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Restorative Justice in Criminal Cases: The Italian Reform

1. Introduction: paths towards the recognition of restorative justice in the Italian criminal justice system

With the approval of Legislative Decree No. 150 of 10 October 2022, the Italian criminal justice system developed an organic discipline of restorative justice (hereafter RJ). In line with international and supranational indications, RJ is defined by Article 42 of the decree as "any program that allows the victim of the crime, the person named as the offender, and other persons belonging to the community to participate freely, consensually, actively and voluntarily, in the resolution of issues arising from the crime, with the help of an impartial, adequately trained third party called a mediator."[1] RJ practices, if implemented through the modalities indicated by the Italian legislature, are, thus, recognized as legitimate tools for dealing with crimes. Modalities of access to the programmes and their legal effects are expressly regulated by law, as I discuss below (section 3.1).

In the Italian legal system, the first applications of RJ occurred within the juvenile jurisdiction from the mid-1990s, with pioneer experiments, mainly thanks to the particular cultural sensibility of a part of the judiciary and among scholars of criminal law. Even in the absence of an *ad hoc* rule, a broad interpretation of the juvenile trial law allowed for the activation of criminal mediation procedures (in offices established mainly through the work of the private social sector) and the possibility of attributing value to them in criminal cases. By contrast, RJ experiences in adult criminal justice have been slow and fragmentary.

The first explicit normative recognition took place in the jurisdiction of the so-called "justice of peace," which is competent to judge crimes deemed to be of low negative value and/or reduced social negative impact. Within the ordinary jurisdiction, it is especially since 2014 that provisions of a restorative nature have been introduced. The "suspension of proceedings with probation of the defendant" (Article 168 bis Penal Code), the "extinction of the crime due to restorative conduct" (Article 162 ter Penal Code), and the "exclusion of punishment for particular tenuousness of the

[1] All translations unless otherwise indicated are by me.

fact" (Article 131 bis Penal Code) have allowed some experiments of RJ in criminal proceedings. During the imprisonment phase, RJ programs have sometimes been implemented and have found normative recognition through the institutions of probation to community service and conditional remission of sentence.

Nevertheless, so far these have been, in adult justice especially, only slight phenomena, hampered by two orders of factors. On the one hand, from a regulatory point of view, such restorative provisions have a limited scope of application, rather limited effects, and structural characteristics of a prescriptive type that are sometimes hardly compatible with RJ programmes (which are based instead on the assumption of voluntary participation). On the other hand, on a strictly practical level, the lack of specific regulation of access to RJ services and their accreditation within national territory engendered operational difficulties, low cultural sensitivity of justice workers, mistrust, and ambiguity.

With Legislative Decree 150/2022 the picture changed significantly and RJ fully entered the Italian system. An acceleration towards the recognition of RJ was likely prompted by the particular sensitivity of the proposing minister (Marta Cartabia) to this issue. In any case, a fertile ground for the development of RJ in the Italian system already existed: the increasing theoretical and cultural awareness of the topic and the attention given to the growing enhancement of restorative programmes in many European states.[2] Earlier suggestions for reform advanced already some years earlier by other governmental bodies to increase the use of RJ paths can all be considered traces of a gradual and continuous tendency towards recognition of RJ within the Italian legal system. Above all, the introduction of specific legislation was also motivated by the need to comply with Italy's explicit commitments in Europe, in particular: Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime; the Council of Europe (CoE) Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters (adopted by the Committee of Ministers on 3 October 2018); and the "Venice Declaration," adopted by the Conference of Ministers of Justice of the Council of Europe on 13 December 2021, during the six-month Italian Presidency.

In light of the significant -European influence on the Italian national reform, before examining the new decree, it is appropriate to briefly recall the normative development of RJ in Europe and the theoretical debate that accompanied it.

2. Restorative justice in Europe: notions, frameworks and common enforcement mechanisms

European law today clarifies what is to be meant by the term RJ. We find two normative definitions. The first, which has matured within European Union (EU) law, defines it

[2] F. Dunkel, J. Grzywa-Holtern, P. Horsfield, *Restorative Justice and Mediation in Penal Matters*, Mönchengladbach 2015.

as "any process that allows the victim and the offender to actively participate, if they freely consent to it, in the resolution of issues resulting from the crime with the help of an impartial third party" (Article 2(1)(d) of Directive 2012/29/EU). The second, which is enshrined in the law of the Council of Europe , identifies RJ as "any process that enables persons who suffer injury as a result of a crime and those responsible for such injury, if they freely consent to it, to actively participate in the resolution of issues resulting from the crime, through the help of a trained and impartial third party" (Article 2 of Recommendation CM/Rec(2018)8, which within the CoE framework is the most up-to-date document after the earlier Recommendation No. R (99)19).

These are definitions that have a common ground. More generally, the two regulatory documents have significant elements of convergence about the framework that Member States are asked to adopt to implement RJ practices. These are mainly: application assumptions, operational standards and training of mediators/facilitators, evaluation of the outcomes of restorative paths, and their normative recognition. Within the limits of this article, I cannot analyse in detail the provisions of the European legislation. I will, however, recall its essential elements through a brief description of the mechanisms for applying RJ in Europe.

To understand how RJ can affect the criminal justice system, it is necessary to clarify what is meant by initiating a process, programme, or practice of RJ and giving it normative implementation. The most widely used RJ practices in Europe are criminal mediation (applied mainly on the Continent) and family group conferencing or simply conferencing (a tool used mainly in the United Kingdom and Ireland). Criminal mediation involves a confrontation between offender and victim in the presence of a third party called a mediator (that is, a facilitator); conferencing is a kind of mediation extended to parental groups and support persons.

