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Committee for the study of reformation proposals in the field of the criminal proceeding and sanctioning system, as well as in the field of the criminal statute of limitations, by means of amendments to Draft Law Chamber Act 2435, which delegates the Government to provide for the efficiency of the criminal proceeding and the rapid definition of trials pending before the Courts of Appeal.

(Ministerial Decree 16<sup>th</sup> March 2021 – President Dr. Giorgio Lattanzi, Vice Presidents Dr. Ernesto Lupo and Professor Gian Luigi Gatta)

**FINAL REPORT AND AMENDMENT PROPOSALS TO DRAFT LAW CHAMBER  
ACT 2435**

**(24<sup>th</sup> May 2021)\***

(...)

**4.5. Restorative Justice (new art. 9-quinquies Draft Law Chamber Act 2435)**

**Art. 9-quinquies  
(Restorative justice)**

1. By performing the mandate referred to in Article 1, the legislative decrees containing a systematic regulation of restorative justice and consequent amendments to the criminal code, to the code of criminal procedure, to the penitentiary law and to the related complementary laws are adopted in compliance with the following guiding principles and criteria:

- a) providing for a systematic regulation of restorative justice in terms of notion, main programs, safeguards, legitimate participants, with particular reference to the victim and the offender, also on the basis of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crimes and on the basis of the international legislations on the subject;
- b) regulating training in restorative justice for public and private practitioners, taking into account the sensitivity and the needs of crime victims;

\* Translated from Italian by [Viola Molteni](#).



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- c) disciplining the organization of restorative justice services with particular reference to the regulation of the centres which provide restorative justice services and to the training of restorative justice practitioners, also by means of the methodological coordination of an inter-institutional dedicated Table at the Ministry of Justice;
- d) establishing specific safeguards for the implementation of restorative justice programs, which shall include: complete and effective information to the crime victims about the available restorative justice services, to be given at the moment of the first contact with the public authority and every time the victim has to be heard; the right for alloglots to receive linguistic assistance; the provision of information mechanisms on restorative justice towards the offender, even if underaged; the conduction of the restorative justice programs in the overriding interest of the victims; the acquisition and the processing of personal data; willingness; consent, which has to be retractable in any moment; confidentiality of the statements made during a restorative justice program; prohibition to use the statements made during a restorative justice program within the criminal proceeding and in the enforcement stage, unless the parties consent to it or the statements themselves constitute criminal offences; prohibition to use the outcome of restorative justice paths with detrimental effects on the suspect, the defendant or the convicted person;
- e) providing for the possibility to access restorative justice programs with no preclusions related to the seriousness of the offence and providing for the possibility to acknowledge the outcomes of such programs at every stage of the criminal justice process, in the frame of the norms and institutions established by the criminal code, the code of criminal procedure, the penitentiary law, the juvenile criminal system and by special laws, so that they can be enriched by the inoculation of the restorative perspective.

## REPORT

The relevance of regulating restorative justice has been expressed by Minister Cartabia in her Policy guidelines, which collect and summarize the many international indications, both binding and pertaining to soft law: “I cannot fail to observe that *it is high time to develop and systematize the restorative justice experiences* already existing in the legal system under an experimental form, which are showing fruitful results in terms of taking care of the negative consequences of the crime, with the purpose to promote the regeneration of relationships, starting from the social and relational tears that the offence has originated. The most authoritative *European and international sources have long established common reference principles and concrete indications to push for national legal systems to develop restorative justice paradigms* which allow the victim and the offender to actively participate, if they both freely consent to it, to the resolution of the matters resulting from the crime with the help of an impartial third party. There is no shortage in our legal system of wide, although not systematic, forms of successful experimentation; also, proposals for regulatory texts that take on the task of *outlining the correct relationship of complementarity between traditional criminal justice and restorative justice* do not lack either. Considering the importance of



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already gained experiences in our system, it is necessary *to undertake reformation activities aimed at making restorative justice programs accessible at every stage of the criminal justice process, right from the stage of cognition*” (p. 15 and following of the Policy guidelines, italics added).

The document issued by the Association of the Italian Professors of Criminal Law, “*Reformation lines with regard to alternative statutory penalties*”, which has been sent to this Commission by its President, is consistent with the above-mentioned policy guidelines.

Restorative justice finds a binding definition in [Directive 2012/29/EU](#) establishing minimum standards on rights, support and protection of victims of crime, which is expressed in the following terms: “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party” (art. 2, c. 1, lett. d).

The [Recommendation of the Council of Europe concerning restorative justice in criminal matters CM/Rec\(2018\)8](#) complies with such definition, further stating that: “Restorative justice” refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the “facilitator”)” (Paragraph 3). The latter definition no longer refers to the offender, but rather to “those responsible for that harm”: such formulation is undoubtedly more appropriate in relation to the use of restorative justice programs during the preliminary investigation, the trial stage or probation, that is, when there has still not been a ruling on the guilt of the suspect or on the defendant. The [Recommendation CM/Rec\(2018\)8](#) also clarifies that the third party (the mediator or the facilitator of conflicts) needs to be *trained*.

