



# REVIJ

Reparation to the victim in the European  
Juvenile Justice System

## FINAL REPORT



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#### AUTHORS

© Francisco Legaz Cervantes, Amparo Pozo Martínez, Juan José Periago Morant, Raquel Jiménez Martos, Natalia García Guilabert, Raquel Matos, Catarina Ribeiro, Conceição Cunha, Mónica Catarina Soares, Sofia Marques, Sébastien Marchand, Florent Bessière, Silvio Masin, Silvio Ciappi, Laida Quijano, Cristian Organero Roldán, Cédric Foussard, Giulia Melotti, Sophie Duroy y Ángela Seychell.

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© Fundación Diagrama-Intervención Psicosocial  
Avda. Ciudad de Almería, 10  
30002 Murcia  
Telf. (+34) 968 344 344  
[www.fundaciondiagrama.es](http://www.fundaciondiagrama.es)

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# NATIONAL REPORT: PORTUGAL

## AUTHORS

Raquel Matos | Catarina Ribeiro |  
Conceição Cunha | Mónica Catarina Soares | Sofia Marques

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## 1. THE PORTUGUESE JUVENILE JUSTICE SYSTEM. GENERAL OVERVIEW

The Portuguese juvenile justice system is currently characterized by a legal bifurcation, between the *Protection of Children and Young People in Danger Act* (Lei de Proteção de Crianças e Jovens em Perigo)<sup>1</sup> and the Youth Justice Act (Lei Tutelar Educativa; hereafter LTE)<sup>2</sup>. This system evolved from a unified model of protection and welfare, reflected in the *Tutelary Organization for Minors* (Organização Tutelar de Menores)-wherein all youth justice measures were directed to youngsters in danger and juvenile offenders alike<sup>3</sup> -to a more differentiated system in terms of target situations and management devices employed (Castro, 2010). According to Rodrigues and Duarte-Fonseca (2003, p. 5 - 6) “(...) *the wide diversity of situations that may legitimize State intervention (minors in danger and juvenile offenders) must lead to a variety of answers. In the first case, a protective and assistentialist answer is required; in the second case, an intervention which aims minor education to society’s fundamental values and norms, namely to the juridical values and rules*”.

Thus, the two current pieces of legislation aforementioned are respectively directed to minors in danger and juvenile offenders, though articulated and with several common principles. Recently, on 15 January 2015, LTE has suffered several legal reformulations with the entry into force of Law 4/2015. Nevertheless the main principles, the structure and the philosophy of educational intervention were upheld. The new modifications are considered in this report.

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<sup>1</sup> Portuguese Law 147/99 from 1 September

<sup>2</sup> Portuguese Law 166/99 from 14 September; changed by the Portuguese Law 4/2015 from 15 January

<sup>3</sup> The protection and welfare model suffered several critics due its unified treatment for minors and the absence of procedural law guarantees. The necessity to comply with international legal standards also boosted the implementation of a more differentiated juvenile system.

## 1.1. REFERENCE STANDARDS

According to the LTE -Law 166/99- a youth justice measure is applied when a youngster aged between 12 and 16 years old has perpetrated an act legally qualified as crime and when he/she needs to be educated to law compliance (articles 1, 2, 6 and 7).

Following the legal amendment of the LTE (law 4/2015 from 15 January), any person can report an illicit fact perpetrated by a youngster aged between 12 and 16 years old, regardless of the crime nature (public, semi-public or particular crime). The complaint is mandatory both to the police and to the public officials when the facts are known in the exercise of their professional duties (article 73).

The youth justice measures selected are those that represent less intervention in the decision-making autonomy of the minor, and that are more likely to get him/her adhesion, as well as of their parents or legal representative, according to his/her best interest. When several offenses have been perpetrated, one or more measures can be applied, according to the specific need of minor's education to the right.

Youth justice system is organized around two different phases: inquiry and jurisdictional phases.

### ☉ Inquiry phase

Inquiry phase aims to determine whether the youngster has perpetrated or not the illicit action of which he/she is suspected and whether he/she needs to be educated to law. The LTE foresees a set of “custodial measures” that can be applied in this phase when preventive and procedural concerns are present – article 57 LTE (i.e., the minor is returned to the parents, legal representatives or whoever has his guardianship or

even to a reliable person or foster family, with imposition of obligations to the minor; minor's custody is ascribed to a public or private entity; the minor is temporarily placed in an educational centre). The application of precautionary measures at this time point (art. 58 LTE) requires:

Clear evidences regarding the perpetration of a crime;

High predictability of application of a youth justice measure to the minor;

High probability to escape or to perpetrate new illicit facts.

