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a cura di Rosa Palavera, Nicola Pascucci, Cecilia Valbonesi

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RESTORATIVE JUSTICE AND SUPRANATIONAL SOURCES: AN OVERVIEW

Elena Mattevi

1. RESTORATIVE JUSTICE IN THE FRAMEWORK OF SUPRANATIONAL SOURCES

Thanks to the comprehensive regulation of restorative justice introduced into our legal system by implementing Delegated Law no. 134 of 27 September, 2021, we now have a broad body of legislation governing this subject.

However, *restorative justice* was first regulated – gradually and in increasingly comprehensive form – within supranational sources, which have served as a fundamental reference point for restorative practices that had often already taken root in various legal systems and, naturally, also for Italian legislation.

It is worth recalling that the concept of *restorative justice* began to gain wide attention starting in the 1970s, especially overseas, as a new approach to criminal justice. This approach moves beyond the traditional logic of punishment to propose a relational interpretation of conflict related to or originating from the crime, using alternatives to traditional penalties. The aim is to promote reconciliation between the offender and the victim and to consensually repair the consequences of the crime.

The issue has gained increasing prominence in international debate, eventually receiving formal legal recognition. Supranational organizations began to focus on the subject in the 1980s, coinciding with the renewed attention to the role of victims in criminal proceedings.

The affirmation of restorative justice – and more specifically, at least in its early stages, of criminal mediation – was strongly influenced by the positions taken by the United Nations and the Council of Europe. These were the first to issue key documents emphasizing the need to make room for new forms of alternative justice, later followed by the European Union with its 2001 Framework Decision on the standing of victims in criminal proceedings, and then, although more cautiously, with Directive 2012/29/EU on «minimum standards on the rights, support and protection of victims of crime».

However, the interest in restorative justice shown by supranational bodies cannot be explained solely by the shift in attitudes toward crime victims that took place in the final decades of the last century. It also stems from a broader and more widespread sense of dissatisfaction with traditional justice systems. Some supranational sources focused on this new model of justice primarily as a response to different demands, both in terms of the UN's normative output and the Council of Europe's soft law instruments.

Restorative justice also arises, on one hand, from the crisis in credibility of the traditional penal system in terms of the effectiveness of punishment and its alignment with its legitimizing aims. On the other hand, it reflects the recognised inefficiency of traditional criminal justice.

As for the first aspect, for example, restorative justice has appeared to be an encouraging response to the demand for alternatives to traditional punishment[1].

According to the United Nations Economic and Social Council, restorative justice tools can help address prison overcrowding by reducing the use of custodial sentences – especially short-term ones – which have proven ineffective and costly to society. Thus, in Resolution 1998/23 of July 28, 1998, Member States were encouraged, where possible, to delegate the management of minor criminal conflicts to the parties themselves, through mediation, compensation, or settlement agreements involving either payment of a portion of the offender's income to the victim or the performance of work by the offender for the benefit of the victim.

As for the enforcement phase of sentencing, Recommendation No. R (99)22 of the Committee of Ministers of the Council of Europe, dated September 30, 1999, stressed in point 15 the importance of promoting mediation and victim compensation as part of alternative measures to detention, with the aim of reducing prison overcrowding.

Concerning the second point, attention to restorative justice as a means to reduce the burden on the justice system has been addressed in multiple initiatives by the Council of Europe.

With Resolution Res (2002)12 of 18 September 2002, the Committee of Ministers established the European Commission for the Efficiency of Justice (CEPEJ), with the aim of improving the efficiency and functioning of judicial systems in Member States and enabling better implementation of Council of Europe legal instruments concerning the efficiency and fairness of justice (Art. 1, Appendix).

1 M. Venturoli, *Verso un nuovo paradigma di individualizzazione della pena? Osservazioni a margine del d.lgs. 10 ottobre 2022, n. 150*, in Sistema penale (31 maggio 2023) 8.

The Resolution called for the implementation of the recommendations developed over the years by the Committee of Ministers to improve the efficiency of judicial systems, as listed for illustrative purposes in Appendix II of the document, along with others relevant to similar issues (§ 2.ii). Among these, in the field of criminal justice, was Recommendation No. R (99)19 concerning penal mediation.