Focusing exclusively on the common aspects of these practices, I can say that the enforcement mechanism works as follows. The RJ office, which in some countries may also be simply a specialized section of the police, while in others it is an *ad hoc* structure, comes into contact with the offender and the victim, usually following a decision of the judicial authority that refers the case to it. The RJ office conducts preliminary interviews to ascertain whether the main conditions are met in order to begin an RJ programme: the first and foremost condition is voluntary participation. Having acquired the informed consent of both subjects and the recognition of the so-called basic facts by the offender, the office organizes the meetings. Communication between offender and victim takes place through a sensitive and in-depth analysis of the actual motivation for committing the crime, the harm (including psycho-emotional harm) concretely suffered, the pain actually felt as a result of the crime, and the victims' restorative expectations. In some models, the path can also take place with indirect victims (that is, between offender and those who indirectly suffer the consequences of the offence, such as the parents or children of the deceased victim), surrogates, or non-specifics (that is, between the offender and the victim who suffered an offence of a similar nature, but carried out by a different person). If the confrontation so allows, the content of the agreements aimed at repairing the consequences of the offence

is identified. In the absence of a specific restorative agreement, a mutually beneficial dialogue, which has resulted in a recomposition of points of view, a new balance between the parties based on mutual recognition, can be considered a positive outcome, especially in humanistic models of criminal mediation, that is, models that aim at the transformation of the conflict as the ultimate goal.[3]

With respect to the concrete effects of restorative programmes on the criminal justice system, in the event of an interruption or negative outcome of the procedure, the judicial authority does not have to take this into account in the continuation of the criminal proceedings. If, according to the assessment of the mediator/facilitator, a positive result is achieved instead, this is likely to favourably influence the response of the system towards the offender, albeit with a diversity of effects because of the specificities of the systems, and depending on whether the restorative programme intervenes at a pre-trial, trial or post-trial stage. During the pre-trial phase, it may constitute the prerequisite for a dismissal of the proceedings or for establishing other forms of diversion; during the cognitive phase, it will be evaluated by the judge via the criteria of making a sentence commensurate or through other suitable instruments to calibrate the sanction in a sense favourable to the offender. Also, with more radical effects, the result of mediation may justify a verdict of acquittal; during the executive phase, it will possibly be evaluated as a useful element for the granting of *lato sensu* benefits to the convicted person.

The process thus outlined in its essential features is the result of a tendency towards an affirmation of the so-called restorative justice movement, which developed mainly from the 1970s in North America and then enjoyed extensive expansion. RJ is one of the major trends of the last four decades in criminological thought. It is a trend that in some ways competes with, and in other ways complements, other tendencies in criminal law with seemingly opposite aspects.[4] Moving from different theoretical perspectives (abolitionist, victimological, communitarianism), RJ advocates propose models of crime management that are characterized by a focus on listening to the parties in conflict (the victim, the offender, and the community) and meeting their expectations.

Models of RJ have been implemented in many jurisdictions; usually through successful pilot experiments that have been followed by specific regulatory recognition. In Europe, the Council of Europe (COE) Recommendation No. R (99) and the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings of the Council of the European Union were the first reference documents; subsequent normative sources, namely the previously noted Directive 2012/29/EU and CoE Recommendation CM/Rec(2018)8 have continued to promote the use of RJ programmes, although they also dwell on the need to identify specific safeguards (especially for the victim of a crime) so that the fundamental rights of those taking part in RJ are protected. Some specific cautions are then suggested for the application

[3] J. Morineau, *L'esprit de la Médiation*, Toulose 1998.

[4] J. Pratt, *Penal Populism*, New York 2007, p. 124.

of RJ in crimes that present structural power imbalances between subjects, such as in domestic violence.

2.1. The gradual establishment of RJ on the cultural and normative level

There are many reasons for the interest in RJ, as well as for its slow but growing diffusion in individual legal systems. There are four important factors:

(a) First, its aptitude to present itself as a radical alternative to criminal law, one capable of overcoming the limitations of criminal law in managing the conflict arising from crime. Especially in its first theoretical formulations, RJ stands as a wide-ranging tool: not only as something different, but also as something better than criminal law. Some theoretical positions state that the goal of RJ is the creation of relationships and communities based on mutuality, respect, harmony, and peace.[5]

Indeed, *prima facie* RJ has alternative characteristics to the criminal justice system. If public punishment emphasizes the vertical dimension of the crime, as it places the agent subject in relation to the norm and the state, RJ highlights its horizontal and interpersonal dimension.[6] It is a justice of the concrete case, in line with a pragmatic-empirical philosophical tradition.[7] Centrality of the victim and the community of reference, listening to emotional experience, satisfaction of expectations and needs, healing of wounds, and conflict transformation: these are the categories used by RJ and ones that seem to outline the signs of a new semantics of crime. What is relevant is not so much the normative dimension, and, thus, the legal interest protected by the incriminating norm, but the human dimension: the consequences suffered by flesh-and-blood people, and emotional components related to the lived experience. It is, therefore, not surprising that RJ is generally presented as a paradigm shift in the criminal justice system.[8]

(b) A second factor concerns language. RJ uses a vocabulary very different from that in use in criminal law. Words such as "dialogue," "forgiveness," and "conciliation," are an important part of restorative vocabulary. One of the fathers of RJ, Howard Zehr, speaks of a "change of lens" through which to view crime.[9] Expressions such as "harm," "conflict," "prejudice," and "problematic situation" are used instead of those of offence/crime; there is a focus on the need to establish communicative channels between those who suffer (victims) and those who act (offenders) in such situations; it is a matter of "putting things right" and not of applying a "punishment."[10] The conflict is returned to the people, who had been "dispossessed" of it.[11]

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5 M. Umbreit, M. Peterson Armour, *Restorative Justice Dialogue*, New York 2011, p. 67.

6 J.M. Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal*, Barcellona 2018, p. 21.

7 R.A. Duff, *Restorative Punishment and punitive restoration* [in:] *Restorative Justice. Critical Concepts in Criminology*, vol. 4, ed. C. Hoyle, London–New York 2010, p. 431.

8 B.D. Meier, *Restorative Justice – A New Paradigm in Criminal Law?*, "European Journal of Crime, Criminal Law and Criminal Justice" 1998, vol. 6, no. 2, pp. 125–139.