In the beginning of the inquiry phase, a youth justice case-file can be archived<sup>4</sup> both when the youngster has perpetrated a crime punishable with a sentence not exceeding one year wherein the youth justice measure reveals unnecessary due to the reduced severity of the facts<sup>5</sup> or when drug use has motivated the youth justice case-file<sup>6</sup> (article 78 LTE).

Inquiry phase comprises a 'collective audience for evidence analysis' (art. 81 and 82 LTE) where the minor, the parents (or legal representative or whoever has the minor guardianship), the lawyer and, if necessary, the victim, are present, to examine the evidences regarding the minor's personality, his/her family, educational and social background as well as evidences of the crime occurrence. As a result of the collective audience, the justice case-file can be suspended or archived as follows:

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<sup>4</sup> "Preliminarily archived "

<sup>5</sup> In this case, family, educational and social backgrounds are evaluated and as a result the measure can be considered as needless (art. 78, nr.1 LTE).

<sup>6</sup> When drug use are related to the instauration of the youth justice case-file, the Public Ministry must evaluate youngster's risk to perpetrate other kinds of crime. If the risk is inexistent, the Public Ministry can preliminarily archive the case-file. This entity is likewise able to refer the youngster to specific drug-related programs or treatments (art. 78, nr.2 LTE).

Suspension of the legal proceedings (article 84 LTE): applied when a youth justice measure is needed and the illicit crime is punishable with no more than five years of a prison sentence. The Public Ministry may indeed decide by the suspension of the process and the development of a 'conduct plan' in the following conditions: a) the minor approves the proposed plan; b) the minor has not been previously subjected to a youth justice measure; c) the minor is willing to avoid practicing facts qualified as crime by law in the future. Parents, legal representatives or whoever has the minor guardianship are heard during the conduct plan development. The Public Ministry requires help from the reintegration or mediation services to elaborate the 'conduct plan' (i.e., DGRSP teams; see *Restorative Practices in Portuguese Juvenile Justice System* in this paper). The Public Ministry may also suspend the process, through enacting a restorative justice measure based on victim-youngster mediation, wherein a mediation agreement should be reached and approved by the parties and the Public Ministry.

Archiving (article 87 LTE): applied when it is proved that the suspected illicit fact has not occurred; when evidences are insufficient; when the youth justice measure is needless and the illicit fact punishable with a prison sentence not exceeding three years; and when the victim, based on a relevant reason, precludes to case-file prosecution within the scope of a semi-public or particular crime.

This phase ends up with the opening of the jurisdictional phase when clear evidences of the crime perpetration are present and when the case-file's suspension or archiving was not possible due to the crime's severity and/or the clear need of education to law compliance.

## © Jurisdictional Phase

Jurisdictional phase refers to the judicial evidence of the illicit facts perpetrated by the youngster. However, in the very beginning of this phase the process can also be archived if the judge agrees with the proposal of the Public Ministry of not applying any measure, when the crime is punishable with a sentence exceeding three years. If the facts are proven and if the minor still needs to be educated to law (articles 7, 110 and 118), then youth justice measures are ordered. Within this phase, a pre-trial audience may occur (article 104 LTE), which can be defined as an informal audience towards a consensus on the most suitable measure to the youngster. As we will discuss later, during the pre-trial audience, the Public Ministry may ask for mediation services support.

### 1.2. PRINCIPLES

*The Youth Justice Act* (LTE) is governed by some main principles (Agra & Castro, 2002; Castro, 2010; Law 166/99; Rodrigues & Duarte-Fonseca, 2003):

**Education:** LTE is oriented to the youngster education for law, which means that the youngster needs to internalize legal norms. This concept embodies the purpose of youth justice measures and dictates the conditions that legitimate the judicial intervention (articles 2 and 7 LTE).

**Minor's best interest:** the legal response is chosen in accordance with the best interests of the minor as suggested by United Nations Convention on the Rights of the Child (General Assembly resolution 44/25 of 20 November 1989 article 3, nr. 1 and article 6 LTE).

**Consensus:** is both a principle and a criterion when the measure is chosen. Among all the youth justice measures, the selected one should gather the maximum consensus among the minor and the parents or legal representatives (article 6 LTE).

**Accountability:** besides the education purpose, make the youngster accountable for the crime is vital. This process entails an evaluation of offender's personality.