The centrality of Recommendation No. R (99)19 – also in terms of procedural efficiency[2] – is demonstrated by the creation in 2006 of a working group on mediation, which led to the adoption in 2007 of actual "Guidelines for a better implementation of the existing Recommendation concerning Mediation in Penal Matters." The explanatory commentary to the Recommendation emphasised that the pursuit of this aim is one of the fundamental arguments for introducing restorative procedures in criminal matters.

2. RESTORATIVE JUSTICE AND VICTIM PROTECTION

As mentioned, the rediscovery of the role of the victim in the criminal justice system – encouraged by victimological thinking[3] – together with the perceived ability of restorative justice to respond to victims' needs, help us understand why the most important supranational documents on victim protection have given a privileged role to criminal mediation, first, and then, more generally, to restorative justice.

According to the Treaty on the Functioning of the European Union, signed on 13 December 2007, «the rights of victims of crime» are among the matters of transnational importance in which the European Parliament and the Council may establish minimum rules through criminal harmonisation directives (Title V, Chapter IV, Article 82(2)(c)).

The interest shown by supranational bodies, both universal and European, in victim protection, even before the Treaty of Lisbon, explains the growing demand for alternative dispute resolution and compensation instruments capable of actively involving those directly concerned, listening to them and, where

2 As P. Maggio clearly points out in *Giustizia riparativa e sistema penale nel decreto legislativo 10 ottobre 2022, n. 150. Parte II. «Disciplina organica» e aspetti di diritto processuale*, in Sistema penale (27 February 2023) 3, the aim of procedural deflation cannot exhaust the plurality of needs that restorative justice is called upon to address.

3 M. Venturoli, *La vittima nel sistema penale. Dall'oblio al protagonismo?*, Jovene, Napoli, 2015, 14; F. Wertham, *The Show of Violence*, Greenwood Press Publishers, New York 1948, 259: «The murder victim is the forgotten man. What with sensational discussions on the abnormal psychology of the murderer, we have failed to emphasize the unprotectedness of the victim and the complacency of the authorities. One cannot understand the psychology of the murderer if one does not understand the sociology of his victim. What we need is a science of victimology».

appropriate, inviting the perpetrators of the crime to take responsibility for the damage caused by their conduct and thus for the suffering caused. Crime is essentially seen as a breach of interpersonal bonds.

Unlike the Council of Europe, however, the European Union has not been able to adopt comprehensive legislation specifically dedicated to restorative justice due to the lack of an appropriate legal basis: its regulation within the framework of victim protection legislation was the only way to regulate the matter, at least in part[4].

In summary, the most important sources to remember are: Resolution 40/34 of 29 November 1985 adopted by the United Nations General Assembly and containing the Declaration of "Fundamental Principles of Justice for Victims of Crime and Abuse of Power", the Recommendation on assistance to victims and the prevention of victimisation, adopted in 1987 by the Committee of Ministers of the Council of Europe (Rec. No. R (87)21 of 17 September 1987), and the aforementioned Framework Decision of the Council of the European Union of 15 March 2001, which required Member States to ensure that victims have «an effective and appropriate role» in their criminal justice systems (Art. 2), followed by the Directive of 25 October 2012 (2012/29/EU of 25 October 2012), which sets out very detailed rules.

Also worth mentioning is the recent Recommendation on the rights, services and support for victims of crime, adopted in 2023 by the Committee of Ministers of the Council of Europe (Rec. No. R (2023)2 of 15 March 2023), replacing Rec. No. R (2006)8 of 14 June 2006 on assistance to victims of crime.

It was with the 2006 Recommendation, in particular, that the courageous openness towards restorative justice instruments was accompanied by a call for caution: the Committee of Ministers focused not only on the benefits but also on the possible risks for victims underlying restorative justice practices (§ 13).

United Nations Resolution 40/34 of 29 November 1985 requires that judicial and administrative mechanisms be established and strengthened, where necessary, to enable victims to obtain redress through formal or informal procedures that are prompt, fair, free of charge and accessible (§ 5). It also encourages the use of informal dispute resolution models, such as mediation, where they appear appropriate for reconciliation and reparation for victims (§ 7).