9 H. Zehr, *Changing Lenses*: *A New Focus for Crime and Justice*, Scottdale 1990.

10 J. Pratt, *Penal Populism*…, p. 124.

11 N. Christie, *Conflict as Property*, "British Journal of Criminology" 1977, vol. 17, no. 1, pp. 1–15.

If the judge is "impartial," the mediator/facilitator, on the other hand, is "equidistant" or rather "equi-close," not so much equally distant from, but equally close to the parties. This is evocative language, especially when compared to the "cold expressions" of criminal law.

(c) Another driving force is the ability of RJ to offer benefits to all parties to the conflict, so much so that it has established itself as "therapeutic justice." Much research has been conducted to ascertain the degree of satisfaction of those who take part in RJ. The rates of fulfillment regarding initial expectations are generally high. Victims appear to be more satisfied, less fearful, and less angry after participating in an RJ programme than in a traditional criminal process.[12] Also in relation to psychological trauma resulting from the crime, RJ paths strengthen their coping skills.[13] As for the offender, there appears to be an increased awareness of his/her actions and a significant reduction in recidivism rates.[14]

(d) One reason for interest in RJ, thus, stems from a growing dissatisfaction of penal doctrine with punishment. The need is strong to find an alternative solution to the mere affliction of suffering, to mitigate the pain[15] that criminal law is structurally, inevitably, meant to bring. There is a dissatisfaction that concerns the functions concretely exercised by punishment and that is projected onto the ideal purposes traditionally attributed to it. In this brief article I certainly cannot retrace the stages of a debate rooted in foundational issues within criminal law. I can only recall in a somewhat severe summary its main problematic nodes, referring to the relevant literature for appropriate insights.[16] Criminal doctrine is well aware of the weaknesses in the epistemological status of traditional theories of punishment. The retributive conception is challenged by the logical and moral untenability of what is termed a "doubling of evil"[17]; the preventive-consequentialist conception is challenged by a lack of empirical evidence about the real deterrent and orienting force of penal norms;[18] re-educative finalism is questioned by the punitive illusion, that is, the enormous distance between the affirmed ideal of just punishment and the reality of the unequal distribution of punishments, as well as by the structural inability of treatment models to reduce the re-entry of the offender into the criminal world.[19]

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[12] A.M. Nascimento, J. Andrade, A. Castro Rodriguez, *The Psychological Impact of Restorative Justice Practices on Victims of Crimes – a Systematic Review*, "Trauma, Violence & Abuse" 2022, vol. 24, no. 3, pp. 1–19.

[13] A. Pemberton, F.W. Winkel, M. Groenhuijsen, *Evaluating Victims Experiences in Restorative Justice*, "British Journal of Community Justice" 2008, vol. 6, no. 2, p. 99.

[14] G. Robinson, J. Shapland, *Reducing Recidivism: A task for Restorative Justice?*, "British Journal of Criminology" 2008, vol. 48, no. 3, pp. 337–358.

[15] J.M. Silva Sánchez, *Malum passionis*…

[16] B.L. Apt, *Do we know how to punish?*, "New Criminal Law Review" 2016, vol. 19, no. 3, pp. 437–472.

[17] M. Donini, *Pena agita e pena subita. Il modello del delitto riparato* [in:] *Studi in onore di Lucio Monaco*, ed. A. Bondi, Urbino 2020, pp. 389–424.

[18] G. Fiandaca, *Prima lezione di diritto penale*, Roma–Bari 2017, p. 21.

[19] D. Fassin, *Punir. Une Passion Contemporaine*, Paris 2017.

Turning from this overall feeling of disenchantment, an important scholarly trend calls for "rethinking punishment," imagining a punishment that "is not suffered" but "acted upon."[20] RJ is seen as the main tool, although one that is not sufficient by itself, through which it is possible "to overcome the model of the response to crime conceived in terms of correspondence in order to access a design dimension of that response."[21]

2.2. Some problematic issues in the relationship between RJ and the criminal justice system

The growing affirmation of RJ cannot exempt us from assessing the problematic issues that some authors believe would result from its grafting into the criminal justice system.

(a) The enhancement of the interpersonal dimension of the crime may be considered an undue form of the privatization of justice, which is all the less desirable the more it involves crimes of serious negative import: it would bring with it the risk of generating dissimilarities in application dissimilarities and amplifying power imbalances, and it would clash with the public dimension of *ius dicere*, which in the penal sphere is deemed constitutionally necessary.[22]

(b) The evocative language of RJ itself may be one of the main factors resisting its dissemination. It is precisely its marked difference from the traditional categories with which we are used to view the victim, the perpetrator, and the crime that would end up provoking a certain amount of mistrust and scepticism and distance the possibility of public support for its development.[23] Compassion, which is undoubtedly endowed with a seductive force, could not possess normative role-guidance, since it would lend itself to overly differentiated and potentially arbitrary applications: suffering is not measurable by an objective yardstick, but through the feeling, the sensations that we ourselves attribute to those who suffer.[24]

(c) Regarding the positive effects that would result from participation in RJ practices, the results do not always seem unambiguously and easily interpretable.[25] Victims' reparative needs do not necessarily replace the need for revenge, especially in more serious crimes; there is the risk of a so-called. "bubble effect," that is, there is a sense of satisfaction that is only temporary and that dissipates over time.[26] The results about

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[20] M. Donini, *Pena agita e pena subita*…

[21] L. Eusebi, *Strategie preventive e nuove risposte al reato*, "Rivista italiana diritto e procedura penale" 2021, no. 3, p. 829.

[22] A. Ashworth, *Some doubts about restorative justice* [in:] *Restorative Justice. Critical Concepts in Criminology*…, vol. 1, p. 70.

[23] J. Pratt, *Penal Populism*…, p. 142.

[24] A. Acorn, *Compulsory Compassion. A critique of Restorative Justice*, Toronto 2004.