**Minimum Intervention Principle:** the minor has the right to freedom; self determination; and to stay, whenever possible, in his/her environment. Court must choose the measure that translates the minimum intervention in the decision-making autonomy of the minor and the maximum support for him/her. Diverse legal mechanisms –like suspension of legal proceeding- are strongly encouraged in accordance with the Portuguese constitutional and international principles (cf. Beijing Rules –article 17, nr. 1c- and Havanam Rules –article 2; article 6 LTE; and article 18, nr. 2 of Portuguese Constitution).

### 1.3. AGE RANGES

*Youth justice measures* can be applied to youngsters aged between 12 and 16 years old at the time of the crime perpetration. In Portugal, there is also 'an exceptional legal regime' (Decree-Law 401/82 from 23 September) concerning youngsters between 16 and 21 years old who perpetrated illicit facts. As an example, this exceptional regime can mitigate the applicable penalty as this brings more benefits to the youngster's rehabilitation. Under this regime, some legal perspectives claim that the youth justice measures can also be applied to youngsters between 16 and 18 years old at the

moment of crime perpetration (in the case of a prison sentence lower than two years – article 5, nr. 1). However, due to different legal readings, some legal professionals do not recognize the possibility to apply youth justice measures to youngsters who have perpetrated illicit facts between 16 and 18 years old.

The accomplishment of the youth justice measures can be extended until 21 years old, although they can only be applied to youngsters who at the time of the crime were aged 12 to 16 years old<sup>7</sup>. Overall, youth justice measures can embrace an age range between 12 and 21 years old.

#### 1.4. TYPOLOGY OF MEASURES

When a youth justice case-file is sent to the jurisdictional phase and when the youngster is considered responsible for the illicit fact and needs to be educated to the Law at the time of the decision regarding youth justice measures (article 7), different kinds of measures can be ordered by the court depending on the youngster's trajectory and criminal act. Firstly, non-custodial measures or community measures can be accomplished in the youngster's natural context of living. These measures are (cf., Law 166/99):

**Reprimand:** judge's warning about the illicit character of the conducts adopted by the youngster (articles 4 and 9).

**Suspension of driving licenses** (articles 4 and 10).

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<sup>7</sup> Exception made to the hypothesis (non-consensual), above mentioned, of extending its applicability to young people up to 18 years old (at the time of the crime practice).

**Victim reparation** (restorative-based measure): the court can select different forms of reparation to the victim (articles 4 and 11).

Apologizing for the damage caused, in the presence of the judge and the victim. The minor has to emphasize his/her clear intention to not reoffend or to express his/her regret in a symbolic way;

Economic compensation related to the property damage; the compensation can be total or partial, since it does not distort the meaning of the measure. In determining the amount of compensation or the provision, the judge must consider the financial capacities of the minor;

Developing an activity in favour of the victim and related to damage caused. This activity cannot take more than two days a week and three hours a day, and respects the need of one day per week to rest and takes into account the school hours and frequency as well as other activities that the court considers important for the formation of the child. Overall, this activity may not exceed 12 hours spread over for a maximum of 4 weeks.

**Payment of economic benefits** (restorative-based measure): paying to a non-lucrative entity a certain amount of money (articles 4 and 12).

**Activities in favour of the community** (restorative-based measure): developing an activity in favour of a non-lucrative entity (maximum of 60 hours during no more than 3 months) (articles 4 and 12).

**Imposition of conduct rules:** the youngster may be obligated to keep away from certain places, people, groups or associations, not to drink alcohol and not to bring along certain objects (articles 4 and 13).

**Obligations imposition:** the youngster may be obligated to attend certain activities (e.g., attend school subjected to control of attendance and school performance; attend activities in a club or juvenile association, etc.) or programs (e.g., outpatient or inpatient psychiatry treatments). In any case, the court should seek the minor's adherence to the treatment plan, being required the minor's consent when he/she has more than 16 years old (articles 4 and 14).

**Formative programs:** sexual education, road safety education; training of personal and social skills, sports participation or vocational training are some types of formative programs directed to offenders (articles 4 and 15).

**Educational monitoring:** personal plan which aims to train and support the youngster in some priority areas, defined by the court. Within the scope of this plan some conduct rules or obligations may be imposed as well as the frequency of training programs. Educational monitoring can last a minimum of three months and a maximum of two years (articles 4 and 16).