The above-mentioned definitions refer to the “victim”, which is intended as a natural person only, and no reference is made to “legal entities offended by the crime”. The latter, however, by reason of the relational and communitarian nature of restorative justice might be interested in taking part, through their representatives, in restorative justice programs other than victim-offender mediation.

The aforementioned Recommendation acknowledges the victim (the natural person) a series of prerogatives, which can be summarized as follows:

- a) the right to a wider participation at the trial stage but also in restorative justice programs, in order to face and define the matters concerning the reparation of the offence;
- b) the right to have “a stronger voice regarding the response to their victimisation, to communicate with the offender and to obtain reparation and satisfaction within the justice process” (Rec. CM/Rec(2018)8);
- c) the acknowledgment of their needs and interests, at the same level as the one guaranteed to the offender;
- d) the right to participate to restorative justice programs, which “should be available at all stages of the criminal justice process” (Rec. CM/Rec(2018)8);
- e) the right to adequate information, sufficient to let victims decide whether to participate or not to a restorative justice program;



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f) the right to a dignified, respectful and professional treatment.

According to what considered with regard to the terms “victim” and “legal entity offended by the crime”, the legislator could extend to the legal entity offended by the crime the rights which [Directive 2012/29/EU](#) and [Recommendation CM/Rec\(2018\)8](#) acknowledge to the victim, following a generalist approach to the use of restorative justice.

Supranational sources show how a restorative justice path could benefit both the victims and the offenders. In particular, the [Directive 2012/29/EU](#) acknowledges that “Restorative justice services, including for example victim offender mediation, family group conferencing and sentencing circles, can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation” (46<sup>th</sup> Consideration). Furthermore, the [Recommendation of the Council of Europe CM/REC\(2018\)8](#) considers the importance of encouraging the sense of responsibility of the offenders and of offering them opportunities to make amends, which may further their reintegration, enable redress and mutual understanding, and encourage desistance from crime (8<sup>th</sup> Consideration).

As for the nature of the programs, the [Recommendation of the Council of Europe CM/Rec\(2018\)8](#) states that: “Restorative justice often takes the form of a dialogue (whether direct or indirect) between the victim and the offender, and can also involve, where appropriate, other persons directly or indirectly affected by a crime. This may include supporters of victims and offenders, relevant professionals and members or representatives of affected communities” (Paragraph 4).

According to the aforementioned supranational sources and to [the Recommendation R\(2010\)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules](#) (Glossary of the terms used, p. 33 and following), restorative justice programs should be based on the following elements:

- repairing, as far as possible, the harm caused to the individual victim and to the legal entity offended by the crime;
- promoting the sense of responsibility of the person who has admitted the commission of the material element of the fact or that has been recognized as the offender, starting with the acknowledgment of the impact the offence has had on the individual victim, on the legal entity offended and on the community;
- giving victims the opportunity to express their material and emotional needs so that the more appropriate kind of reparation emerges;
- including the community in the management of restorative justice paths or in the follow-up stage.

Significant indications on the nature of the programs and on the values and standards of restorative justice come from the [Handbook on Restorative Justice Programs \(UNODC 2020\)](#).

The meaning and the function of any single delegation criteria proposed are illustrated below:

Criterion *sub a*): it is essential to have a systematic regulation of restorative justice, in terms of notion, main programs, safeguards, legitimate participants, with particular



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reference to the victim and the offender. At the *regulatory* level, such discipline is compliant with the [Directive 2012/29/EU](#); at the *operational* level, it promotes the establishment of restorative justice centres on the territory; concerning the *functionality of restorative justice programs*, it contributes to the identification of the training standards for restorative justice practitioners (mediators, facilitators, but also subjects working in first aid centres for victims) and of the emanation standards for restorative justice programs.

Adopting a systematic legislation regarding restorative justice also allows Italy to align with legal systems which have already done so. An effective model to look at is represented by the Irish Criminal Justice (Victims of Crime) Act 2017, which, particularly at [Section 26 \(Restorative Justice\)](#), establishes a coherent and complete rule on restorative justice.

Introducing specific provisions which open input channels for restorative justice paths in the context of existing institutions also encourages the dispatch of cases to the restorative justice centres and eases the procedural management of the outcomes of the restorative paths.

Criterion *sub b*): regulating training is essential to have restorative justice practitioners who are capable to operate in a serious, professional and respectful manner, which avoids secondary victimisation. The [Directive 2012/29/EU](#) states that “Member States shall encourage initiatives enabling those providing victim support and restorative justice services to receive adequate training to a level appropriate to their contact with victims and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner” (art. 25, clause 4).

