

Mediation in Juvenile Criminal Cases - The Case of Catalonia

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Over the last forty years, changes in Europe in the sphere of the juvenile justice system have allowed for a progressive diversification of responses to juvenile delinquency and strengthening alternatives to confinement. We might even venture to say that the juvenile justice system constitutes a test field for new trends, which, afterwards, exert their influence both on criminal laws and criminal policy as a whole.

This change may have been made possible by the priority given to special measures in the sphere of juvenile justice, rather than the measures that prevail in ordinary criminal justice. During the last fifteen years, changes have moved the juvenile system in new directions: strengthening diversions; considering the victim; favoring reparation; and involving victims and young offenders in resolving their conflicts out of court.

In Spain, the changes found in the European juvenile justice system were incorporated belatedly and slowly. Until 1992, juvenile justice legislation was anchored in the principles of positivism and rehabilitation typical of the 1948 Law of Juvenile Courts. The legislative stagnation, however, was partly offset by the momentum of the juvenile justice policy, which was similar to that of other European countries (Germany, Austria and the Netherlands, among others), and in agreement with the most recent international treaties and recommendations. This could be seen particularly in Catalonia.

The broad discretionary authority of the old law provided juvenile court judges with the exclusive authority given to the Catalan civil service in enforcing legal proceedings for minors, the intent of that civil service to foster new programs, and the cooperation between the civil service and the juvenile court enabled the beginning of a change. This change was only partially reflected in the legislative context with Law 4/92. This new law reforms different sections of the law of 1948, and diverse unconstitutional matters regarding the regulation of rights and guarantees of minors during judicial proceedings.

From this dynamic of creating a new juvenile justice, the Mediation and Reparation Program started in Catalonia in May 1990. Before the entry into force of Law 4/92, 1,200 minors and 800 victims had already participated in the program, reaching out-of-court resolutions for their conflicts with the assistance of a mediator. The legal reform was welcomed in Catalonia, despite the apparent limitations of Law 4/92. These limitations were overcome on the sound legal base that the Mediation and Reparation Program offered a program, which, until then, had only been possible through the will and consensus of the juvenile court judges and the Catalan civil service.

The Mediation and Reparation Program in Catalonia, within the framework of Law 4/92, which regulates competencies and proceedings in juvenile courts (1992-2000)

During these years, the program worked with young people 12 to 16 year old who had been accused of an offense or infringement by the Prosecuting Attorney's Office for the Underage, as provided for in the Criminal Code. It also considered the victims who had suffered the consequences of the criminal act.

Law 4/92 empowered the Public Prosecutor to propose the dismissal of a case, provided that the young offender had made amends to the victim or made the commitment to do so. Thus, it was possible to avoid judicial proceedings, and give priority, over a possible sanction, to the offender's acceptance of responsibilities and the resolution of the conflict with the voluntary participation of offender and victim in a mediation process.

Out-of-court reparation was also implemented as an alternative to enforcing reparation at the end of the proceedings. In this case, judicial proceedings continued until the juvenile court judge makes a decision. Reparation was a consequence of the stay of enforcement, after offender and victim accepted the reparation proposal.

During those years, the mediation program developed in Catalonia with the 6th principle of the Law as its exclusive point of reference (i.e. as an alternative to continuing judicial proceedings).

At the request of the Public Prosecutor, the mediation process started in cases in which the seriousness of the crime and the nature of the conflict indicated that an out-of-court solution could be reached. The characteristics of the process vary according to the objective being pursued (reconciliation or reparation) and the degree of participation by the victim.

After the mediation and reparation process is over, the mediator submits a document signed by the parties to the Public Prosecutor. This document contains the agreements and a general assessment of the process. Then the Public Prosecutor, taking into consideration the criminal act and the reparation made, proposes that the judge of the juvenile court discontinue the proceedings and end the case.

Some data obtained through this experience

From May 1990 until January 1999, 6,624 offenders and 4,279 victims voluntarily participated in the program. The difference between the number of offenders and victims is caused by the fact that many criminal acts are committed by groups. These figures indicate that, out of the total number of first time juvenile offenders in Catalonia, 25% participated in the program before the end of 1996 and 50% did so from the beginning of 1997-January 1999.

78% of offenders were male, while 22% were female. However, it is worth pointing out that the proportion of girls has progressively increased, growing from 10% in 1990, to 22% in 1999. The data agree with the trend that has shown an increase in

the presence of girls, a trend that has also been detected in the juvenile justice system in Catalonia.

82% of the offenders were enrolled in a school, while the remaining 18% were not. In 50% of the cases, the victims were individuals, 50% of whom were minors; the remaining 50% were public or private entities.

Property crimes (theft, damages and robberies by force, etc.) altogether represent 63% of the total number of crimes committed by the young offenders diverted to the program. Crimes against persons, which have to do mostly with assaults, account for 24%. Robbery by intimidation and robbery by violence and intimidation represent 4% and 2%, respectively, of the cases diverted to the program.

Depending on the seriousness of the act, the Prosecuting Attorney's Office authorizes a prior consultation in order to assess the feasibility of mediation. 50% of the accused minors voluntarily accept this option, while the remaining 50% prefer to face the facts in the framework of criminal law proceedings.

13% of victims (the proposal is made to them only if the offender has previously accepted this option) absolutely reject this alternative. There is a high acceptance rate on the side of victims; 87% accept the proposal, although levels of interest and participation are variable.