Within the Council of Europe, the Recommendation on assistance to victims and the prevention of victimisation, adopted in 1987 by the Committee

4 M. Kilchling, L. Parlato, *Nuove prospettive per la restorative justice in seguito alla Direttiva sulla vittima: verso un diritto alla mediazione? Germania e Italia a confronto*, in Cass. pen. (2015) 4190.

of Ministers (Rec. No. R (87)21 of 17 September 1987), considering, among other things, that traditional criminal justice alone is not sufficient to repair the damage and distress caused by the crime, contains – within the framework of a complex set of strategies – an explicit reference to mediation between the perpetrator and the victim of the crime as a tool to be encouraged, as well as the evaluation of results, with particular reference to the degree to which the interests of the victim are satisfied.

With the experimental phase now well and truly over, Recommendation No. R (2023)2 of 15 March 2023 outlines in its appendix a number of principles on restorative justice, following on from Recommendation No. R (2006)8 of 14 June 2006, and reaffirms the need for services to be generally accessible (Art. 18) but also to comply, for the protection of victims, with the principles contained in Recommendation No. R (2018)8 of 3 October 2018 on restorative justice in criminal matters, which is the most comprehensive source on the subject adopted by the Committee of Ministers of the Council of Europe. The legislative act reflects a full awareness of the need for different legal systems to provide the tools to mitigate the potential risks to victims arising from participation in programmes, with the support of victim support services.

Within the European Union, the most effective harmonisation instrument developed prior to the 2012 Directive is undoubtedly Framework Decision 2001/220/JHA of the Council of the European Union of 15 March 2001 on the «standing of victims in criminal proceedings», which was initiated by the Portuguese Republic during its Presidency of the European Union.

The Framework Decision, whose objectives were not fully achieved, was therefore replaced by Directive 2012/29/EU containing specific and meaningful obligations regarding the rights of victims of crime: information, assistance, protection and participation in criminal proceedings. However, it should be noted that the European legislator has taken a cautious approach to the risks of further victimisation to which victims may be exposed during a restorative process.

Compared to the Framework Decision, the Directive does not refer exclusively to criminal mediation, but more broadly to «restorative justice services», which may theoretically include restorative programmes that are less well known in Europe, such as extended dialogue with parental groups or mediation councils (Recital 46).

Beyond this profile, Article 12 of the Directive, in requiring Member States to facilitate «the referral of cases, where appropriate, to restorative justice services, including by establishing procedures or guidelines on the conditions for such

referral», requires that such services be «used only if they are in the interest of the victim» and be «based on the victim's free and informed consent», obtained after detailed information has been provided on the procedures and their potential outcomes, as well as on the methods of monitoring the implementation of any agreement. The same article also lays down provisions concerning the need for services to be safe and competent, the prior acknowledgement of the essential facts of the case by the offender (perpetrator of the crime), the voluntary nature of the agreement reached, which may be taken into account in any criminal proceedings, and the obligations of confidentiality.

Within the scope of the Directive, restorative justice services are effectively considered to be instruments of «great benefit» to the victim (Recital 46), but here too there is no lack of caution, fears and reservations.

The attention given to restorative justice by the 2012 Directive is justified only indirectly and from the victim's point of view, with the concern to ensure that such processes are implemented in a manner that respects the victim's needs[5].

3. SUPRANATIONAL SOURCES SPECIFICALLY DEDICATED TO CRIMINAL MEDIATION AND RESTORATIVE JUSTICE

The most comprehensive and systematic regulation of restorative justice is contained in certain legislative acts of the United Nations and the Council of Europe.

Since 1999, the United Nations – like the Council of Europe – has been working on the implementation of mediation and restorative justice in the criminal justice system, starting with Resolution 1999/26 of 28 July 1999.

The document illustrates the importance of these tools for resolving conflicts concerning minor offences, reiterating that they can adequately satisfy victims, prevent future unlawful behaviour and represent a valid alternative to short-term prison sentences or fines (§ 3). The Resolution calls on States to develop them at the legislative level as an alternative to traditional formal proceedings, creating awareness-raising policies – both among the authorities responsible for their implementation and within local communities – and providing specific training courses for those involved in the implementation of restorative processes (§ 5).

