LUISS

Dipartimento
di Giurisprudenza

Cattedra di Diritto Penale 2

METAMORPHOSING THE UNFAVOURABLE INTO FAVOURABLE: RESTORATIVE JUSTICE FOR ENVIRONMENTAL CRIMES

Prof. Maurizio Bellacosa
RELATORE

Prof. Paola Balducci
CORRELATORE

Margherita Marotta
Matr. 149153
CANDIDATO

Anno Accademico 2021/2022

TABLE OF CONTENTS

I. INTRODUCTION

The air we breathe, the water we drink, and the land we live on are all potentially affected by environmental crimes.[1] Environmental crimes are defined as "an unauthorized act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanctions. This offence harms or endangers people's physical safety or health as well as the environment itself."[2] Broadly speaking, environmental crimes can thus be understood as activities violating the law that damage, or have the potential to damage, the environment.[3] Environmental offences predominantly encompass activities such as polluting, damaging the fauna and the flora, running afoul of the obligations surrounding environmental protection licenses, and hampering the cultural heritage of Aborigines.[4] According to INTERPOL,[5] the last ten years have witnessed an increase of environmental crimes by an yearly growth rate of 5-7%.[6] Such an annual growth rate has rendered environmental crimes one of the dominant areas of misconducts at the global as well as at the national level.[7] To

---

[1] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 487.

[2] Rob White, "Prosecution and Sentencing in Relation to Environmental Crime: Recent Socio-legal Developments," *Climate Law Soc Change* 53 (2010): 366.

[3] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1460.

[4] Even if aboriginal cultural heritage offences are qualitive different from environmental offences, they are oftentimes gathered together under "the environmental offending umbrella." Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 151. Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1460-1.

[5] The international Criminal Police Organization, in use since 1950.

[6] UNEP-INTERPOL Rapid Response Assessment. *The Rise of Environmental Crime- A growing Threat to Natural Resources Peace, Development and Security,* 2016 [7-8].

[7] Lorenzo Colantoni and Margherita Bianchi, "Fighting Environmental Crime in Europe: Preliminary Report," *Istituto Affari Internazionali* (2020): 5.

name but a few: Italy has registered 34,867 environmental crimes in 2020 alone,[8] Germany had experienced a frightening number of allegations of illicit disposal of toxic waste in 2009,[9] whereas Spain, in the last ten years, has witnessed the deaths of several thousands of birds due to the practice of illegal poisoning.[10]

Environmental crimes stand apart from other offences for a variety of reasons. Firstly, environmental crimes affect a wide range of victims. Besides the negative effects felt by the environment (ranging from the loss of habitats and ecosystems to the endangerment of species illicitly traded), the impacts of environmental crimes are oftentimes borne by a broad spectrum of human victims.[11] This broader societal dimension includes:[12] individuals whose property, health or life has been impaired, the community by means of the loss of common natural resources, and future generations, in so far as today's environmental crimes can impinge upon the interests of the generations of tomorrow.[13] The interests of this wide array of environmental victims, which includes 'atypical' victims such as the environment and future generations, might not necessarily coincide.[14] Accordingly,

[8] Legambiente, "Ecomafia 2021. Tutti i Numeri sulle Illegalità Ambientali in Italia," available at https://www.legambiente.it/comunicati-stampa/ecomafia-2021-tutti-i-numeri-sulle-illegalita-ambientali-in-italia/.

[9] European Union Action to Fight Environmental Crime, Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE), 2016 [9].

[10] European Union Action to Fight Environmental Crime, Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE), 2016 [9].

[11] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1461. European Union Action to Fight Environmental Crime, Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE), 2016 [12].

[12] Brunilda Pali, and Ivo Aertsen, "Inhabiting a Vulnerable and Wounded Earth: Restoring Response-Ability," *International Journal of Restorative Justice* 4, Issue 1 (2021): 5.

[13] Aiden Stark, "Environmental Restorative Justice," *Pepperdine Dispute Resolution Law Journal* 16, no. 3 (2016): 436.