59% of mediation cases were realized with direct or indirect participation of the victims:

- In 12% of the cases the parties had already solved the conflict on their own initiative, before the first contact with the mediator. Generally speaking, in these cases, victim and offender know each other, have a certain relationship or share the same social context.
- In 20% of the cases, the mediation is done and agreements are reached through a mediator, without direct encounter between the parties.
- In 27% of the cases, the parties attend meetings, in the context of which agreements are reached.
- In 30% of cases -owing to the little relevance of the events, lack of interest of on the side of the victim, the fact that the victim is not identified, etc, plus the fact that the offender has expressed his desire to make amends- different out-of-court solutions were sought without the participation of the victim. Out of all the cases that made use of the mediation program, only 11% ended without obtaining positive results.

Experience has shown that the concern of victims and offenders in relation to resolving the conflict is not solely focused on restitution or compensation claimed for damages (although these aspects are covered by the agreements); the mediation process itself acquires great importance. The agreements made reflect the concern of the parties regarding their future relationship and include a non-aggression pact and the commitment to not re-offending on the side of the offender, as well as the consequences that the events have had both for victim and offender in moral and emotional aspects as well as the criminal law.

From the perspective of 10 years of experience with wide participation of victims and offender, and three research projects to date in which we have evaluated the process and results obtained through mediation and the opinions of those who participated in the program, we can draw the following conclusions:

- All parties benefit from mediation processes: justice is perceived as faster and gains an improved social image. Mediation constitutes a good way to hold young people accountable for their actions. Victims feel taken care of and listened to, and are able to experience their requests being taken into consideration.
- Offenders and victims feel that this kind of justice reacts to crime, offering both of them the possibility of participating in reaching a solution. This is also considered as a very positive factor in the social context where the conflict occurs and programs are developed.
- The justice system is given an increase in the understanding of the damages suffered by the victims personally and emotionally, as well as materially and financially.
- The program makes it possible to differentiate between crimes, while keeping in mind the legal seriousness of the crime and the characteristics of the conflict. The conflict is seen from the standpoints of victim and perpetrator, regarding both the law and the consequences the victim may have suffered.
- We can say with certainty that, thanks to mediation, victims feel less victimized and offenders feel more responsible and see themselves less as criminals. Also, both victim and offender come to appreciate values useful for them and the community.
- It is essential to strengthen this type of program in order to favor peace and fight feelings of insecurity.
- On the other hand, the enforcement of Law 4/92 and the mediation program have favored the institution of proceedings involving minor offenses, which can work against the initial objective of increased diversion and implies an obvious risk regarding the social control network.

Mediation and Reparation - Law 5/2000

Law 5/2000 of January 12, which regulates the criminal responsibility of minors, absolutely replaced the juvenile laws that were in effect up until then (1948 and reform of 1992). It also opens up new possibilities and fosters reparations for victims, reconciliation and mediation programs.

The new law empowers the Public Prosecutor with authority to institute proceedings (just as Law 4/92 did). This fact, together with the broad possibilities for discontinuance granted by the law, supports a policy with the aim of implementing the principles of opportunity and diversion.

The law will affect the population between 14 and 18 years of age and, in the case of misdemeanors and infringements, youths of up to 21 years old*. It considerably broadens the population that will be subject to the new law.

In principle, the support for diversion and the widening of the eligible age group increase the possibilities for the future development of mediation programs. The law provides for diverse procedures with the ultimate goal of discontinuance of proceedings (sections 18,19 and 27.4). The most significant points regarding the preliminary investigation are described in section 19. The following conditions must be met for the Public Prosecutor to discontinue proceedings:

- The offense must have been committed without serious intimidation or violence, or
- the offender must make the commitment to repair the damage inflicted to the victim, or
- the offender must make the commitment to develop an educational activity proposed by the technical team in its report.

In section 19.2, the law defines reconciliation and reparation, with the aim of taking these into account during the mediation process and in the agreements reached by the parties.

The law explicitly differentiates discontinuance from stay of proceedings (sections 19.1 and 19.4). Discontinuance will be possible if the act is a misdemeanor or infringement. This is temporary and subject to whether the minor complies with the reparation and/or reconciliation commitments undertaken.

In case of felony, the Public Prosecutor may only authorize the mediation process if there was no violence or intimidation involved; however, there cannot be discontinuance of proceedings. In this situation, after the mediation and reparation process ends, the Public Prosecutor may propose the stay of proceedings to the judge of the juvenile court.

The civil liability can be approached within the mediation and reparation process, provided both parties want to reach an agreement. In any case, the law establishes that the judge of the juvenile court will have competence over civil liability (section 2.2). For that purpose, he or she will start a separate civil liability investigation. Sections 61 to 64 establish the general rules for demanding civil liability. These rules will be enforced by the Public Ministry, unless the injured party expressly waives his right to them. Therefore, in case the parties do not reach an agreement regarding civil liability, this will be decided by the judge in the framework of the lawsuit.

* Law 5/2000 entered into effect on January 13, 2001. The section stipulating that judges of juvenile courts will have competence in cases involving youths between 18 and 20 years of age will enter into effect in 2007.

However –and with regards to obtaining legal benefits- the law does not make the reconciliation between victim and offender, nor the reparation, dependent on the satisfaction of civil liability.

On the other hand, the law stipulates the joint liability of parents, custodians and legal and actual guardians, whenever the offender is under 18 years of age.

In order to differentiate between mediation and reparation, section 18 makes it possible to foster a diversions policy considering the following criteria:

- It must be a misdemeanor, without violence or intimidation towards people.
- It must be the first offense.

In our opinion, the possibility of increasing diversions should be generously fostered. This is partly because, both in Catalonia and in most countries where similar experiences have been developed, 80% of minors taken to the judicial system only go through that experience once because of one crime and do not re-offend. The arrest, the fact that their families know about the event, etc, are deterrent enough to prevent most young offenders from re-offending.

If diversion is not encouraged, an unnecessary judicialization with regards to minors would be activated. Judicialization would hinder any jurisdiction that is intrinsically agile and easy to understand, not only for youths but also for the victims and the community.