States, international organisations and other bodies are therefore called upon to exchange information and experiences on mediation and restorative

5 See V. Bonini, *Le linee programmatiche in tema di giustizia riparativa. Il quadro e la cornic*e, in Legisl. pen. (15 giugno 2021) 18 ss.

justice (§ 6), and the Commission is recommended to consider the usefulness of formulating basic principles in this regard, in order to ensure fairness in the definition of minor offences (§ 8).

During the 10th Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna in April 2000, support for these instruments was confirmed; a wide-ranging discussion was held on these issues and the Resolution «Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century» was adopted. The latter strongly encouraged the development of restorative justice policies, procedures and programmes (§ 28) as new approaches to justice for reducing crime and promoting respect for the rights, needs and interests of victims, offenders, the community and all other parties.

It was precisely on the basis of these initial initiatives that the United Nations Economic and Social Council, with Resolution 2000/14 of 27 July 2000, drew up the preliminary draft of the "Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters", which took its final form with the adoption of ECOSOC Resolution 2002/12 of 24 July 2002.

It represents a fundamental point of reference – starting with the definitional proposals – for all States wishing to regulate restorative programmes or, in any case, for all entities or subjects (governmental and non-governmental organisations, United Nations network bodies involved in crime prevention) operating in this field.

In the context of the Council of Europe's regulatory sources dealing exclusively with restorative justice, the first measure to be mentioned is the aforementioned Recommendation No. R (99)19 of the Committee of Ministers, adopted on 15 September 1999 and concerning criminal mediation. It represents «the only document in Europe systematically dedicated to the subject»[6].

It was Recommendation CM/Rec No. (2018)8 of 3 October 2018 on restorative justice in criminal matters, however, that outlined the most comprehensive framework of principles to be taken into account by Member States in the development of restorative justice; a development that the Recommendation in question aims to encourage both within and outside the context of criminal proceedings (§ 1).

Thus, in the Declaration of the Ministers of Justice of the Member States of the Council of Europe on the role of restorative justice, delivered in Venice on 14 December 2021 at the conference of Ministers of Justice of this suprana-

6 A. Ciavola, *Il contributo della giustizia consensuale e riparativa all'efficienza dei modelli di giurisdizione*, Giappichelli, Torino 2010, 215.

tional body, held on the theme of "Crime and Criminal Justice", the Council of Europe was invited to encourage and assist Member States in developing national plans or policies for the implementation of this latest Recommendation.

A comprehensive review of the sources mentioned above – in particular Council of Europe Recommendation CM/Rec (2018)8 and UN Resolution 2002/12 of 24 July 2002, as well as certain passages from the 2007 CEPEJ Guidelines and Directive 2012/29/EU – allows us to identify the fundamental principles of restorative justice and the areas that need to be strengthened in order to ensure a certain uniformity in the regulations and quality standards guaranteed by the restorative programmes implemented in the various legal systems.

It is no coincidence, therefore, that the Recommendation, together with Directive 2012/29/EU and the United Nations "Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters" (Resolution 2002/12), is one of the reference sources used in drafting the implementing decree of the Italian delegation on restorative justice.

Starting with the question of definition, which has always been one of the most debated aspects of supranational literature on the subject, it should be noted that restorative justice was tried and tested long before it was defined.

The first experiments with restorative justice were not prompted by national or international political initiatives, but arose from the bottom up, in the 1970s, thanks to proposals from operators in the "traditional" criminal justice system or social service officials who were seeking practices that could more effectively meet the needs of those who had suffered the negative consequences of a crime[7].

Restorative justice is difficult to define because it is characterised by «informality, flexibility and malleability»[8].

Among the definitions of restorative justice offered by supranational sources, the most interesting is found in the Resolution of the United Nations Economic and Social Council concerning "Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters" (Resolution 2002/12), which effectively distinguishes between 'restorative process' and 'restorative outcome'.

The "restorative programme", defined as a whole, must make use of "restorative processes" and aim to achieve "restorative outcomes" (§§ 1, 2 and 3).

7 D. O' Mahony, J. Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Process*, Bloomsbury Publishing Plc, London 2017, 3.