[14] Diletta Stenardi, "Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l'Ambiente. Spunti di

environmental disputes involve the primary (and complex) step of identifying the relevant stakeholders in a given environmental problem.[15] Second and relatedly, the causal link between the action/omission and the damage that has been suffered by the broad range of victims is not always straightforward. The issues surrounding the establishment of causality help turn environmental crimes into potential 'victimless' offences.[16] Thirdly, the acts that result in environmental offences are oftentimes attributable to corporations rather than single individuals. This leads to imbalances in terms of knowledge between those retaining the power and those suffering from the consequences stemming from it.[17] Moreover, it is difficult for domestic governments to find solutions for environmental conflicts because such governments are oftentimes involved in environmental matters firsthand. Lastly, conflicting claims of public interests are yet another issue involved. This is because different groups interested in environmental matters claim to represent the public interest on different grounds. Since the pattern of governments (i.e., a democratic pattern) has created an obligation of the state to respect the interest of everyone, the reconciliation of such different interests may prove to be a hard task.[18] These circumstances, among other things, have turned the

---

Riflessione dall'Estero," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 159.

[15] Jyoti Bharat Rangari, "Mediation in Environmental Disputes," *Journal on Contemporary Issues of Law* 3 (2017): 4.

[16] Melissa L. Jarrell and Joshua Ozymy, "Real Crime, real victims: environmental crime victims and the Crime Victims' Rights Act (CVRA)," *Crime, Law, and Social Change: An Interdisciplinary Journal* 58, no. 4 (2012): 381. Diletta Stenardi, "Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l'Ambiente. Spunti di Riflessione dall'Estero," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 159; Brunilda Pali, and Ivo Aertsen, "Inhabiting a Vulnerable and Wounded Earth: Restoring Response-Ability," *International Journal of Restorative Justice* 4, Issue 1 (2021): 12-3.

[17] Diletta Stenardi, "Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l'Ambiente. Spunti di Riflessione dall'Estero," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 159.

[18] Jyoti Bharat Rangari, "Mediation in Environmental Disputes," *Journal on Contemporary Issues of Law* 3 (2017): 4-5.

issue as to how to best respond to environmental crimes into a paramount concern.[19]

The prosecution of environmental crimes is a rather recent practice that mirrors traditional criminal prosecution by relying on the same retributive premises.[20] As a consequence, environmental prosecution results in the imposition of traditional penalties, such as imprisonment and fines.[21] Foreign scholars have noted that, even if one were to concede that the infliction of punishment and sanctions on the individuals and the companies who have caused harm to the environment has some deterrent effect, punishment and sanctions tend not to repair the environment and the damaged relationships in the community of reference.[22] In plain language, the payment of a fine and the execution of a conviction sentence are unlikely to cure and restore the social and environmental harm provoked by the offence.[23] From the perspective of the victims, traditional penalties do not return anything to the victim, let alone give them justice.[24] From the offender's angle of view, such penalties do not have the potential to sensitize the offender about the negative effects

[19] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 3-5. Richard J. Lazarus, "The Reality of Environmental Law in the Prosecution of Environmental Crimes: A Reply to the Department of Justice," *Georgetown Law Journal* 83, no. 7 (1995): 2545.

[20] Yingyi Situ-Liu and David Emmons, *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment,* (Thousand Oaks: Sage Publications, 1999) 147.

[21] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 10].

[22] Luca Ramacci, *Diritto Penale dell'Ambiente* (Italy: CEDAM, 2009), 87-8. Diletta Stenardi, "Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l'Ambiente. Spunti di Riflessione dall'Estero," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 158.

[23] John F. Cooney, "Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach," *Journal of Criminal Law and Criminology* 96, no. 2 (2006): 456; Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 10].

[24] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022) 55.

generated by their misconduct.[25] By focusing on imposing a harsh punishment on the offender, traditional environmental prosecution might lose sight of the victims affected by the offence. In other words, environmental prosecution holds the restoration of the harm suffered by the victims as a secondary concern to the pivotal aspiration "of the maintenance of the law and social order."[26] The individualistic approach to crime by which environmental prosecution is currently informed disregards "many indirect and remote victims of the offence."[27] Victims of environmental offences, e.g., aboriginal people, the community, the environment, and future generations, are not granted a direct voice in the process nor are their needs and rights adequately and extensively represented.[28] In a nutshell, traditional environmental prosecution is inclined to silence the victims[29] and supersede any victim-offender direct interaction.[30] The flaws of the traditional criminal justice model, informed by a retributive perspective, become thus evident when dealing with offences impinging upon the environment.[31]

In light of the unique features of environmental crimes and their special victimization many scholars call for the use of

---

[25] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 10].

[26] Donald H. J. Hermann, "Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice," *Seattle Journal for Social Justice* 16, no. 1 (Summer 2017): 89.

[27] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 6].

[28] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 6].

[29] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1468.

[30] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 84.

