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WHAT ABOUT RESTORATIVE JUSTICE PRACTICES IN ITALY AFTER THE EU DIRECTIVE 29/2012? A LONG STORY OF CULTURAL DIFFICULTIES AND MISUNDERSTANDING

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Abstract:

While in more recent years the attention for victims of crime in Italy has known an increasing (but often ambivalent in contents and effectiveness) consideration on political agenda and media interest, the concrete opportunity to intervene in the criminal justice system – and on the procedural criminal scene - is still partial and in some cases actually lacking. In particular, some obstacles of different nature still remain with regards to the implementation of restorative justice practices despite the spread consideration they benefit among professionals and, above all, the almost numerous laws promulgated on this matter also before the EU Directive 29/2012 (see: art. 47 of the Italian Penitentiary Code in 1975; art. 28 of the Juvenile Criminal Procedural Code in 1988; Law No. 274/2000 on the penal competences of the "Judge of the Peace"; and again: Law No. 67/2014 on probation in the adult criminal justice system; Law No. 212/2015 for the implementation of the EU Directive; Law No. 103/2017 introducing changes on Penal, Procedural and Penitentiary Codes).

The contribution aims to explore the reasons why the building of a "real" culture for all victims and the implementation of the restorative justice paradigm still encounter difficulties and misunderstanding, also taking into consideration the point of view of judges and lawyers, as well as the perception of victims of crime and the Italian public opinion.

INTRODUCTION

The Directive 2012/29/EU of the European Parliament and the Council, establishing "Minimum standards on the rights, support and protection of victims of crime", offers a peculiar and yet revolutionary definition of who is the victim. Actually, at *considerandum No. 9* is reported that *"Crime is a wrong against society as well as a violation of the individual rights of victim"*: by this way considering this subject as an actor of primary importance on the criminal scene, promoting a substantial change in the perspectives of Member States. A subject for a very long time considered as a mere object on which the offence fell back or, from a penal point of view,

a secondary, marginal figure on the criminal justice scene - where the most important actors were the State (represented by the prosecutor) and the offender.

As a consequence of this important modification – that is social as well as penal and political – one of the most important issue discussed in the Directive concerns the condition of vulnerability experienced by victims. A vulnerability grounded in the violation of personal rights, dignity and identity; in the lacking of reconnaissance of victims' peculiar needs by society and public institutions; in the partial and often instrumental attention paid by media to the emotions originated from victimization.

Starting from these general considerations, the EU Directive emphasizes some fundamental rights to be guarantee to victims after the offence, that could be summarized with respect to four main aspects: the right to be informed, the right to receive support, the right to be protected, and the right to participate to criminal proceedings. The first three are subjected to strong guarantees, the last one to what could be defined as "soft law" – because, according to *considerandum No. 20*, *"The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system"*. In the same time, the articles of the EU Directive let emerge the importance of four types of needs. Shortly, they can be described as following, in the belief the Law does not own all the instruments able to respond to the complexity of victim's condition:

- the need for truth, in the double sense of judicial and historical truth, as preliminary to any form of reconnaissance (acknowledgement) of victims' condition of suffering and restoration of the harm;
- the need for justice, not only as the result of the criminal proceeding but also as a concrete manner to restore the symbolic order violated by the crime;
- the need for knowing, because for victims is essential to understand how and why that event could happened, and particularly happened to his/her; but essential is also the need to be understood, giving voice to victims' point of view, feelings and emotions;
- the need for changing, because for the rebuilding of identity is necessary to have the opportunity of image an alternative condition to the one of victim giving a different narration of its own story in the present and, most of all, in the future.

These needs are strictly connected to the emotions felt by victims of crime, but also abuse of power, social exclusion and marginalization, repression: emotions like rage, shame, humiliation, solitude and loneliness, sense of culpability and sense of helplessness; emotions not rarely experienced also by offenders, in particular when condemned to a prison sentence: so they can be considered as aspects in common (or points of similarity) in both tragic experiences [Vezzadini 2016]. The EU Legislator was well aware of that when promoting restorative justice practices – not only mediation – at all levels of the criminal justice system, stressing the participation of communities to restorative programs. Nevertheless, considering the potential risks of secondary victimization, the EU Legislator required restorative practices would be applied first "in the best interest" of victims: *"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 victimization, intimidation and retaliation. Such services should therefore have a*

primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm" as reported in *considerandum No. 46*. In the same direction were the previous EU Recommendations (see No. R (85)11 on the position of the victim on the framework of criminal law and procedure; No. R (87)21 on assistance of victims and the prevention of victimization) and the Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings.

