, they must be scarcely significant.

Nevertheless, however small they are, they can be an obstacle to the parties with insufficient resources from exercising the right to the protection of their legitimate interests. For this reasons, the insertion of mediation in the content of the law is more than justified.

Finally, and in relation to conflict resolution systems, it can be proposed the promotion of these tools in their online mode.

The COVID-19 pandemic has completely changed the way we interact with each other, both personally and socially, as well as in the work field. Isolation, confinement, restrictions or fear of contagion have led to the need for us to adapt to the virtual reality.

And for this reason, although many sectors have been paralysed, many others are experiencing an express maturation thanks to the Internet phenomenon. In the field of Justice, it has been also proposed to carry out judicial processes electronically. However, the Spanish system is not yet ready to face virtual reality.

The fact is that, if we do not have the means to ensure a trial with all the guarantees, not only would the defense rights of the defendants be violated, but the online practice would turn out to be counterproductive. That is why it is essential to modernize the Spanish judicial system to new information technologies, as well as the alternative dispute resolution systems, emphasizing the rights of all the parts of the process.

### 3. Conclusions

For all the exposed, it should be noted that mediation stands as an economic and agile resource, which requires an active participation of the interested

parties themselves, and generates a high dose of satisfaction in those who they come to it. Therefore, it is worth highlighting the need for the Spanish legal system to opt for a systematic and complete regulation of the institution of mediation, extending to the criminal field, given the undeniable benefits that its exercise entails, both for the State with respect to relief the workload for judges and courts, as for the parts, who save time and money.

In addition, it can be emphasized the possible insertion of mediation in the free justice content, given the equality of the judicial procedure with respect to the disbursements that may derive from its application, in order to avoid this flagrant discrimination among those defendants who choose the judicial process and those who decide to submit to mediation.

Finally, it can be said that it is important for society to adapt to new social reality defined after the pandemic, and, along the same lines, it is vital that the Administration of Justice itself do so, so as to achieve a proliferation of alternative systems for solving problems by a telematic way. Telecommunication networks have become more relevant than ever, and they are vital in this era of digitalization. Therefore, the need to bet on true digital justice is more than evident, as well as the promotion of the telematic use of alternative systems, that ultimately suppose an absolute support for the judicial process.

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