[31] Luca Ramacci, *Diritto Penale dell'Ambiente* (Italy: CEDAM, 2009), 87-8. Diletta Stenardi, "Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l'Ambiente. Spunti di Riflessione dall'Estero," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 158.

restorative justice programs in the management of such conflicts.[32] This is because restorative justice programs are more flexible and able to better fulfill the needs of the wide array of victims affected by the offence while providing for a more effective preventive function than traditional criminal justice tools. Restorative justice stands out as a criminal policy option in that it is a relational (i.e., it brings together all the relevant stakeholders) and victim-centric response to crime (i.e., it re-evaluates the victim and his/her suffering in order to make the victim participate in eliminating or mitigating the consequences of the crime together with the offender and the affected community).[33] Restorative justice is particularly harmonious with respect to the goals of preventing and repairing environmental offenses. Such goals are prioritized over the mere punishment of individuals and companies, which, among other things, is often not concretely possible because of the failure to establish the causal link between the action and the damage, the expiration of the statute of limitations, etc. Criminal mediation and other restorative justice programs make it possible to break out of the rigidity of the legal definitions of victim and offender, and to enhance the interests of a wider range of stakeholders, as the caselaw of New Zealand, Canada and Australia concretely demonstrates. Restorative justice programs, by enabling the victims and the community to actively participate in the settlement of the conflict and in the determination of the most appropriate way to repair the harm stemming from the offence, enhance the empowerment of the victims and further promote the democratic participation of the relevant stakeholders in the

[32] Claudia Mazzucato, "La giustizia riparativa in ambito penale ambientale. Confini e rischi, percorsi e potenzialità," In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 143.

[33] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022) 59. Ministero della Giustizia, "Tavolo 13 – Giustizia Riparativa, Mediazione, e Tutela delle Vittime del Reato," available at https://www.giustizia.it/giustizia/it/mg_2_19_1_13.page.

resolution of environmental conflicts.[34] Furthermore, restorative justice programs hold the offender truly accountable for the consequences of their actions. This is particularly the case when the so-called 'white collars' are involved in a process in which evidently "the humanity of the restorative justice process pierces the corporate veil."[35] Restorative justice deals with the offender's genuine accountability – intended not only as the transgression of the norm but also as the responsibility for the violation of the personal and social relationships carried out by the offender and for the injury of the relational goods of the person protected by criminal norms - to and for the future, with a project of reparation and reconciliation in view of the progression of life and of the person concerned. In a nutshell, the offender's responsibility is a dynamic form of accountability. That is to say that the responsibility promoted by restorative programs is inherently relational. Namely, it looks towards the other, towards the victim, and towards the society, whose social and citizenship ties have been broken. This form of responsibility requires legal and moral obligation to repair the suffering experienced by the victims not only from an economic point of view.[36] While retributive criminal justice seeks to pragmatically provide answers to the questions of who deserves to be punished and with what sanctions the offender should be punished, restorative justice raises different queries. The essential question that flows from a judicial mechanism that "heals" rather than "punishes," is "what could be done to repair the harm?" rather than "what punishment shall be imposed?" Reparation does not merely mean offsetting the harm caused by the crime through positive actions. Reparation has a much more

[34] Diletta Stenardi, "Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l'Ambiente. Spunti di Riflessione dall'Estero," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 159-160.

[35] Brian Preston, "The Use of Restorative Justice for Environmental Crime." *Criminal Law Journal* 136 (2011): 21.

[36] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022) 54-5.

significant value and an ethical depth that render restorative justice far more complex than mere compensation.[37] In a nutshell, the soul of restorative justice – the reparation of the victims of the offence – has much more to do with the real expectations of justice than the interminable criminal trials with their afflictive responses. The latter oftentimes is incapable of conveying the message about the disvalue and seriousness of the crime experienced by the offended persons.[38]

Environmental protection and environmental conflict resolution, though, are not elective areas of restorative justice in the criminal sphere. Restorative justice has predominantly been applied in other contexts, such as juvenile delinquency. In this novelty lies the reason as to why concretely exploring the practicability of restorative justice in the environmental criminal sphere represents the unique contribution of the present dissertation. Herein lies the challenge of proposing concrete ways to implement restorative justice in environmental matters.

In Italy we are still at an early stage, with all the potential and pitfalls of an open and initial situation, as generative and as risky as they may be. In our country, during the last ten years, we have been witnessing an unprecedented scientific-cultural fervor around restorative justice practice which has not, however, always corresponded to the practical incidence of the instrument. Restorative justice has been for decades a tiny niche in the criminal justice edifice, despite the efforts of several scholars and the proactivity of certain institutional actors and many criminal

[37] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale* (Milano: Giuffrè Editore, 2005), 100-1.