THE POSITION OF VICTIMS OF CRIME IN THE ITALIAN LEGISLATION

It has first to be observed that the attention for victims of crime in the Italian legislation finds a relevant validation yet some years before the EU Directive. So in the Italian Penitentiary Code - art. 47, Law 354/1975 that states the possibility for offenders to act in favour of their victims and their families, too, and in the subsequent implementation of Law 230/2000, art 27[1], that promotes a reflection by the offender on his/her behavior and the harm caused, elaborating together with the Social services concrete actions to repair the consequences of the misconduct. Again this attention is clear in the Juvenile Criminal Procedural Code, DPR 448/1988, art. 28[2], that promotes probation, suggesting a wide implementation of restorative justice practices; and furthermore in the provisions of Law No. 274/2000 on the attribution of penal competences of the so called "Judge of Peace"[3], where it is clearly reported the duty for the judge to implement restorative justice programs under specific circumstances concerning the type of crime and the consequences it produced on victims.

During the last years, after the EU Directive, the suggestions there presented have been considered and formally included by the Italian Legislator at least in three important recent provisions on this matter:

- Law No. 67/2014 introducing probation in adults criminal proceedings[4];
- Law No. 212/2015 on the position of victims of crime inside criminal proceedings, in order to implement the EU Directive;[5]
- Law No. 103/2017 introducing changes to the penal, procedural and penitentiary Codes[6].

With regards to the first law here considered (No. 67/2014), it has to be noticed the introduction, for the first time in Italy, of probation for adult offenders. The treatment agreement includes some activities (defined by Social services according to the judge) such as compensation/reimbursement to victims, reparation of the harmful consequences, jobs for the community or of social utility, voluntary work of relevance. In particular, it states the opportunity that social workers suggest the implementation of restorative justice practices, promoting also victim offender mediation when in presence of the required conditions. Actually the law establishes the participation of victims of crime along to the whole process, but in concrete it largely depends – as we will say later – from judicial discretion.

The second law (No. 212/2015) is particularly important representing the implementation of EU Directive 29/2012. It includes some significant news for the Italian legislation on this matter: in particular we can mention art. 90 bis, concerning the rights of victims to be informed, to understand and being understood during criminal proceedings, the right to translation, the right to get informed about the presence of medical structures and shelters where find support and help. On the contrary, there is a still partial interpretation of the concept of vulnerability, that is generally considered "deduce" ("*desunta*" in Italian) from the peculiar seriousness of the offence and from the specific social group victims belong to (i.e. women, children, disable persons) [Bouchard 2016]. The Law do not present new instruments to guarantee the effective participation in the criminal proceedings for all victims; it does not even mention the need for the creation of a victim support national service network or assume as important to improve the diffusion of restorative justice services all over the Country (and not only in some regions), as required by the European document.

Finally, the third law here considered (No. 103/2017) presents some important changes in the penal, procedural and penitentiary Codes; in particular, at art 1, it introduces the possibility the judge declares the settlement or resolution of an offence when restorative actions result successfully realized by the offender. But exactly this pronunciation, at first glance so consistent, hides some critical aspects – in particular with regards to the words used in that context – as it will be discussed in the next paragraph.

But despite the formal consideration to victims and to restorative justice procedures suggested by this long list of rules and regulations, the proclaimed interest for their condition among politicians of all Parties and by media (an interest often ambivalent in contents and effectiveness, it has to be said), it's correct to affirm that the "real" and concrete opportunities to intervene in the criminal justice system are nowadays still partial and in some cases totally lacking.