[25] A. Hartmann, *Victims and restorative justice. Bringing theory and evidence together* [in:] *Routledge International Handbook of Restorative Justice*, ed. T. Gavrielides, London–New York 2018, p. 127.

[26] P. McCold, *Protocols for evaluating restorative justice programmes*, "British Journal of Community Justice" 2008, vol. 6, no. 2, p. 17.

the reduction of recidivism rates are not very different from those obtained through other treatment interventions well calibrated to the offender's characteristics,[27] and, in any case, they do not always seem to calculate the variable of so-called self-selection (that is, that those willing to participate already present personal inclinations so that future abstention from crime can be presumed).

(d) RJ would fail to fulfill the social purposes attributable to punishment. The main obstacle is whether or not it can be considered a just response to crime according to collective perception.[28] In some ways, from a symbolic-functional point of view reparation falls into the same class of acts as punishment, since it is capable of expressing recognition of the violated norm and giving rise to an effect of consolidating social trust in the functioning of the legal system.[29] Nevertheless, it seems to be characterised by a quantitative insufficiency, which can be understood as a deficit of expressive intensity and effectiveness, which prevents it from rising to the functional equivalent of state punishment.[30] The relations with the principle of rehabilitation may be complex. While it is true that the dialogic-reparative path can certainly increase the offender's awareness of the negative value of his or her conduct, the risks of discriminatory applications should not be overlooked. Distinctions would be interposed between categories of convicts, those capable or incapable of performing meaningful acts of reparation.

Indeed, critical objections come even from the supporters of RJ themselves. Thus, the recognition of RJ in the penal system might take place via undesirable trends.[31] These are: (a) the focus on an increasing bureaucratization of the mediator, which would also be witnessed by a particular interest in practice monitoring procedures; (b) the limitation of RJ to the criminal context alone, excluding its broader applicative potential in other spheres of social interaction; and (c) the idea of RJ understood as a "product service," as witnessed by the emphasis in international standards on terms such as "services," "processes," "practices," and "programmes," which are followed by specific "outcomes." In developing thus, RJ would move away from its origins. It would run the risk of being engulfed by criminal justice, replicating its flaws, of producing an "imitator paradox."[32] As it is gradually absorbed into the meshes of traditional criminal justice, it would find itself in the paradox of following the same tendencies, the same flaws.

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[27] J. Doak, D. O'Mahony, *Evaluating the success of restorative justice conferencing based approach* [in:] *Routledge International Handbook of Restorative Justice*…, pp. 211–223.

[28] J. Pratt, *Penal Populism*…, p. 143.

[29] C. Daly, *Restorative Justice: The real story* [in:] *Restorative Justice. Critical Concepts in Criminology*…, vol. 1, pp. 281–308.

[30] J.M. Silva Sánchez, *Malum passionis*…, p. 124.

[31] B. Pali, G. Maglione, *Discursive representations of restorative justice*, "European Journal of Criminology" 2023, vol. 20, issue 2, pp. 507–527.

[32] G. Pavlich, *Governing Paradoxes of Restorative Justice*, London 2005, p. 14.

2.3. Summary: balance

The reasons that discourage the recognition of RJ in the criminal justice system, especially when viewed as complementary rather than alternative, can perhaps be seen as less convincing.

(a) RJ is not a mere privatization of justice, dealing with conflict-processing practices that, once explicitly recognised, take place under the banner of the law. What matters, above all, is that the burden of the reparative path and its meaning be brought to the attention of the public authority (the judicial authority) and thus, through it, of the community.

(b) Restorative language is part of a process of rediscovery of emotions and feelings, which has long been encouraged in the humanities.[33] There is nothing to prevent valuing the more emotional dimension of the conflict of crime, if this does not result in the injury of the rights of those who take part in the reparative process.

(c) While it is true that in the evaluation of restorative programmes one must take into account the many variables capable of modifying their outcomes, it is also true that at least two basic values must be recognized: the effects appear to be able to be evaluated in a positive sense overall; RJ does, however, have the merit of having submitted itself to a level of empirical verification to which traditional criminal justice remains reluctant to submit itself.

(d) Finally, the alleged incompatibilities between RJ and the purposes of punishment do not seem to be convincing. According to some, RJ operates in synergy with the traditional purposes of punishment.[34] Regarding the relationship with retribution, RJ is also "backward-looking," like the retributive position. There remains a close connection between past actions (the offending conduct) and obligations arising from them (reparation).[35] The key difference lies in the fact that in RJ there is no focus on the suffering of the offender, but a positive obligation is required. There is an activism on behalf of the victim or the community. RJ complements and supplements retribution, but does not cancel it. With reference to preventive theories, on the one hand, it has been pointed out that RJ can have preventive effects in the long run, according to the paradigms of "procedural justice" (the more satisfied protagonists are, the more willing they are to refrain from crime) and "reintegrative shaming."[36] On the other hand, the "communicative" components of RJ programmes have been emphasized: despite the differences that obviously exist between punishment in the strict sense and the RJ path, the latter, once emancipated from its representations as "soft justice,"

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33 M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, Cambridge 2001.

34 H. Dancig-Rosenberg, T. Gal, *Characterizing multi-door criminal justice: A comparative analysis of three criminal justice mechanisms*, "New Criminal Law Review" 2020, vol. 23, no. 1, pp. 139–166.

35 Z.D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, "Journal of Dispute Resolution" 2005, issue 2, p. 376.

36 J. Braithwaite, *Crime, shame and reintegration*, New York 1989.

should not be seen as a radical alternative to punishment, but as an alternative form of punishment.[37]

From this perspective, RJ would retain the ability to send both a deterrent and guiding message to the community. At the same time, offender management that can be oriented in a restorative-reconciliatory rather than a retributive direction is anything but historically unprecedented.[38]

3. The "Cartabia reform"

As mentioned at the beginning of this article, the reasons pushing for the recognition of RJ within the criminal justice system have found a gradual acceptance in Italy: first through pilot experiments in the 1990s in juvenile justice, then through some timid normative recognition in adult justice, and, finally, with Decree 150/2022 (otherwise known as the "Cartabia reform," named after the minister proposing it), RJ officially entered the system.