In order to foster the access to restorative justice services and the dispatch of the cases, it is also essential to raise awareness among other institutional bodies (operating within the trial, the justice services, or the penitentiary enforcement). The aforementioned Directive specifies that it is necessary that “officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims” (art. 25, clause 1).

Training should comply with the standards set forth by art. 24 of the [Recommendation R\(99\)19 of the Council of Europe](#) and by the [Guidelines for a better implementation of the existing Recommendation concerning mediation in penal matters](#), which also specify a list of subjects in which mediators have to be trained (art. 20) and require States to acknowledge the importance to set up common criteria to permit the accreditation of restorative justice centres and training institutions (art. 21). Although related to mediators, such standards also apply to those who run restorative justice programs other than mediation.

Criterion *sub c*): it is essential to regulate restorative justice centres so that they provide uniform services, aimed at ensuring restorative justice paths which are reliable, high-quality and do not induce secondary victimisation.

Regulation could also provide for the creation of public structures, sufficiently spread on the national territory, possibly operating in synergy with private entities or accredited centres.



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Criterion *sub d*): the systematic analysis of the [Directive 2012/29/EU](#) – with particular reference to the provisions concerning the right to information, restorative justice services, the rights, the safeguards and the cooperation aimed at promoting access to the rights provided for by [Directive 2012/29/EU](#), which are respectively referred to in articles 4, 8, 12 and 26 – leads to the conclusion that restorative justice services constitute a *right* for the victims of crimes.

The [Directive 2012/29/EU](#) acknowledges the right of the victims to be promptly informed of the possibility to undertake a restorative justice path, stating that “Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive: (...) j) the available restorative justice services” (art. 4, clause 1, lett. j).

The safeguards to be adopted in the implementation of restorative justice programs are inferable from art. 12 of the [Directive 2012/29/EU](#): “Rights to safeguards in the context of restorative justice services. – 1. Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions: a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time; b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement; c) the offender has acknowledged the basic facts of the case; d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings; e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest. 2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral” (art. 12 [Directive 2012/29/EU](#)).

Two issues concerning safeguards are to be treated with particular attention: the right of defence and the management of personal data. The former is protected by providing for the prohibition to use the statements made during a restorative justice process within the criminal proceeding or in the enforcement stage – unless the parties consent to it – and the prohibition to use the outcome of restorative justice paths with detrimental effects on the suspect, the defendant or the convicted person. The latter is protected by establishing a *Code of conduct on the processing of personal data* of the parties accessing restorative justice programs, in order to safeguard them with respect to the retrieval and the use of their data and to the right to preliminary correct information on restorative paths in view of the expression of consent.



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Criterion *sub e*): in the context of the [Stati Generali of criminal enforcement](#), established by the Minister of Justice in 2015, Table 13 “Restorative justice, mediation and protection of victims of crime” had already developed a series of proposals to align the Italian criminal system to the provisions set forth by the [Directive 2012/29/EU](#) and, in particular, to promote *access to restorative justice at any stage of the criminal proceeding*. The latter indication is now also present in the [Recommendation CM/Rec\(2018\)8](#) (Paragraphs 6 and 19). The reason for this can be identified in the fact that the possibility to access restorative justice paths should be offered to *all the victims*, with no distinction on the basis of the offence committed. Hence the need to adopt a generalist approach to restorative justice.

It is also essential, for the purposes of a full implementation of restorative justice, to take care of its insertion at the regulatory level and, in particular, within the following institutions: deserved dismissal of the case; exemption from punishment in the case of petty offences (article 131-*bis* criminal code), sentencing on the grounds of the seriousness of the offence and of the tendency to commit crimes of the offender (article 133 criminal code), exemption from punishment due to reparation (article 162-*ter* criminal code), suspended sentence (article 163 criminal code), probation (articles 168-*bis* and following criminal code), judicial pardon (article 169, clause 1, criminal code), parole (art. 176 criminal code), exemption from prosecution in the case of petty offences (article 34 Legislative Decree 274/2000), exemption from punishment due to reparation before the Justice of the Peace (article 35 Legislative Decree 274/2000), penitentiary treatment (articles 1 and 15 Law 354/1975) and intermediate sanctions.

As witnessed with the works of Table 13 of the *States General of criminal execution*, it is necessary to offer to politics and to the community the value of an approach to doing justice which is constructive, inclusive, aimed at restoring the harm, respectful of the dignity both of the victim and of the offender – which have to be considered by the system first of all as *people* – and which does not lack in safety. The preferable approach is that of *complementarity between restorative justice and the criminal system*, which includes the possibility to use restorative justice programs both in parallel or as an alternative to the procedural and sanctioning path, as diversion techniques.