8 V. Bonini, *Una riforma organica della giustizia riparativa tra attese decennali e diffidenze contemporanee. Definizioni, principi e obiettivi*, in G. Spangher (a cura di), *La riforma Cartabia*, Pacini, Pisa 2022, 728; G. Mannozzi, *Giustizia riparativa: la questione definitoria*, in G. Mannozzi, G. A. Lodigiani, *La giustizia riparativa. Formanti, parole e metodi*, Giappichelli, Torino 2017, 89.

More specifically, "restorative processes" include those processes in which: «the victim, the offender and, where appropriate, any other individual or member of the community who has suffered the consequences of a crime participate actively together in resolving the issues arising from the criminal offence, usually with the help of a facilitator».

The "restorative outcomes", reached by consensus, include: «responses and programmes such as reparation, restitution, socially useful activities aimed at meeting individual and collective needs and responsibilities of the parties, and achieving the reintegration of the victim and the offender».

The centrality of the 2002 Resolution for Italian reform is immediately apparent when reading Article 42 of Legislative Decree No. 150/2022, which opens the comprehensive regulation on restorative justice by offering a series of definitions.

The two most important concepts are those of "restorative justice" and "restorative outcome".

Article 42(1)(a) also builds the concept of "restorative justice" on the concept of "programme" «that allows the victim, the person identified as the offender and other members of the community to participate freely, consensually, actively and voluntarily in the resolution of issues arising from the offence, with the help of an impartial, suitably trained third party, known as a mediator».

More recently, Recommendation CM/Rec (2018)8 of the Council of Europe identifies restorative justice as «the process that allows people who suffer harm as a result of a crime and those responsible for that harm, if they freely consent, to participate actively in the resolution of issues arising from the offence, with the help of a trained and impartial third party» (§ 3), expressly citing practices such as mediation, restorative or family group conferencing and circles.

However, the door is also open to practices that do not involve dialogue between victims and perpetrators and which can nevertheless «be designed and implemented in a manner strictly adhering to the fundamental principles of restorative justice» (§ 8).

The definitions offered by supranational sources, however, are not always consistent with each other. For example, Directive 2012/29/EU defines services as «any process that allows the victim and the offender to participate actively, if they freely consent, in the resolution of issues arising from the crime with the help of an impartial third party» (Article 2(1)(d)). This concept appears to be modelled on that formulated exclusively for criminal mediation by Recommendation No. R. (99)19 of the Committee of Ministers of the Council of Europe, with the risk of creating some confusion in this regard.

This definition completely omits the community, but Recommendation CM/Rec(2018)8 also takes a cautious approach to this aspect.

Paragraphs 4 and 27 of CM/Rec (2018)8 provide that other persons directly or indirectly affected by the offence (including representatives of the affected communities) may, where appropriate, participate in restorative justice and that restorative justice services should be as inclusive and flexible as possible, so as to allow as many people as possible to participate. As we have seen, there is no reference to the community in the definition of "restorative justice" provided in Recommendation CM/Rec(2018)8, § 3.

The "Cartabia" enabling law no. 134/2021 included, among the guiding principles and criteria with which the delegated legislator should comply, «the compliance of restorative justice programmes with the interests of the victim of the crime, the perpetrator of the crime and the community» (Article 1, paragraph 18, letter d)[9].

It is therefore easy to understand why the latter, also called upon to provide a definition of restorative justice, focused primarily on the source developed within the United Nations.

4. SUPRANATIONAL GUIDELINES FOR RESTORATIVE JUSTICE

Finally, we will analyse the main guidelines on restorative justice offered by the various supranational sources on the subject.

As we have repeatedly mentioned, the Council of Europe Recommendation CM/Rec (2018)8 – which is based primarily on Recommendation No. R(99)19 on mediation in criminal matters, but also takes into account all other sources – offers the most comprehensive framework. Without prejudice, of course, to national regulations, the principles contained in the relevant Appendix therefore represent the benchmark par excellence for «all public and private agencies operating in the context of criminal justice and which refer or refer cases to restorative justice bodies or which may in any case resort to restorative justice or apply its principles in their work» (§ 2).