Two directions were followed by the Cartabia reform. With the first (see 3.1 below), the Italian legal system introduces an "organic discipline of RJ"[39] (Articles 42–67 of Decree 150/2022), that is, RJ is given identity and form by identifying its principles, by specific implementation methods, and by the creation of RJ offices throughout the country. With the second guideline (see 3.2 below), the law defines through which regulatory tools and with what legal effects RJ programmes are grafted onto the system.

3.1. The "organic discipline" of RJ

With the "organic discipline of RJ," Italian law: (i) provides the reference coordinates for the implementation of RJ ("definitions, principles, objectives," conditions of "access to programmes," "guarantees and duties for participants and mediators," and "types of eligible programmes, potential outcomes and their evaluation by the judicial authority"); and (ii) devotes a specific regulatory section to the creation of the structures competent to manage, organise, and monitor the RJ programs, as well as to the identification of the rules for the training and qualification of criminal mediators.

In (i), the decree complies with the indications coming from European sources on RJ, transposing into domestic law norms, practices, procedures, and guarantees long established on the international and supranational level. However, the Italian provision is characterized by some peculiarities.

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37 R.A. Duff, *Punishment, Communication, and Community*, Oxford 2001, p. 97.

38 A. Bottoms, *Some sociological reflections on restorative justice* [in:] *Restorative Justice and Criminal Justice: Competing or Reconcilable Programs?*, eds. A. von Hirsch, J. Roberts, A. Bottoms, K. Roach, M. Schiff, Oxford 2003, pp. 79–113.

39 Una "disciplina organica della giustizia riparativa" (Comprehensive Regulation of Restorative Justice).

With regard to potential participants in RJ programmes (Articles 42 and 45 of the decree), in addition to the "victim" and the "person indicated as the perpetrator of the offence," "other subjects belonging to the community," as well as "anyone else who has an interest in it," are included. The victim of the offence is defined broadly, including in this formulation not only a "family member," but also legal entities. The offender is defined with terminology that does not exactly correspond to that ("offender") in use in the international context. It speaks of "the person indicated as the author of the offence." This is a lexical choice that, according to the promoters of the reform, "balances the due respect for the presumption of innocence until eventual final conviction, on the one hand, and the need to maintain the equal consideration of the victim of the crime and of the one who, although definitively held responsible for the same crime, is not forever diminished by the experience of guilt and offence."

With respect to permissible RJ "programmes" (Article 53 of the decree), two aspects should be stressed. The first is that, in addition to proposing the models commonly indicated on the international level, namely "author-victim mediation," "family group conferencing," and "circles," the decree includes in this notion, through an open formula, "any other dialogic programme led by mediators." The second is that the legislature expressly states that mediation can also take place between perpetrators and surrogate or nonspecific victims, "that is, with victims of crimes other than the one for which they [perpetrators] are being prosecuted."

With respect to "access" to RJ programs (Article 44 of the decree) it is provided that access is allowed "at every state and level of the proceedings and that there is no preclusion by reason of the offences or their seriousness"; and that "in the case of offences prosecutable on complaint, access may be granted even before the complaint is brought."

Italian regulations to ensure safe and guaranteed participation in RJ programmes are mostly in line with international standards. The decree dictates regulations aimed at making effective the right of participants to receive adequate information about the right to access the programmes and to express an informed consent to participation, including through the right to language assistance. The law, moreover, stipulates that information about the right to access RJ programs be provided not only by the judicial authority, but also by all other public agencies that in any capacity are in contact with the same individuals. As for the guarantees of mediators, the "duty of confidentiality" is stipulated, and specific rules are provided to make effective the "non-usability of statements" and the "protection of secrecy" in relation to the contents of the activity carried out. In any case, a peculiarity of the Italian regulations is that neither in the section on "guarantees of RJ programs" (Articles 47–52 of the decree), nor in the section on "preliminary activities" (Article 54 of the decree), is the recognition of the "basic facts" by the perpetrator required. This is despite the fact that this is a requirement under European law (see 3.4 below), both within the framework of the European Union (Article 12 of European Directive 2012/29/EU) and within the framework of the Council of Europe (rule number 30 of Recommendation CM/Rec(2018)8 of the Committee of Ministers).

As for the "restorative outcome," this is defined as "any agreement, resulting from the RJ programme, aimed at repairing the offence and capable of representing the mutual recognition that has taken place and the possibility of rebuilding the relationship between the participants." It is clarified that the outcome can be both material ("compensation for the damage, restitution, working to eliminate the harmful or dangerous consequences of the offence") and symbolic ("formal declarations or apologies, behavioral commitments including public ones or those addressed to the community, agreements regarding the attendance of persons or places").

(ii) The second strand of the "organic discipline" is devoted to the creation of the structures responsible for managing, coordinating and monitoring RJ programmes, as well as the identification of standards to ensure the training and licensing of criminal mediators.

The system is designed as follows. A "National Conference for RJ" is established at the Ministry of Justice, which indicates the essential and uniform levels of performance and annually monitors the results. A "Local Conference for RJ," established at each district of the Court of Appeals in the national territory (in Italy there are twenty-six districts of the Courts of Appeals), identifies one or more local authorities to be entrusted with the establishment and management of "Centres for RJ." The latter are the (public) structures that concretely ensure the carrying out of the service through the figure of the "expert mediator": a qualification that can be acquired at the end of a period of practical and theoretical training curated by the RJ Centres themselves and by universities, the passing of a final test, and the inclusion of the applicant on the "list of expert mediators" established at the Ministry of Justice. RJ programmes are then concretely implemented by the Centres for RJ, which are able to make use of "expert mediators" from the local authority of reference or external "expert mediators," who will be entrusted with the task of mediation through a contract.