Secondly, custodial measures are the more restrictive measures, applied to more severe cases (articles 1, 2, 4 and 17 - LTE), which implies the placement of the youngster on an educational centre. Depending on age, number, type and severity of the crime, the minor can be placed on educational centre within an open, semi-open or closed regime:

**Open regime:** the youngster can develop scholar, educational or training, working, sport and free-time activities outside the educational centre. The minor can also spend the weekends and holidays with his/her parents or legal representatives (article 167 LTE).

**Semi-open regime:** the youngster has to develop scholar, educational or training, working, sport and free-time activities inside the educational centre. The minor may perform the previous activities outside the centre in order to accomplish certain individual educational goals (article 168).

**Closed regime:** the minor only leaves the educational centre due to judicial obligations, healthcare needs or other exceptional reasons (article 169).

Semi-open and closed regimes can only be applied to the most severe cases. For instance, the closed regime is applied when the minor has perpetrated a crime punishable with a prison sentence greater than five years or when the minor has perpetrated two or more crimes against the person punishable with a prison sentence greater than three years and cumulatively the youngster is 14 years or older at the time of the measure enactment (article 17).

Regarding custodial measures, the legal amendment of LTE (law 4/2015 from 15 January) has introduced two new practices:

**Intensive supervision period** (article 158-A LTE): in regard to institutionalized youngsters, when imposed by the court, the youngster's social rehabilitation may comprise a supervision period. Intensive supervision period starts in the final period of the custodial measure and it can be accomplished outside the educational centre, during at least 3 months and no more than 1 one year.

This process aims to evaluate the skills developed inside the educational centre, as well as institutionalization's impact on personal and social behaviour. Intensive supervision occurs on youngster's natural context of living or alternatively in "autonomy houses" and, in any case, cannot exceed a period greater than half of the duration of the enacted measure. During this period, the judge may enforce certain conduct rules (e.g., obligation to attend school, obligation of attendance in the workplace, obligation to live in a specific place or to appear regularly to the court). During the intensive supervision period the minor is accompanied by the social reintegration team, which is responsible for producing quarterly reports to inform the court. Intensive supervision measure is extinguished whenever it is shown that the youngster accomplished the obligations imposed by the court.

**Post-custodial monitoring** (article 158-B - LTE): if an intensive supervision period is not determined, once the custodial measure is ceased, the social reintegration services must monitor the minor's return to liberty and community life. If necessary, a promotion and protection case-file can be elicited to promote the reintegration of the youngster (ruled by Law 166/99 from 14 September). The *Youth Justice Act* revisited (Law 4/2015 from 15 January 2015) foresees the construction of 'residential units of transition' directed to youngsters who have recently left from educational centres, to facilitate their reintegration into society when they cannot count on the necessary support in their natural context of life.

Noteworthy, all the youth justice measures that are ordered can be reviewed. The measures revision can be asked by Public Ministry, by the minor, by the minor's parents or legal representatives (or whoever has his/her guardianship), by the lawyer and also by the entity that monitors the measure's execution. The revision can occur at any time (except on custodial measures) and in some cases is mandatory (see below).

Some specific circumstances may motivate the measure's revision (articles 136 et seq. LTE), specifically:

Measure's execution is not possible due to a fact not imputable to the minor;

Measure's execution has become too onerous for the minor;

Youth justice measure has become inadequate to the minor;

Youth justice measure has become needless due to the educational improvement of the minor;

The minor has intentionally put himself/herself in a situation that precludes measure implementation;

The minor has violated the duties associated with the measure's execution;

The minor over 16 years old has perpetrated a new criminal offense.

In addition, measure's revision is mandatory in some concrete situations to reassess the need for its implementation (article 136, nr.2 LTE) and one year after the beginning of the measure's execution or the last revision or, when the youngster is institutionalized under a semi-open or closed regime, six months after the beginning of the measure's execution or the last revision (article 137, nr.4 LTE).

The revision of a non-custodial or community measure serves the following purposes (article 138):

To preserve the current measure;

To change the conditions surrounding the measure's application;

To replace the current measure by another more suitable non-custodial measure;

To reduce the duration of the measure;

To cease the measure's execution, declaring its extinction;

To warn/advertise the youngster to the severity of his conduct and for any consequences thereof;

To order a custodial measure under semi-open regime, when the illicit fact perpetrated allows the application of a custodial measure under the semi-open or closed regimes. This measure is applied, as a last resort, when the youngster has incurred in non-compliance or has grossly violated the duties of the former measure.