[38] Claudia Mazzucato, "Appunti per una Teoria 'Dignitosa' del Diritto Penale a Partire dalla Restorative Justice," *Libellula Edizioni* (2010): 120. Grazia Mannozzi, e Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 8-9.

mediators. To make matters even more complex, for years Italy has been one of the few European countries that has not been equipped with discipline tools on the subject matter. This has had negative repercussions on the capillary diffusion of restorative justice centers throughout the territory, on the effective accessibility of the restorative programs and on the uniformity of the judicial culture on the subject matter.[39] Luckily, with the issuance of the enabling law n. 134/2021 and the publication of the official draft of the implementing decree on August 10, 2022, things seem to be changing.

Against this backdrop, the present dissertation attempts to investigate the evolution and the applicability of restorative justice programs to crimes against the environment perpetrated in Italy and abroad. In particular, it seeks to stress how restorative justice can enhance the protection, preservation, and reparation of the environment. In order to so, the present contribution starts by investigating whether, and under what conditions, restorative justice can be a suitable mechanism to tackle environmental harm and overcome the shortfalls of traditional environmental prosecution. To back up this claim, the first chapter investigates how each of the "critical ingredients" set forth in the United Nation Office on Drugs and Crime's Handbook on Restorative Justice Programmes for a fully restorative process to achieve its objectives, i.e., "an identifiable victim, voluntary participation by the victim, an offender who accepts responsibility for his/her criminal behavior and non-coerced participation of the offender,"[40] applies in an environmental offending scenario. In conducting the evaluative analysis, the chapter explores the

[39] Claudia Mazzucato, "La giustizia riparativa in ambito penale ambientale. Confini e rischi, percorsi e potenzialità," In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 134-136.

[40] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 8].

beneficial implications of applying restorative justice conferencing to environmental offending scenarios. These include things such as the victims' active participatory role in the process, the offender's education and likely desistance from reoffending, the innovative and targeted outcomes aimed at restoring the harm and amending the relationships between the relevant stakeholders, and the internalization of the costs of abating and controlling the harm caused to the environment. In order to substantiate any theoretical findings, chapter one investigates the practice of environmental restorative justice developed by Australia, New Zealand, and Canada. The foreign caselaw concerned with restorative justice and environmental protection helps demonstrate how the theoretical implications of deploying restorative justice principles in environmental offending scenarios play out in *real-world* environmental contexts. In the wake of such foreign experiences, the present contribution moves forward to consider whether the Italian legislative framework can also represent a suitable candidate to embrace restorative justice principles in environmental offending scenarios. To this end, chapter two explores the restorative justice's compatibility with the principles enshrined in the Italian Constitution, the Italian practice of restorative justice developed to date i.e., mediation in juvenile trials, the *probation* of adult offenders and the conciliation before the Justice of Peace, and the newly inserted delegating act n. 134/2021 entitled "Delega al Governo per l'efficienza del processo penale nonchè in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari" along with the official draft of its implementing decree published on August 10, 2022. The last section of the dissertation will delve into the analysis of the environmental crimes contained in the Italian legislation (the "eco-crimes" of Article 425-*bis* et seq. of the Italian Criminal Code and the administrative corporate liability for environmental crimes ex art. 25-*undecies* D.lgs 231/2001) and the restorative

practices envisaged thus far in the field of environmental protection. Accordingly, chapter three surveys the mechanisms of "ravvedimento operoso" of Article 452-*decies* of the Italian Criminal Code, the extinguishing procedure of Article 318-*bis* of the D.lgs 152/2006 and the reparatory measures of Article 17 of the D.lgs 231/2001 as proof of the willingness to apply the concept of "performance-based" restorative justice – conceived of as the actions that eliminate the effects of the crime through restitution, active conduct of neutralization of dangerous or offensive situations, performance in favor of victims or the community, special forms of active withdrawal, procedural cooperation, reparations, activities regulated by pardons, amnesties, pardons, oblations etc. – in environmental offending scenarios. The chapter will further reflect on the challenges that the "interpersonal"' form of restorative justice in environmental offending scenarios (i.e., the behaviors of criminal mediation and of reconciliation with the victim which aim at easing the tensions stemming from the offence with the help of a trained and impartial third party) might face within our domestic criminal system.[41] The thesis will conclude by offering some insights as to how Italy might become a leading country in the field of restorative justice and environmental protection.