9 This regulatory choice reflects the contributions of several scholars of restorative justice, who have focused on the importance of the community's role in the restorative model from a variety of perspectives: as victims of crime or recipients of restorative interventions, but above all as social actors in promoting the restoration and resocialisation of offenders. Cfr. G. Mannozzi, *Giustizia riparativa: la questione definitoria* cit., 93; H. Zehr, H. Mika, *Fundamental Principles of Restorative Justice*, Appendix of H. Zehr, A. Gohar, *The Little Book of Restorative Justice*, in https://sites.unicef.org/tdad/littlebookrjpakaf.pdf (s.d.), 84.

Restorative justice must be based on two solid foundations: the parties should be able to participate actively in the resolution of the offence, and responses to the offence should be primarily oriented towards addressing and repairing the harm caused to individuals, relationships and society (§ 13 CM/Rec (2018)8).

Voluntariness, dialogue, equal attention to the needs of those concerned, the collective dimension of agreements, reparation and the absence of domination are other key principles of the model, but it is desirable that they also support broader reforms of criminal justice (§ 14 CM/Rec (2018)8)[10].

Going into more detail, an important issue addressed by supranational bodies is that of accessibility. Restorative justice services must be "generally available", without any restrictions related to the type, severity or geographical location of the offence (§ 18 CM/Rec (2018)8) and accessible «at every stage of the criminal justice process/system» (§ 19 CM/Rec (2018)8; § 6 Res. 2002/12).

No detailed information on the costs of restorative justice can be found in the sources. However, the CEPEJ Guidelines (§ 34) invite Member States to ensure financial support, providing that only in exceptional circumstances should the offender bear the related costs, which should in any case be proportionate to their means.

Along the same lines, the 2018 Recommendation recalls that «restorative justice, in order to be effectively implemented, requires adequate human and financial resources» (§ 54 CM/Rec (2018)8).

In this regard, legal doctrine has expressed the view that restorative justice centres should operate in a public context and offer their services free of charge. This aspect is fundamental in light of the public nature of criminal law; it is necessary to avoid the matter being dominated by market logic[11].

Criminal offences are prosecuted by the public justice system, and it is not desirable for restorative justice to be administered by entities that operate according to different principles or priorities. Nor is it desirable for the parties involved to be required to bear the costs of participation.

10 See UNODC, *Handbook on Restorative Justice Programmes*, United Nations, Vienna 20202, 5: «Restorative justice practitioners tend to agree that what truly makes a particular response to crime a "restorative" one is not only a specific practice or process, but more importantly its adherence to a broad set of values that provide a common basis for the participation of parties in responding to a criminal incident and its consequences. These values include truth, fairness, physical and emotional safety of participants, inclusion, empowerment of participants, safeguarding of victims' and offenders' rights, reparation, solidarity, respect and dignity for all involved, voluntariness and transparency of process and outcomes».

11 A. Ceretti, C. Mazzucato, *Mediazione e giustizia riparativa tra Consiglio d'Europa e O.N.U.*, in Dir. pen. e proc. (2001) 773.

With regard to procedural guarantees, international documents also refer to the fundamental principles of "fair trial" or "procedural fairness" for these procedures: the right to defence (legal assistance), the right to translation – at least "where appropriate" (§ 23 CM/Rec (2018)8) – the right to review by the "judicial authorities" of the referral of a case to restorative justice centres and of how to proceed – or discontinue the proceedings – after an agreement has been reached, as well as promptly in the event of failure of the programme or non-implementation of the agreement reached (§§ 23, 32 and 35 CM/Rec (2018)8 ; §§ 11, 13, 15, 16 and 17 Res. 2002/12).

The need for judicial review is naturally greater if restorative justice affects judicial decisions (§ 7 CM/Rec (2018)8).

The mediator/facilitator, in addition to possessing – as we shall see – the necessary skills, including interpersonal skills, and being adequately trained, must be impartial (§ 18 Res. 2002/12), but in a particular way, given that he or she is required to pay equal attention to each of the parties (§§ 3, 41, 42 and 46 CM/Rec (2018)8). Restorative justice, in fact, is not designed to defend the interests of one party to the detriment of the other, but to support them in expressing their needs and seeing them met as far as possible (§§ 14 and 15 CM/Rec (2018)8).

The free and voluntary (§§ 3, 14, 16 CM/Rec (2018)8; § 7 Res. 2002/12) participation of those involved in restorative justice programmes, which can be an alternative to trial, is the golden rule of restorative justice.