The revision of the custodial measures (article 139) also have other purposes, besides those above mentioned, such as to extend the applied measure without any change in their regime, to exchange the execution's regime -establishing a more open or restrictive regime- or even to suspend the measure.

## 2. RESTORATIVE PRACTICES IN THE PORTUGUESE JUVENILE JUSTICE SYSTEM

Conceptually, restorative justice is a broad notion which incorporates several strategies and instruments (Costa, 2012). In the Portuguese juvenile justice system, penal mediation is the main restorative practice along with the above mentioned restorative-based youth justice measures. In the following sections, we present the features, proceedings and statistics regarding restorative practices in Portugal.

### 2.1. FEATURES

Mediation was first framed on the juvenile justice or *Youth Justice System* based on the argument that young offenders' accountability is essentially allocated on external factors. Though penal mediation turned out to be conceptualized as an important educational resource (Costa, 2012), it is rarely used in juvenile justice (Portuguese Permanent Observatory of Justice (OPJP), 2010). The important role given to mediation on LTE diverges from the current real scenario. In fact, we have witnessed a scarce presence of the victims in reparation measures and the almost inexistence of truly restorative or reparative aims (Castro, 2010).

Mediation can be understood as *“an informal and flexible process carried out by another impartial person, the mediator, which promotes an approximation between the offender and the victim, actively supporting them in the formulation of an agreement, which in turn should repair the damages caused by the illicit fact and contribute to peace restoration”* (Law 21/2007, Article 4, nr.1). The mediator is someone who helps to promote the communication between the victim and the offender and to find an appropriate solution to both (DGRSP, s/d). When applied to the judicial system, penal mediation aims a 'decriminalization' process, promoting at the same time the victim's role and the offenders' social rehabilitation (Costa, 2012).

Mediation and youth justice restorative-based measures may be applied to young offenders aged between 12 and 16 years old (Law 166/99), with an 'exceptional legal regime' that may extend these measures to offenders aged up to 18 years old. In addition, measures can be fulfilled until 21 years old. So, we are referring to an age range between 12 and 21 years old.

The principles guiding the implementation of victim-youngster mediation and restorative-based youth justice measures are (DGRSP, s/d):

**Accountability:** in contact with the victim, the youngster can easily become aware of their actions and consequences;

**Compensation of the victim:** compensatory features can be integrated on juvenile justice. Above all, this principle reflects an educational concern, in which the victim is seen as an instrument for achieving educational goals and making youngsters aware of their responsibility (Castro, 2010);

**Active participation:** the youngster and the victim can actively participate on the legal proceedings;

**Reducing bureaucratic and legal formal procedures:** mediation and restorative-based measures can engender participative and quickly forms of conflict resolution, avoiding youngster's later stigmatization.

## 2.2. THE IMPLEMENTATION OF RESTORATIVE PRACTICES IN THE JUVENILE JUSTICE SYSTEM

From the inquiry phase to the jurisdictional phase, several restorative practices, mainly mediation practices, can take place: elaboration of a conduct plan (which may integrate several restorative commitments); victim-youngster mediation; and restorative-based measures. Figure 1 illustrates the development of these practices taking into account the legal phases on the youth justice system.

We also may note that in the youth justice field, the elaboration of a conduct plan and the victim-youngster mediation together constitute the Portuguese Mediation and Reparation Program (MRP) monitored by the DGRSP -Directorate-General of Reinsertion and Prison Services (cf., Law 166/99 articles 42, 84 and 104; DGRSP, s/d; Silva, 2013). DGRPS is an administrative organism from the Justice Ministry intended to reintegrate the young offenders. In 2002, the DGRSP founded the MRP which intends to foster and build best technical and logistical conditions for the mediation case-files ordered by judicial authorities. Despite several efforts to the development of the Mediation and Reparation Program, it has been poorly implemented until now, but is in the process of being reactivated.

### ☉ Elaboration of Conduct Plan embedded in the Suspension of Legal Proceedings

During the inquiry phase, a youngster who has perpetrated a crime punishable with a sentence not exceeding five years and if youth justice intervention is still needed, the Public Ministry may introduce a conduct plan. The preparation of this conduct plan can be requested by the Public Ministry to the social reintegration/probation services or mediation services and may include several social engagements and reparation activities to be developed by the minor (some of them representing restorative-based commitments), such as:

Apologizing to the victim (restorative-based commitment);

Compensation (effective or symbolic) regarding the whole or partial damage by paying with pocket money or by providing an activity in favour of the victim (restorative-based commitment);

Achievement of certain goals at personal, educational and professional domains or at his/her free-time occupation;

Implementation of economic benefits or activities in favour of the community (restorative-based commitment);

Exclusion from certain places or peer networks.