3.2. The regulatory changes to the criminal justice system

The changes made by Decree 150/2022 to the existing criminal justice system are aimed at ensuring complementarity between RJ and "conventional criminal justice." As noted above, the Italian legislature operates on multiple fronts through amendments to the Penal Code, the Code of Criminal Procedure, laws on justice of the peace jurisdiction, juvenile trial law, and prison law. The central ligatures through which the complementary relationship is articulated are the rules regarding access to RJ programmes and those governing the legal value of their outcomes.

With regard to access, the Italian legislature has embraced a strong "referral" model designed to ensure ample opportunities for RJ. First, access is allowed "at every stage and level of the proceedings." Second, with regard to methods of access, new regulations have been introduced, in the ordinary criminal trial, in the penitentiary phase, in the juvenile proceedings, through which it is provided that the judicial authority may order, even *ex officio*, a referral to the Centres for RJ of the victim and the accused, as well as the convicted person. That is, in these regulations, the subjects

are obliged to present themselves at the centres, although they obviously remain at complete liberty, without detrimental consequences, to decide whether or not to begin, continue, or possibly discontinue a RJ path. With reference to the criteria through which the judicial authority assesses whether or not to send the case to mediation, Article 129 bis of the Code of Criminal Procedure stipulates that the judicial authority must assess: first, the "usefulness" of the RJ path for the resolution of issues specifically arising from the crime; second, "the absence of concrete danger to the persons concerned and to the establishment of the facts."

With reference to the evaluation of the outcomes of restorative paths, Decree 150 confirms the well-established rule of assurance, in force internationally, that any negative outcome or failure to carry out the programme cannot have unfavourable effects (Article 58 of the decree). With respect to a positive outcome, the most significant changes are as follows.

First, and as a general rule, the reform affirms the rule that the judicial authority evaluates the conduct of the programme, including for the purpose of sentencing (Article 58 of the decree). This, thus, applies to all types of offence, regardless of their severity.

Second, "participation in an RJ programme concluded with a restorative outcome" is considered by the Italian legislature as: i) a new mitigating circumstance (Article 62, first paragraph, No. 6, Penal Code); ii) an element that allows the judge to suspend the execution of the sentence (Article 163, last paragraph, Penal Code); and iii) a factor that determines the tacit remission of the complaint (Article 152, second paragraph, Penal Code). In all these three cases, therefore, RJ programmes are explicitly mentioned by the Italian legislature and independently determine the above legal effects.

Third, the legislature amends the text of Article 131 bis of the Penal Code, which regulates the "exclusion of punishment due to particular tenuity of the act" in crimes for which a prison sentence not exceeding a minimum of two years or a fine, are provided for. The reform provides that the character of tenuousness of an offence can be assessed not only according to the ordinary parameters, but also "in consideration of conduct subsequent to the crime." RJ paths undoubtedly fall within this. The potential application of this innovation should not be exaggerated, however. In fact, while it is true that it is now possible to enhance the value of RJ programmes in order to recognize a tenuousness of the offence, it is also true that they are relevant in an indirect way and do not have an autonomous extinguishing effect: other elements (related to the modality of the conduct and the exiguity of the danger) are necessary to arrive at the exclusion of criminal liability. In addition, the decree significantly expands the catalogue of offences for which the offence cannot in any case be considered of particular tenuity: for example, certain offences covered by the Istanbul Convention on Violence against Women and Domestic Violence (Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, signed in Istanbul on 11 May 2011) are explicitly excluded. For the latter types of crime, therefore, RJ tools will not be applicable, even indirectly, as factors in establishing the tenuousness of the act, which may exclude criminal liability.

3.3. The new model of complementarity between RJ and criminal justice in the Italian legal system

In addition to the normative novelties introduced by Decree 150/2022, other pre-existing normative instruments, not changed by the reform, can provide the legal framework to accommodate RJ paths and to attribute value to it in the criminal justice system. If one wishes to sketch an overall summary, one can therefore analyse the current intertwining between RJ and the penal system in the Italian legal system according to whether the restorative program intervenes in a pre-trial, trial, or post-trial phase.

During the pre-trial phase, the successful outcome of RJ programmes may result in the tacit dismissal of the complaint. For crimes prosecuted *ex officio*, the reform does not introduce specific mechanisms. For example, the decree does not take up the proposal to introduce the institution of a "deserved dismissal" formulated by the Lattanzi Commission. Nevertheless, it is possible to activate RJ paths at this early stage through the institution of "suspension of proceedings with probation" (Article 168 bis Penal Code), which operates for crimes punishable by a prison sentence not exceeding a maximum of four years and for other crimes specifically provided for by law. With probation, the offender must follow a treatment programme, among the prescriptions of which is "conduct aimed at promoting, where possible, mediation with the offended person and the conduct of RJ programmes" (Article 464 bis, fourth paragraph, Penal Code). The successful outcome of probation determines the extinction of the crime. It should be pointed out, however, that although this instrument has been used to date in some cases to initiate paths of criminal mediation, it is ill-suited to perform conciliatory-reparative functions in the strict sense. This is mainly because of the requirement of public utility work, which continues to be inescapably required by the norm and which orients the institution toward objectives quite different from those underlying criminal mediation and restorative dialogue.

With regard to the trial phase, a positive outcome will be seen in three different possible effects: i) for any type and gravity of crime, it permits the sanctioning response to be graduated in a direction that is favourable for the offender, either through the criteria for making punishment commensurate (Article 133, Penal Code), or through the application of the new common mitigating factor (Article 62, first paragraph, no. 6, Penal Code); ii) it can justify the granting of a suspended sentence (Article 163, ult. paragraph, Penal Code); iii) more radically, it can be taken into account in order to exclude criminal liability, both for crimes prosecuted on complaint (for which Article 152 Penal Code will be applicable), and for crimes prosecuted *ex officio* (for which the previously mentioned Article 168 bis Penal Code, as well as Article 131 bis Penal Code as amended by the reform, are applicable). Nonetheless, as I have already suggested, in the latter cases the positive restorative result will not be independently assessable: it will be able to determine the total exclusion of criminal liability only if supported by other elements, which come together to determine a favourable judgment on the probationary course or on the tenuous nature of the offence.