OBSTACLES, MISUNDERSTANDINGS AND PREJUDICES: THE LONG WAY TOWARDS

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4 Legge 28 aprile 2014, N. 67, Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili (14G00070) (GU n. 100 del 2-5-2014)

VICTIMS' RECONNAISSANCE

In order to analyze and try to explain the discrepancy between what it is said about victims and what it is concretely done for guaranteeing the implementations of their rights - in particular concerning the possibility to accede to restorative justice practices - it could be of interest to examine some obstacles, misunderstandings, prejudices and stereotypes still remaining in the present. To this regards, it will be first take into consideration the terminology (the "words") used in the three more recent Italian Laws to represent victims' position and their rights inside the criminal proceedings (such as the possibility of direct/indirect intervention) and the opportunity to enter in restorative justice programs. Secondary, we will consider the position of penal and social operators such as judges, prosecutors and lawyers with regards to the same subject, referring to the results of some studies and researches realized in the Italian context. Finally, the considerations here presented derive also from the direct experience and observation made by the Author of this paper, who has been for six years (2008-2013) Special Judge in the Juvenile Criminal Court of the Emilia Romagna Region, in Bologna, and being from 2003 penal mediator for the "Centro Italiano di Mediazione e di Formazione alla Mediazione" (that operates on the humanistic model of mediation developed in France by Mm. Jaqueline Morineau).

The first issue to be discussed concerns what we can called a sort of lexical misunderstanding, because the Laws here considered (in particular No. 67/2014 on probation for adults who committed crimes, and No. 103/2017 introducing important changes on penal, procedural and penitentiary codes) present a critical overlap within the Italian verbs *"riparare"* (in English "to repair, to restore") and *"risarcire"* (in English "to reimburse, refund, indemnify, compensate"). While *"riparare"* means – in a broader sense – trying to rebuild emotional and interpersonal dimensions, the verb *"risarcire"* is mostly referred to an economic and financial retribution or restitution to victims.

But in the Italian texts of Laws these verbs are not considered as different; on the contrary, they are often used as similar or coincident, so that the verb *"risarcire"* (or "compensate") is often applied meaning a sort of restoration of the harm. The offence is intended to be "restored" when, as required by the judge or suggested by the lawyer, it has been compensated by the offender through financial actions: in other words, the harm is considered "repaired" when economically indemnified by the offender. To clarify this point, we propose an example brought from Law 103/2017, art. 1, where in order to be define "repaired" the damage has to be "compensated" by a payment or a sum of money (also paid in installments) by the offender as a reimbursement. So we read the following statement: *"Il giudice dichiara l'estinzione del reato, di cui al primo comma, all'esito positivo delle condotte riparatorie",* that in English sounds – more or less – in the following manner: "The judge declares the settlement of the offence (…) in front of the positive result of the restorative conduct".

In this perspective, central dimensions in the restorative justice paradigm such as victims' participation and listening do not seem to find a real acknowledgement; the negative consequences of the offence (the violation of victim's dignity or the perceived sense of insecurity) simply seem to be treated - and considered "repaired" - through a sort of monetarization of the offence. Maybe an important role in explaining the differences (also in qualitative terms) between these two actions could be played by lawyers and operators of Social services – that, nevertheless, need an accurate training on these topics.

To this regard, a second observation could be done. Actually among judges, prosecutors and

lawyers it is easy to observe an ambivalent attitude towards the restorative justice paradigm: they use to say it is very appealing "in theory", but "in concrete" they rarely apply it in the belief it seems to be too ideal, sometimes even dangerous.

Moreover, there is still the tendency to attribute to restorative justice practices different aims from the original ones, as constantly shown in the studies on this subject [Mestitz 2004; Scivoletto 2009; Vezzadini 2014, 2016, 2017]. Very frequently they are considered as a sort of "special tool" inside the traditional rehabilitative paradigm, especially in case of juvenile offenders; or, with a more pragmatic intent, they are seen as a mere instrument to reduce the huge charge of penal processes in the criminal justice system [Pavarini 2001].

So while judges, prosecutors and lawyers mostly show curiosity and a general "theoretical" interest in restorative justice (mediation in particular), they nevertheless apply it rarely, and when it happens is often for "different" motives. First, the restoration/compensation of the offence would represents a possibility to reduce or avoid a prison condemn, or other consequences for the offender. The focus of the attention is on the offender instead of the restoration of harmful consequences for victims or, at least, the interests of both parties. According to this perspective, we can assume that restorative aims are intended to be included into the traditional rehabilitative paradigm, becoming a sort of "original tools" inside that model of justice. Moreover, restorative justice measures are seen positively by judges when they contribute to better manage and organize the huge number of (pending) penal proceedings, offering an easy, "innocuous" choice to divert a significant part of them. In these cases, the offences considered are generally not very serious, sometimes they do not require the effective presence of a victim, or do not referred clearly to an interpersonal or mutual dimension of harm and reconnaissance, as it seems to be clearly stated in particular in the Law No. 67/2014 on probation for adults offenders.