DGRSP' mediation services can also be enacted in order to support the development of the conduct plan. If the conduct plan is agreed, the youngster must accomplish it and the youth justice case-file is then suspended.

### ☉ Victim-Youngster Mediation

Victim-Youngster Mediation is legally foreseen in the LTE (art. 42, art. 84 e 104). In the inquiry phase, the mediation is the closer procedure to the mediation done with adults and it depends on the decision of the Prosecutor's office, even if the mediation has been required by the youngster, their parents or legal representatives.

In a first moment, both the youngster and the victim are interviewed in order to evaluate the conditions surrounding the mediation. Parents or legal representatives of the young offender are also interviewed. During these interviews, certain conditions are assessed and mediation only occurs when these are totally satisfied and addressed. In regard to the young offender, he/she needs to:

Recognize the responsibility and damages associated to the perpetration of the illicit fact;

Display the ability or willingness to find solutions with the purpose of repair the caused damage;

Display willingness to participate on the mediation and to achieve the future agreement.

Taking into account the victim, the assessment must similarly evaluate:

Victimization experience and type of harm suffered;

Interest in being repaired and ending the conflict;

Interest in participating on mediation.

In case these conditions are guaranteed, a direct mediation starts. Each person has the opportunity to express how the illicit fact has affected her/his life. The mediator helps throughout the identification of unsolved problems and tensions. In the last phase, a mediation agreement is defined and written, being signed by the youngster, the victim, the parents or legal representatives and the mediator.

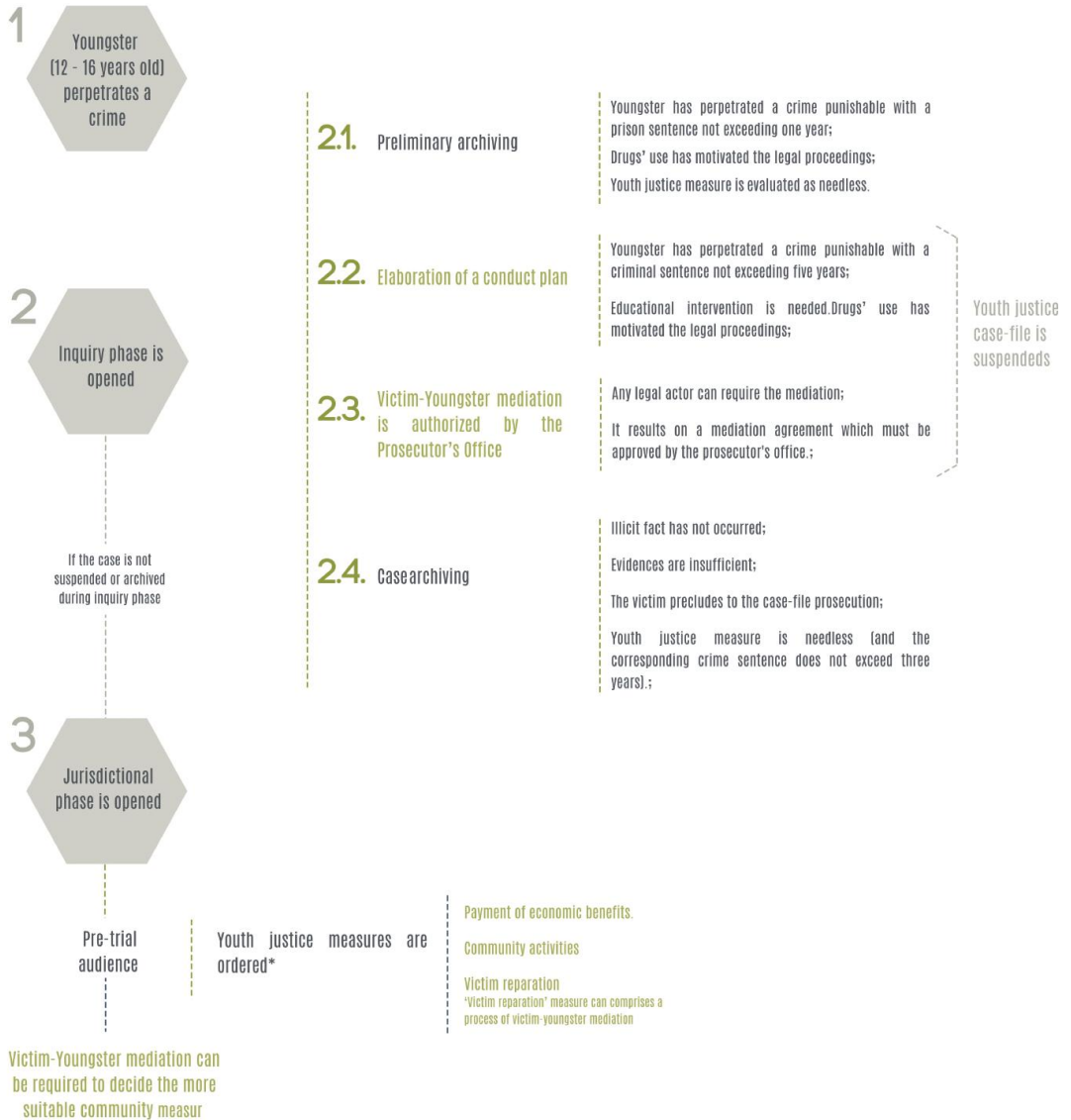
Following MRP program, DGRSP services are responsible for the practical implementation of victim-youngster mediation on juvenile justice field supporting the development of the mediation agreement. If this is approved by the Public Ministry, the youth justice case-file is suspended.