Finally, during the post-trial phase, the restorative outcome may be evaluated, for adult offenders, for the purposes of "assignment to work outside, the granting of premium permits and alternative measures to detention […], as well as conditional release" (Article 15 bis, second paragraph, Law 354/1975). For juvenile offenders it may be evaluated "for the purposes of the adoption of community-based criminal measures, other alternative measures and conditional release" (Article 1 bis Legislative Decree 121/2018).

To sum up, some regulatory options are new; others were already in existence. What should be highlighted is that the legislature not only enhances these normative channels through explicit and even more extensive recognition of RJ programmes, but also makes access to such programmes easier today than in the past. Such access is possible thanks to massive reforming initiatives aimed at ensuring the operation of RJ centres throughout the country.

3.4. Provisional assessment of the reform

In Italy, a reform that affirms without hesitation, ambiguity, or wavering, the recognition of RJ within the criminal justice system is long overdue. Decree 150/2022 certainly lays the legal foundation for a coexistence between the dialogical principles of RJ and those of conventional criminal justice.

Generally speaking, the reform has been well received in by Italian doctrinal commentators, although some of its specific aspects have raised some concerns. Some of the most debated issues include, on the one hand, the mechanism of access to RJ programmes, and, on the other hand, the absence of a specific rule that considers the recognition of "basic facts" as a prerequisite for the conduct of the programmes.

Regarding access, the choice of providing the judicial authority with the power to order, even *ex officio*, the referral of the victim and the accused to the RJ Centres has stimulated much discussion. Indeed, the provision could attract some criticism, since it seems to imply some form of pressure to participate in the RJ programme, contrary to the principle of voluntariness. Nevertheless, it should be pointed out that in the system devised by the legislature there is no lack of forms of protection of voluntariness, both upstream and downstream of the reparative pathway. On the one hand, in fact, it is an absolute prerequisite for starting, conducting, and completing a RJ program. On the other hand, refusal to participate or continue the reparative pathway cannot ever be taken into consideration by the criminal judge. While there remain perhaps some critical issues on the ethical-political level (insofar as RJ ends up imposing interpersonal contact between offended and offender), it should nevertheless be pointed out that the norm has a primarily practical role. It is more a norm-incentive than anything else, which can perhaps be justified because of the considerable administrative, organizational, and financial effort required for the creation of RJ Centres, their updating, and their monitoring; an effort that would likely be unmotivated if such public structures ended up being placed at the service of only those cases, probably few in number, coming from private initiative.

With reference to the lack of the recognition of "basic facts" as a prerequisite for restorative programmes, the Italian legislature seems to have been motivated by the intention to guarantee the "person named as the perpetrator of the crime" against the violation of the presumption of innocence, provided for in Article 27, second paragraph, of the Italian Constitution. Nonetheless, this is a choice at odds with European legislation,[40] potentially a forerunner of risks of secondary victimization, and actually difficult to implement on the actual paths of RJ. In fact, the idea is unrealistic that mediators may be able to manage communication between the parties without their recognizing themselves in the "basic facts."

Other aspects of the reform also prompt critical reflections and perhaps require future corrective action. Within the limits of this article, I indicate them in summary fashion.

On the level of "organic discipline," in the notion of "restorative outcome" (Article 42) great emphasis is placed on elements such as "mutual recognition," the "possibility of rebuilding the relationship." Thus, according to the normative text, an agreement aimed at reparation of the offence that is not, however, "capable of representing" both the first and second elements could not be positively assessed. In fact, one should not *a priori* exclude the possibility of positively judging programmes that settle for something less and/or different. One cannot exclude the possibility of positively assessing the benefits of an agreement also from an individual, and not necessarily relational, perspective, or programmes that consider the successful reparative outcome on the basis of the fulfillment of personal expectations as represented by the offending protagonists themselves, rather than on the basis of the possibilities of conflict transformation.

With respect to participants, the involvement of the community in managing the consequences of a crime is one of the hallmarks of RJ, especially in transitional justice experiences and in conflicts between ethnic or cultural groups.[41] Nonetheless, especially in ordinary crime scenarios, the identification of the target community is not always an easy task. This suffers from a structural deficit of predictability and discretion. Who should be involved? How? To what end? The reform says little about this. Moreover, the Italian legislature not only uses the notion of community but also employs that of stakeholder. These are concepts marked by ambiguity. They are not devoid of ethical elements and lend themselves to being instrumentalised, potentially engendering widespread social-disciplinary systems of control.[42] It will, thus, be

[40] In particular, rule number 30 of Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters states: "[t]he basic facts of a case should normally be acknowledged by the parties as a basis for starting restorative justice. Participation in restorative justice should not be used as evidence of admission of guilt in subsequent legal proceedings." A similar provision is provided by the European Directive 2012/29/EU, which in the context of Article 12 (Right to safeguards in the context of restorative justice services), sub-paragraph (c), establishes as a precondition for the programme that "the offender has acknowledged the basic facts of the case."

[41] *Transitional Justice*, eds. J. Elster, R. Nagy, M.S. Williams, New York 2012.

[42] L. Ferrajoli, *Il paradigma garantista. Filosofia e critica del diritto penale*, Napoli 2016, p. 51.

necessary to test in practice how to succeed in involving the community or other stakeholders in a virtuous deliberative-participatory mechanism,[43] without incurring the risks structurally inherent in such notions.