[41] For the difference between the "performance-based" and the "interpersonal" form of reparation see Massimo Donini, "Le Due Anime della Riparazione Come Alternativa alla Pena-Castigo: Riparazione Prestazionale vs. Riparazione Interpersonale," *Giuffrè Editore* (2022): 2027.

II. CHAPTER 1 – RESTORATIVE JUSTICE IN ENVIRONMENTAL OFFENDING CONTEXTS: FOREIGN EXPERIENCE AND COMPARATIVE INSIGHTS

A. Restorative justice As a Mechanism to Address Criminal Acts

Historically, punishment has been conceived of as being the 'debt' that the offender had to pay to the society.[42] The Greek term of *poiné* referred to some sort of trade, and thus it implied the punishment to be the proportionate response to the committed offence.[43] With the spread of Christianity, the offender's repentance became justice's central pillar. Consequently, the concept of punishment was bound up to the ideas of pain and suffering.[44] The synthesis of the Semitic and Greek approaches to justice resulted in a punitive and retributive understanding of the concept of punishment.[45]

Modern criminal prosecution is still resultantly informed by an adversarial and retaliatory perspective.[46] The crime is seen as a breakdown of the relationship between the offender and the state.[47] This implies that the state is considered the primary victim

[42] Sara Castiglioni and Antonella Salvan, "L'esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l'Ufficio di Esecuzione Penale Esterna di Verona e Vicenza," *Il Mulino* (2012): 327.

[43] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 473.

[44] Sara Castiglioni and Antonella Salvan, "L'esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l'Ufficio di Esecuzione Penale Esterna di Verona e Vicenza," *Il Mulino* (2012): 327.

[45] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 473.

[46] Donald H. J. Hermann, "Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice," *Seattle Journal for Social Justice* 16, no. 1 (Summer 2017): 79.

[47] Howard Zehr, *Changing lenses: Restorative Justice for Our Times* (Harrisonburg, VA, and Kitchener, ON: Herald Press, 2015), 183; Paula Kenny

of the offence.[48] As a consequence, the whole focus of the proceedings is on punishing the offender and redressing the wrongdoing.[49] Following the flow of the argument, punishment is conceived of as being the 'just' response to the wrongdoing[50] and the only effective tool to deter future offences.[51] Deterrence is but an overarching aim pursued by traditional criminal prosecution. The prosecutor's ultimate hope and belief is that, by attaining a murder conviction, the potential reus would be dissuaded from committing further homicides.[52] The retributive approach can thus be summarized as follows: the offender must pay the debt to justice.[53]

Restorative justice is an approach to justice that emerged as a response to the dissatisfaction with the traditional retributive system.[54]

---

and Liam Leonard, *The Sustainability of Restorative Justice,* (United Kingdom: Emerald Publishing Limited, 2014), 48.

[48] Donald H. J. Hermann, "Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice," *Seattle Journal for Social Justice* 16, no. 1 (Summer 2017): 79.

[49] Chaitanya Motupalli, "International Justice, Environmental Law, and Restorative Justice," *Washington Journal of Environmental Law and Policy* 8, no. 2 (July 2018): 352.

[50] David J. Cornwell, F W M McElrea, John R Blad, and Robert B Cormier, *Criminal punishment, and restorative justice: past, present, and future perspectives,* (Winchester, UK: Waterside Press, 2006) 41.

[51] Rob White, "Indigenous Communities, Environmental Protection and Restorative Justice," *Australian Indigenous Law Review 18,* no. 2 (2014/2015): 43-4.

[52] Mark S. Pollock, "Local Prosecution of Environmental Crime," *Lewis & Clark Law School* 22, no. 4 (1992): 1411.

[53] Sara Castiglioni and Antonella Salvan, "L'esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l'Ufficio di Esecuzione Penale Esterna di Verona e Vicenza," *Il Mulino* (2012): 327.

[54] Armando Macrillò e Paola Balducci, *Esecuzione Penale e Ordinamento Penitenziario* (Milano: Giuffrè Francis Lefebvre, 2020) 846-7. Gilda Scardaccione, "Nuovi Modelli di Giustizia: Giustizia Riparativa e Mediazione Penale," *Rassegna Penale e Criminologica* (1997): 13. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 82.