In the jurisdictional phase, victim-youngster mediation can also be required by the judge or prosecutor in order to obtain a consensus on the application of a non-custodial measure or to discuss how the 'victim reparation measure' should be implemented. In the cases where the Public Ministry proposes, in the request for opening the jurisdictional phase, the application of a non-custodial measure and is justifiable an abbreviated handling of the case, the judge may appoint a pre-trial audience (article 93, nr. 1c). This pre-trial audience is an informal audience that aims at a consensus. If the judge, during this audience, considers that the non-custodial measure proposed by the Public Ministry is appropriate seeks a consensus in applying it, listening to the youngster, his/her parents or legal representative, the advocate and the victim. If there is no consensus, the judge may refer the youngster to mediation services to seek an agreement to another non-custodial measure and suspend the audience for a period not exceeding 30 days (article 104, nr. 2 and 3 LTE). If an agreement is obtained the judge approves the proposal of the Public Ministry or apply the youth justice measure proposed within the scope of the intervention of the mediation services. In short, the use of mediation is only made if, at the outset, a consensus was not obtained.

### ☉ Restorative-based Measures

Some youth justice measures embrace restorative principles and practices, namely victim reparation, payment of economic benefits and activities in favour of the community. The 'restorative' youth justice measures are also monitored by DGRSP, whose teams supervise its implementation, ensuring its execution and drawing up the necessary legal reports.

Figure 1. Restorative Practices in Portuguese Juvenile Legal Proceedings



All boxes filled in green represent restorative practices.

\* Other measures are foreseen on LTE (see Juvenile Justice System in Portugal | General Overview on this paper).

Figure 1 only comprises restorative-based measures

### 2.3. STATISTICAL DATA ABOUT RESTORATIVE PRACTICES AT NATIONAL LEVEL

The last available statistics concerning victim-youngster mediation refer to 2008 and 2009. The number of mediation case-files accomplished by DGRSP was 44 in 2008 and 49 in 2009. In regard to suspension of legal proceedings with mediation, on 2008 and 2009, 92 and 93 case-files in respect were conducted by DGRSP.

At last, in respect to restorative-based measures, Table 1 shows the quantitative evolution between 2008 and 2013. On December 2013, no victim reparation measure neither payment of economic benefits was ongoing. Activities in favour of community represent 183 measures, less than on the same period of 2012 when this represented 217 applied measures. Altogether, victim reparation measure and payment of economic benefits are seldom applied to the young offenders under youth justice system.

Table 1. Restorative-based measures between 2008 and 2013

| Year                                 | 2008        | 2009        | 2010        | 2012        | 2013 <sup>8</sup> |
|--------------------------------------|-------------|-------------|-------------|-------------|-------------------|
| <b>Measure</b>                       |             |             |             |             |                   |
| Victim<br>Reparation                 | 7           | 6           | 4           | 1           | 0                 |
| Payment of<br>economic benefits      | 2           | 2           | 3           | 3           | 0                 |
| Activities in favour<br>of community | 186         | 189         | 118         | 217         | 183               |
| <b>Total</b>                         | <b>1196</b> | <b>1188</b> | <b>1116</b> | <b>1703</b> | <b>1639</b>       |

Source: DGRSP (2013; 2012; 2010; 2009; 2008)

<sup>8</sup> Data refers to the number of ongoing case-files in the last month of each year.