On the organizational-operational level, two aspects of the reform require some corrective action. The first concerns the lack of cooperation between RJ Centres, on the one hand, and victim support services, on the other. It is true that sometimes precisely the involvement of services, associations, and support groups specifically dedicated to the protection of only one of the two parties risks producing exacerbation of conflict rather than conflict mitigation.[44] Nevertheless, especially in some situations (for example, those characterized by a particular power imbalance, as in the paradigmatic case of domestic violence), the possibility of exercising the right to access "safe and competent RJ services" (Article 12 of Directive 2012/29/EU) does, indeed, seem to call for such inclusive and collaborative strategies: structural cooperation between mediation offices, on the one hand, and victim support services, on the other, as well as the inclusion of accompanying services for the perpetrator, could facilitate the psychological empowerment of those who decide to engage in such a communicative dialogue. The second aspect concerns the model devised by the legislature for the coordination of services and the identification of essential levels of RJ services. The Italian regulations aim to achieve the meritorious goal of providing adequate restorative programmes throughout the entire country. However, they should not end up crystallizing RJ paths in rigid forms of technical-operational bureaucratization. Excessive formalization of restorative processes would risk transforming RJ into an institutional agency of social control, attentive more to compliance with the rules of the game than to the uniqueness and specificity of personal experiences.

With respect, then, to the overall normative impact on achieving a positive restorative outcome, the reform was more cautious than could have been imagined. RJ processes are likely to influence the severity of punitive reaction, affecting the quantum of punishment, but not to exclude the criminal liability. From this point of view, the Italian legislator could have been more challenging. The Italian legal system already values reparative activities, such as work in the public interest or other different types of treatment activities, for the recognition of an exclusion of criminal liability. RJ processes are not comparatively less relevant activities than the latter. Nothing would actually prevent the introduction of an autonomous cause of non-punishability, more explicitly calibrated to the specificities of RJ and subject to application limits similar to those established for other restorative conduct.

Finally, with reference to the changes made in the penitentiary stage, they acquire substantial value not so much because of substantive or procedural innovations, but because they are assisted by the regulatory compartment that governs the organic regulation of RJ services, which will facilitate their implementation. Value also accrues from the important novelty of having also placed in the hands of prison

[43] S. Benhabib, *The Claims od Culture: Equality and Diversity in the Global Era*, Princeton 2002.
[44] D. Garland, *The Culture of Control*, Oxford 2001, p. 121.

directors an obligation to provide information regarding the possibility of accessing RJ paths. Nonetheless, some clarifications should be made to clear the field of possible misunderstandings. A first misunderstanding could stem from the idea that the reform is sufficient in itself to allow a large-scale spread of restorative programmes in prisons. In reality, the same obligation to provide information risks remaining sterile if not accompanied by a more general reconsideration of the way of understanding prison sentencing. The current state of Italian prisons (not unlike that of other countries) seems, in fact, more likely to nurture processes of infantilisation of inmates, rather than to nurture an empowering redemption. One should start from the idea that "penal mediation should not act as the party of a criminal law that in its ordinary days maintains a retributive character."[45]

A second misunderstanding, in some ways symmetrically contrary in nature to the first, may instead arise from the idea that forms of offender-victim dialogue in the executive phase end up being considered privileged modes over others, or even worse, irreplaceable, for the granting of conditional release or rewards and benefits to the prisoner. The spread of RJ paths in the prison environment is certainly desirable. This should not give rise to the idea that the inmate, in order to prove his/her resocialization must do more than what is normally expected of him/her.

4. Conclusions

Although not all aspects of the Cartabia reform seem immune to criticism, Decree 150/2022 opens a new and promising course in Italian criminal justice. RJ is a vision that is among the most advanced spearheads of a "criminology of trust."[46] Of course, it is not the only tool that takes this perspective. It is not necessarily the most effective one. Likely, combinations of models, tools, and practices can coexist and increase the chances of success in crime response strategies focused more on the inclusion and support of conflict actors, rather than their social exclusion or control.[47] While RJ programmes cannot be expected to become a panacea for all ills,[48] it can certainly be assumed that, once the system of regulatory and organizational intersections I have briefly described has been tested, the community will be offered more flexible and, in many cases, overall more personally satisfying solutions[49] than those currently provided by punitive justice alone.

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45 L. Eusebi, *Strategie preventive*…, p. 852.

46 L. Walgrave., T. Ward, E. Zinsstag, *When restorative justice meets the Good Lives Model: Contributing to a crimonology of trust*, "European Journal of Criminology" 2021, vol. 18, no. 3, p. 455.

47 H. Dancig-Rosenberg, T. Gal, *Characterizing multi-door criminal justice*…

48 L. Walgrave, *Restorative Justice is Not a Panacea Against All Social Evils* [in:] *Critical Restorative Justice*, eds. I. Aertsen, B. Pali, Oxford 2017, pp. 107–108.

49 A.M. Nascimento, J. Andrade, A. Castro Rodriguez, *The Psychological Impact of Restorative Justice*…

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Summary

Francesco Parisi

Restorative Justice in Criminal Cases: The Italian Reform

Through legislative decree 150/2022, restorative justice has properly entered the Italian penal system. the introduction of a specific regulation was motivated by the necessity to comply with explicit obligations assumed by Italy under European law. After reviewing the notion, models, and application mechanisms of restorative justice, and the reasons for a progressive implementation of it in Europe, the author analyses the new model of complementarity between RJ and the penal system in the Italian jurisdiction, focusing on scenarios that may be opened up because of this important reform.

Keywords: restorative justice, European RJ models, Italian reform.

Streszczenie

Francesco Parisi

Sprawiedliwość naprawcza w sprawach karnych – reforma włoska

Dzięki dekretowi ustawodawczemu 150/2022 sprawiedliwość naprawcza na dobre wkroczyła do włoskiego systemu karnego. Wprowadzenie szczegółowej regulacji było również motywo-

wane koniecznością wypełnienia wyraźnych zobowiązań, jakie Włochy przyjęły na mocy prawa europejskiego. Po omówieniu pojęć, modeli, mechanizmów stosowania i powodów stopniowego wdrażania sprawiedliwości naprawczej w Europie autor analizuje nowy model komplementarności między sprawiedliwością naprawczą a systemem karnym w jurysdykcji włoskiej, skupiając się na scenariuszach, które mogą się pojawić dzięki tej ważnej reformie.

Słowa kluczowe: sprawiedliwość naprawcza, europejskie modele SN, reforma włoska.