Restorative justice is a concept that, due to the diverse juridical and philosophical angles from which it can be studied,[55] is subject to constant evolution and multiple interpretations.[56] One of the most broadly welcomed definitions of restorative justice is given by Marshall:

Restorative justice is a process whereby all the parties with a stake in a particular offense come together to collectively resolve how to deal with the aftermath of the offense and its implications for the future.[57]

Restorative justice is an approach to justice that aims at involving all those affected by the offence in order to reach a shared agreement as to how to repair and restore the harm caused by the misconduct.[58] This approach derives from the perception of the crime as a breakdown of the relationship between the offender and the victims, rather than a depersonalized violation of the law against the state.[59] Consequently, restorative justice conceives of the punishment not as being the 'just debt' of the offender, but as entailing the offender's acceptance of responsibility for the harmful consequences borne by the victims

[55] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 1.

[56] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 13].

[57] Tony F. Marshall, "The Evolution of Restorative Justice in Britain," *European Journal of Criminal Policy and Research* 4 (1996): 37.

[58] European Forum for Restorative Justice, *Thematic Brief on Restorative Environmental Justice*, (Leuven, Belgium, 2017), 3.

[59] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 88. Mark Hamilton and Tom Howard, "Restorative Justice in the Aftermath of Environmental Offending: Theory and Practice," *National Judicial College of Australia* (2020): 1; Marilyn Armour, "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history. Martin Wright, "In che Modo la Giustizia Riparativa è Riparativa?" *Convegno sul Tema 'Quali Prospettive per la Mediazione? Riflessioni Teoriche ed Esperienze Operative'* (2001): 153.

and the community altogether.[60] Accordingly, restorative justice aims at redressing the wrongdoing by advancing restitution over retribution.[61] Restitution is the attempt "to re-establish the situation which existed before the wrongful act was committed."[62] In line with this perspective, restorative justice involves all relevant stakeholders (the victim, the offender and the community) in the pursuit of a solution to repair the harm and reconcile those affected by the offence.[63] Restorative justice thus enhances the victim's participation and engagement in the process, holds the offender genuinely accountable to those who have borne the impacts of the crime, and pursues the restoration of the harm to the greatest extent possible.[64] Restorative justice also represents a hope for the future. Through restorative processes of direct interactions between the offender and the victims, and through reparative outcomes aimed at restoring the harm suffered by the victims, restorative justice boasts the benefit of hastening the process of reintegration of the offender into the society.[65] Moreover, by making the offender face up to the

---

[60] Sara Castiglioni and Antonella Salvan, "L'esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l'Ufficio di Esecuzione Penale Esterna di Verona e Vicenza," *Il Mulino* (2012): 327.

[61] Armando Macrillò, e Paola Balducci, *Esecuzione Penale e Ordinamento Penitenziario.* Milano: Giuffrè Francis Lefebvre, 2020, 854. Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 13].

[62] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* November 2001, Supplement No. 10 (A/56/10).

[63] "Reparation refers the process and result of remedying the damage or harm caused by an unlawful act." Oxford Bibliographies, available at https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0003.xml. *See also* Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 4. Paula Kenny and Liam Leonard, *The Sustainability of Restorative Justice* (United Kingdom: Emerald Publishing Limited, 2014), 54. Howard Zehr, *Changing lenses: Restorative Justice for Our Times* (Harrisonburg, VA, and Kitchener, ON: Herald Press, 2015), 183.

[64] Marilyn Armour, "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history.

[65] Armando Macrillò, e Paola Balducci, *Esecuzione Penale e Ordinamento Penitenziario.* Milano: Giuffrè Francis Lefebvre, 2020, 854. Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 21.

victims' stories and needs, restorative justice renders the chances that the culprits will engage in reoffending less likely to occur.[66]

In a nutshell, restorative justice is an inclusive response to crimes which calls together all relevant stakeholders to advance 'healing' by making things right.[67]

In sum, restorative justice revolves around four main pillars:

1. The recognition of the rights and needs of the victims of the offence.
2. The reparation of the harm suffered by the victims.
3. The offender's understanding of the wrongful character of their behavior and of the harmful consequences suffered by the victims.
4. The active engagement of the parties in the resolution of the aftermath of the offence.[68]

The restorative approach can thus be summarized as follows: the harm suffered by the victims is the object whereas the restoration of the harm is the ultimate aim pursued by restorative justice.[69]

1. Brief Overview of the History of Restorative justice

Restorative justice arose in conjunction with the emergence of alternative dispute settlement mechanisms and the victims'

---

[66] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 13].

[67] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 77.