### 3. VICTIMS IN RESTORATIVE PRACTICES

The “Victim Status” (Law 130/2015) was recently created and introduced in the Portuguese justice system, based on the Directive 2012/29/EU of the European Parliament and of the Council that sets standards on the rights, support and protection of victims of crime. This law establishes a series of principles and rights, such as: Equality principle; Confidentiality principle; Principle of consent; Right to information and Right to protection, to name a few. It contains a set of measures aimed at ensuring the protection and promotion of the rights of victims of crime (art. 1) articulated with other legislation – Law 93/99 modified by the Law 29/2008 and Law 42/2010 - and not impairing the procedural rights and duties of the victim contained therein (art. 2).

In this section we focus mainly on the rights of victims in practices of restorative justice. Accordingly, we start this section by explaining how penal mediation is generally understood and implemented in adult criminal matters (Law 21/2007 from 12 June). After this contextualization, we introduce and discuss the guarantees enjoyed by victims in Portuguese restorative criminal proceedings.

In the adult justice system, penal mediation can only occur at ‘inquiry phase’ (i.e., investigation phase) at the initiative of the offender, the victim, or the Public Ministry (article 3, nr.2) who is also responsible for the validation of the agreement and for ending up the process (article 5, nr.7; article 3, nr.6) (Costa, 2012). According to the typology of Groenhuijsen (2000) penal mediation is integrated in the Portuguese traditional justice system in that the process cannot be delivered to the mediation system without a formal complaint and sufficient crime evidences to accuse the offender. In regard to its scope, penal mediation and restorative strategies are further

legally foreseen in the following cases:

Criminal proceedings depend on the victim's complaint or private prosecution – Law 21/2007 from 12 June (article 2, nr.1);

If the crime depends only on the victim's complaint then mediation can only occur if the crime is against persons or property - Law 21/2007 from 12 June (article 2, nr.2);

According to the point nr.3 of this regulation mediation cannot take place in the following cases:

If the crime is punishable with a prison sentence exceeding five years

If the crime is against sexual freedom and self-determination

If the crime is of embezzlement, corruption and influence peddling

If the victim is less than 16 years old

If a speedy trial is applicable

Thus, concerning public crimes (e.g., human trafficking, white-collar criminality) and crimes against sexual liberty or sexual self-determination, restorative strategies cannot be applied (Carmo, 2010).

After the decision to proceed with the mediation, the mediator has three months to finish the mediation agreement, signed by the offender and the victim. This period can be extended to more two months since a high agreement probability is presented (article 5). The mediation agreement cannot express custodial sanctions and other duties that may harm offender's dignity. Besides, sanctions or duties cannot exceed a period of 6 months implementation (article 6).

### 3.1 . GUARANTEES ENJOYED BY VICTIMS IN CRIMINAL PROCEEDINGS

In terms of the rights and guarantees which are legally foreseen to the victims of a crime, hereafter we emphasize those which are related to penal mediation and other restorative practices (cf., Carmo, 2010; Law 21/2007; Law 112/2009; Law 29/2013), both on juvenile and adult justice systems:

Mediation requires always the victim's consent: mediation practices can be elicited by a court order and also by a mutual decision taken by the offender and the victim. In both cases, the victim has to consent the penal mediation and he/she can leave the mediation at any time. Mediation is then a voluntary process (article 3, nr.5, nr.6, nr.7 – Law 21/2007);

Mediation is a confidential process: the mediator must keep all the information discussed at mediation sessions under secrecy. Information cannot be used in court (article 4, nr.5 – Law 21/2007);

Victim is an active agent of the penal mediation: the victim is an active agent, whose opinion is on the basis of the mediation agreement. Even so, the ultimate decision is given by the Public Ministry, who must approve or disapprove the mediation agreement (article 5 – Law 21/2007);

Victim has the right to a representative: if the victim cannot understand the right to complaint, mediation can be developed with a representative (i.e., a complainant) (article 2, nr.4 – Law 21/2007);

In face with offender non-compliance to the mediation agreement, the victim can restart the penal case-file: if a mediation agreement is not, partially or

fully, accomplished by the offender or offenders, the victim can renew the complaint and the penal case-file is then reopened in regard to the non-compliant offenders (article 5, nr.4 – Law 21/2007);

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