Probably it could be affirmed that the very change impressed by the restorative justice paradigm is far to be completely recognized, reached and implemented in Italy in the absence of a well-rooted, but in the same time not ideological, culture "for" all victims.

To "support" and reinforce these ambiguities, we can not ignore the interpretation of a consistent part of new and traditional media, that often offer to public opinion a distort image of restorative justice as an opportunity given to offenders to close in short time penal proceedings without having their "just desert". Restorative justice is represented as a sort of soft condemn, a model of justice too benevolent or gentle towards offenders despite the harm they caused to victims. In other words, restorative justice is considered a "lacked justice", if not a form of injustice at all.

It is easy to understand that this kind of representation influences very much a public opinion generally skeptical and reluctant about "innovation" on criminal justice matters; a public opinion more and more worried by the spread of micro-criminality and agreeable to the implementation of harder sanctions – following that penal populism at this point so "popular" and common in many Western Countries [Bottoms 1995; Pratt 2007]. In this framework media play a central role in reinforcing a general, increasing perception of insecurity, hard to be argued and contrasted also by academics or social scientists. The principal risk is that victims can be used and manipulate in their request for reconnaissance and justice by politicians searching for votes and political consensus as a paradigmatic example of the (supposed) escalation of criminality and the widespread fear of crime [Fattah 1992; Garland 2001; Christie 2010]: a sympathetic discourse towards victims that leads to a perversion of the concept of justice and

its implementation [Salas 2005].

These last considerations bring us to make a final reflection on the ambivalent perception experienced among victims of crime about restorative justice practices, according to the different types of expectations concerning their own condition. If it is true that in more recent years also in Italy the interest for these alternative paths of justice has known a consistent widespread among victims, also victims of violent crimes such as sexual violence, homicide and terrorism [Bertagna, Ceretti and Mazzuccato 2015; Vezzadini 2017], still remains a variety of prejudices and feelings of mistrust. They are mostly due to the fear of receiving back any benefits (in a material or emotional sense); feeling new harm and humiliation; being wounded again; being shamed or blackmailed by the offender; not to be protected by the (justice) system; becoming instrumental to other expectations; having to re-open difficult processes of elaboration of sorrow and suffering they often managed in solitude; not to be understood, or even to be negatively judged or blamed by the social context. Of course these are only some reasons that could explained how and why victims feel disoriented about restorative justice practices, preferring to give up and withdraw into themselves, wishing silence will help to forget and being forgotten. And maybe find a different way to start a new existence.

All these reasons generally merge together in offering a distort, not positive image of restorative justice practices, influencing in a negative manner the possibility of their concrete implementation in the Italian criminal justice system as the cited Laws (seem to) required.

(IN)CONCLUSION

In conclusion, to try to image some substantial interventions to overcome the gap between "theory" and "practice", to improve victims' participation in the criminal justice system as well as in a more restorative community (as suggested by the EU Directive), four steps would be fundamental:

first, build a concrete culture of the victim far from those stereotypes and prejudices still affecting the concept, in order to overlap the enduring diffusion and consensus among politicians, media's representation and public opinion for the dichotomy between "ideal" and "real" victims [Christie 1986; Bouris 2007];

- second, clarify and propagate among the public opinion a different (but authentic, real) image of restorative justice practices, emphasizing the concrete benefits they produce for the whole community in terms of feelings of security, dialogue, rebuilding of interpersonal and institutional trust, reconciliation;
- third, improve the knowledge of restorative justice' aims among all the actors of the criminal justice system as well as their training in practices, with the financial support of the Ministry of Justice and the regional/municipality levels, too;
- last but not least, identify concrete places where victims could find attention, help and support, and for the effective implementation of restorative justice practices. Generally it is said that restorative justice practices represent a fundamental space of listening and wording for victims: now we need to transform that symbolic "space" in a real and concrete "place", with the support of public institutions, all over the Country.

But at the end this contribution, still remains a question: are these times "the good ones" for such a cultural and political change in Italy?

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