[68] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 469. Wijdekop, "Restorative Justice Responses to Environmental Harm," 20. Grazia Mannozzi, "Problemi e Prospettive della Giustizia Riparativa alla Luce della 'Dichiarazione di Vienna,'" *Dottrina e Ricerche* (2001): 7 et seq. Gilda Scardaccione, "Nuovi Modelli di Giustizia: Giustizia Riparativa e Mediazione Penale," *Rassegna Penale e Criminologica* (1997): 13

[69] Sara Castiglioni and Antonella Salvan, "L'esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l'Ufficio di Esecuzione Penale Esterna di Verona e Vicenza," *Il Mulino* (2012): 327.

rights movements of the late 70s.[70] Restorative justice can thus be conceived of as being a backlash against the traditional criminal system[71] and its tendency to disregard the victims and the offender's participatory role in the process.[72]

The 1974 Kitchener case is understood to be the precursor of the victim-offender mediation and the starting point of restorative practices.[73] Kitchener is a small town in Ontario (on the border between Canada and the United States) where in the early 1970s two educators, Mark Yantzi and Dean E. Peachey, proposed to the judge of the case a probation program different from the one usually deployed.[74] The case dealt with the vandalization of twenty-two properties by two young boys, who pleaded guilty for damaging several houses close to the town's central street.[75] The two educators came up with the idea of replacing the usual model of probation, which was based on recreational activities and psychologically oriented interviews, with a more demanding program of encounters between the two young offenders and the families affected by the offence.[76] The new program, which was

[70] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 15].

[71] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 15].

[72] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1462.

[73] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 165-6. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 80-1.

[74] Marco Bouchard, "Breve Storia (e Filosofia) di Giustizia Riparativa," available at https://www.questionegiustizia.it/rivista/articolo/breve-storia_e-filosofia_della-giustizia riparativa_237.php.

[75] Marilyn Armour, "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history.

[76] Marco Bouchard, "Breve Storia (e Filosofia) di Giustizia Riparativa," available at https://www.questionegiustizia.it/rivista/articolo/breve-storia_e-filosofia_della-giustizia riparativa_237.php.

identified as a primal form of the victim-offender mediation, resulted in the offenders paying restitution to the victim.[77]

Shortly after the Canadian case, restorative practices begun to spread in North America and Europe.[78] The majority of the values and principles which informed early restorative practices were borrowed from indigenous communities, such as the First Nations People in the USA and the Maori in New Zealand.[79] At this very early stage, restorative justice was predominantly utilized for juvenile crimes. This was partially occasioned by the belief that the restorative process would potentially rehabilitate and reintegrate the offender into the society more effectively than the traditional system.[80] A step toward a more widespread application of restorative justice came in 1994, when the American Bar Association[81] endorsed the victim-offender mediation, a mechanism which until then was deployed only in minor offences and in the offenders' first-time trials.[82] Further support for restorative practices came from the monograph entitled *Restorative Community Justice: A call to Action,* which was delivered by the National Organization for Victim Assistance in 1995. [83]

---

[77] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 81.

[78] Marilyn Armour, "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history. Marco Bouchard, "Breve Storia (e Filosofia) di Giustizia Riparativa," available at https://www.questionegiustizia.it/rivista/articolo/breve-storia_e-filosofia_della-giustizia riparativa_237.php.

[79] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 16].

[80] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 16].

[81] The American Bar Association was created in 1878 for the purpose of advancing the rule of law among law practitioners and beyond. The American Bar Association, available at https://www.americanbar.org/about_the_aba/.

[82] Marilyn Armour, "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history.

[83] National Organization for Victims Assistance. *Restorative Community Justice: A Call to Action.* Washington, 1995. Marilyn Armour, "Restorative Justice: Some Facts and History," available at

In the 90s, the urge to recognize restorative practices started to spread throughout all Europe. In Germany, in 1990, the Täter-opfer-ausgleich (Author-Victim Mediation) was introduced in juvenile trials both as a "measure" and as a condition for the diversion from criminal justice proceedings. Norway, by means of the Mediation Law of 1991, introduced the mediation and reconciliation services as an option permanently available in criminal proceedings, whereas Spain, in 1992, adopted the first restorative provisions with Law 1992 No. 4, which governed the proceedings initiated before the courts specialized in juvenile trials.[84]

The worldwide growth of the late 90s resulted in restorative justice to be practiced in more than eighty countries.[85] The reason for such a sharp growth was twofold.