Freedom and voluntariness make a fruitful encounter between the offender and the victim possible: they are conditions for the feasibility of restorative processes. They also make it possible to avoid possible friction with the fundamental principles of criminal proceedings and guarantee that "active participation" in the resolution of issues arising from the offence, which, together with "reparation for the harm caused", is the most characteristic feature of restorative justice (§ 13 CM/Rec (2018)8).

Consent – conscious, informed, spontaneous, never vitiated by pressure or other underhanded or unfair means (§ 13 Res. 2002/12; §§ 16, 25 and 26 CM/Rec (2018)8; §§ 31 and 32 CEPEJ Guidelines; Art. 12, paragraph 1, letters a and b Directive 2012/29/EU) – must cover all stages of the process (it can be revoked at any time: § 16 CM/Rec (2018)8; § 7 Res. 2002/12). Consent must naturally also cover any agreements (§ 50 CM/Rec (2018)8; § 7 Res. 2002/12).

However, the role of the facilitator/mediator is decisive when it comes to reaching consensus. They must not simply take note of the lack of consensus, especially at the beginning: in the preparatory meeting, they must invest time

in understanding the reasons behind the reluctance of the parties involved and in removing the causes of the refusal, particularly when these lie in a lack of information or trust.

Restorative justice is characterised by confidentiality: any form of disclosure of the content of the discussions that take place during the programme is prohibited, unless the participants agree otherwise (§ 17 CM/Rec (2018)8; § 14 Res. 2002/12; Art. 12, paragraph 1, letter e Directive 2012/29/EU). There are two reasons for this guarantee: to ensure free expression between the parties and to protect the principle *nemo tenetur se detegere*.

When reporting to the authorities on the outcome of the programme, the facilitator/mediator must not dwell on what emerged during the programme, nor express any judgement on the behaviour of the protagonists (§ 53 CM/Rec (2018)8). Once again, the restorative justice professional must be adequately prepared to draft these communications with the right balance, especially when the authorities themselves request a detailed report.

Restorative justice agencies must be guaranteed sufficient autonomy from the criminal justice system, although the need to ensure compliance with the guidelines (§ 20 CM/Rec (2018)8) must also be addressed through supervision by a competent authority.

The principle of confidentiality is subject to limited exceptions, which must be regulated by national legislation (§ 14 Res. 2002/12), in order to correctly guide the work of facilitators/mediators in complex cases where they may be faced with the costs of «breaching the confidentiality assured to the parties or the legal consequences of any failure to report»[12].

The facilitator/mediator must, for example, pass on to the competent authorities information about imminent or serious offences gathered during the restorative justice process (§ 49 CM/Rec (2018)8).

The CEPEJ Guidelines (§§ 17 and 18) reiterate the need for each State to legislate on the duty of confidentiality, which is to be considered binding on the facilitator/mediator and subject to appropriate disciplinary sanctions in the event of a breach, at any stage of the procedure and even after its conclusion.

Programmes must take place «in a safe and welcoming environment», allow «sufficient time to prepare the parties for participation» (§ 47 CM/Rec (2018)8) and be conducted «effectively but at a pace that is sustainable for the parties» (§ 48 CM/Rec (2018)8).

12 A. Ceretti, C. Mazzucato, L*e "istruzioni per l'uso" del Consiglio d'Europa*, in Nuove esperienze di giustizia minorile 1 (2008) 204.

During the preparatory phase, the facilitator/mediator is required to carry out a delicate assessment of the risks for those involved (§ 29 CM/Rec (2018)8); risks that may exist in particular when the offence arose in violent contexts and which may make a 'face-to-face' meeting between the parties inadvisable. At the same time, the professional must interrupt the programme if this is necessary to ensure the safety of the participants (§ 47 CM/Rec (2018)8; § 10 Res. 2002/12).

Directive 2012/29/EU, in particular, requires that special attention be paid to the safety needs of the victim: only if these needs are met can restorative justice services be used (Art. 12, paragraph 1, letter a).

With regard to agreements, the 2018 Council of Europe Recommendation clarifies that they do not necessarily have to include "tangible" results, as dialogue may also have sufficiently satisfied the needs and interests of the parties (§ 51 CM/Rec (2018)8). Rather, agreements must contain «fair, achievable and proportionate actions» to which all participants have given their consent (§ 50 CM/Rec (2018)8).

In truth, agreements should be based exclusively on proposals made by the parties, but when there are «aspects [...] that are clearly disproportionate, unrealistic or unfair», facilitators/mediators should intervene, explaining their reasons (§ 52 CM/Rec (2018)8; § 7 Res. 2002/12).

Much debate surrounds the question of the need for some kind of prior "acceptance of responsibility" on the part of the accused, to which restorative justice should be subordinate. On the one hand, this would guarantee compliance with the principle of non-culpability in restorative justice – understood as a prohibition on the "involvement of persons not involved in the facts" – and, on the other hand, the feasibility of the programme: the parties, even if only to be able to talk fruitfully about a historical fact, must not declare themselves uninvolved in it.

It is essential to specify, however, that such admission must relate only to participation in the act and must be kept separate from criminal liability in the strict sense, which is determined during the trial.

The documents cautiously refer to mere "acknowledgement of the basic facts of a case", specifying that participation in the programme must not be used against the defendant/suspect as evidence of admission of guilt in court (Section 8 of Resolution 2002/12; § 30 CM/Rec (2018)8; Art. 12, paragraph 1, letter c Directive 2012/29/EU). Such an admission must not be treated as a confession or used as evidence.

Although it is not always clear whether the acknowledgement should be made before mediators or before the referring authorities, the former solution should be preferred, as it ensures that the judgement is not even indirectly influenced by the factual conditions for initiating the programme.

Although they do not establish an obligation to define specific rules on restorative justice, both Recommendation CM/Rec (2018)8 (§21 and 22) and, in similar terms, ECOSOC Resolution 2002/12 (§12), focus on the usefulness of a clear legal basis, especially for cases in which restorative justice intersects with traditional justice and, therefore, for «procedures for referring cases to restorative justice and their handling at the end of the restorative justice process» (§22 CM/Rec).

In conclusion, we believe it is essential to briefly return to the professional figures called upon to manage restorative justice programmes.

Although the judicial authority may have a decisive role "at the entrance" (referral of the case) and "at the exit" (procedural assessment of its outcome) of restorative justice programmes, the role of the facilitator/mediator, as we have already seen, is of incomparable importance. He or she is a facilitator of dialogue, must know how to manage the emotions of the participants, but, first and foremost, must provide the necessary information and understand whether the conditions are in place for the parties to meet; in conclusion, he or she must draft communications addressed to the judicial authority but, at the same time, is also a sort of "guarantor of the agreement", at least in terms of its reasonableness and proportionality[13].

Well aware of this, supranational bodies pay particular attention to this figure, requiring the development of serious training courses aimed at acquiring and maintaining the skills necessary to perform this delicate task.

Mediators should be «recruited from all sections of society» and «have a good knowledge of local cultures and communities» (§ 40 CM/Rec (2018)8; § 19 Res. 2002/12).

They should be selected on the basis of their "judgement", "common sense and interpersonal skills" and, before undertaking restorative justice activities, receive initial basic training that promotes the acquisition of a high level of competence, including conflict resolution skills and the additional requirements necessary to work with victims, offenders and vulnerable persons, as well as basic knowledge of the criminal justice system (§§ 41 and 42 CM/Rec (2018)8; § 19 Res. 2002/12).

13 F. Brunelli, *Programmi di giustizia riparativa*, in G. Spangher (a cura di), *La riforma Cartabia* cit., 758 s.

Training should then be ongoing.

The adoption of minimum standards of required skills and ethical rules, as well as specific procedures for the selection, training, evaluation and support of mediators (§ 36 CM/Rec (2018)8), is strongly recommended by the Council of Europe, together with a constant exchange of good practices between European criminal mediators (§§ 22 and 23 CEPEJ Guidelines).

Taking these recommendations into account, the efforts made by the Italian legislator – most recently with two decrees of the Minister of Justice, which implemented the provisions of Legislative Decree 150/2022 – to regulate a comprehensive training programme for expert mediators and to regulate this profession, which has been left to improvisation for too long, can only be reassuring.