Firstly, the victims' and the offender's satisfaction are a mainstay of restorative justice processes. Academic studies have shown that the restorative processes reach 85% satisfaction among the victims.[86] Offenders are also said to be treated more satisfactorily in restorative processes.[87] This is mainly due to the possibility of actively engaging with the needs of the victims

https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history.

[84] Marilyn Armour, "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history. Marco Bouchard, "Breve Storia (e Filosofia) di Giustizia Riparativa," available at https://www.questionegiustizia.it/rivista/articolo/breve-storia_e-filosofia_della-giustizia riparativa_237.php.

[85] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 17].

[86] European Forum for Restorative Justice, *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017 [page 3].

[87] European Forum for Restorative Justice, *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017 [page 2].

while availing themselves of the possibility to apologize to the victims firsthand.[88] Second and relatedly, the majority of the academic studies developed to date demonstrate that restorative justice helps the offender in desisting from reoffending and thus reducing the chances of the offender's recidivism.[89] According to an Austrian study, the rate of offender's recidivism is 14% for restorative cases whereas 33% for traditional ones.[90] These, among others, are all plausible reasons for which the victims and the offenders may find it appealing to be involved in a restorative process.

With the advent of the new millennium, further support for restorative justice came from the European Union, the Council of Europe, and the United Nations, all of which committed to promote restorative justice through regulatory efforts, as it will be explained below.[91]

2. Restorative Justice: European and International Standards

To date, there are a number of European and International standards dealing with restorative justice.[92]

---

[88] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 21].

[89] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021 [page 2]. Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 17].

[90] European Forum for Restorative Justice, *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017 [page 4].

[91] Marilyn Armour, "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history.

[92] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 17].

Among the European standards envisaged to date are the 2001 Council of the European Union's *Framework Decision on the Standing of Victims in Criminal Proceedings*[93] and the 2012 EU Directive *establishing minimum standards on the rights, support, and protection of victims of crime.*[94]

The former upholds the idea that victim's rights should be perceived as a central tenet of criminal law policies.[95] Accordingly, the EU Council Framework Decision aims at harmonizing the member states' domestic legislation on the rights and key participatory roles of the victims in criminal law proceedings.[96]

The Framework Decision can be structured in three main parts, with each focusing on a specific subject matter. Part one addresses the rights exercisable by the victims before, throughout, and after the end of the trial.[97] To name but a few: the right of the victims to participate in criminal proceedings and to be treated with dignity throughout the course of the trial,[98] the rights of the victims to be heard and to provide inputs into the process,[99] and the right of the victims to receive adequate compensation for the damage they have suffered.[100] Part two, without delving deep into

[93] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

[94] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[95] Jonathan Doak, "The Victim and the Criminal Trial: A Survey of Recent Trends in Regional and International Tribunals," *Legal Studies* 23 (2003): 10.

[96] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

[97] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Articles 1-9.

[98] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 2.

[99] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 3.

[100] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 9.

the topic, dwells on mediation in penal matters. More specifically, it requires member states to engage in mediation whenever the latter is considered to be an adequate judicial mechanism to deal with the aftermath of the offence.[101] Mediation in penal matters, however, as far as international sources are concerned, is thoroughly regulated by the 1999 Council of Europe *Recommendation on Mediation in Penal Matters*.[102] Thus, by mentioning mediation within the EU Council Framework Decision, the European Union makes it clear that penal mediation should definitively become part of the member states' legal systems, since it is an alternative model of resolving conflicts that enhances the role of the victims while pursuing criminal deflation's purposes.[103] Lastly, part three of the EU Council Framework Decision focuses on whether the victims who reside in a country other than the one where the crime has occurred are granted the chance to fairly engage in criminal law proceedings.[104] More specifically, member states shall provide victims with the possibility of filing a complaint to the competent authorities of the state in which they reside in cases where they have not been able to do so in the state where the crime was committed.[105]

In a similar vein to the EU Council Framework Decision, the 2012 EU Directive *establishing minimum standards on the rights, support, and protection of victims of crime*, establishes a set of

[101] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 10.

[102] The Recommendation sets forth the set of standards and principles that should govern mediation services. Council of Europe Committee of Ministers, Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies).

[103] Marco Venturoli, "La Tutela delle Vittime nelle Fonti Europee," *Diritto Penale Contemporaneo* (2012): 92.

[104] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 11.

[105] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 11(2).

standards and provisions for the protection of the rights of the victims in criminal proceedings.[106] In broad terms, the Directive enhances the access to justice and the rights of the victims to be fully informed before and throughout the course of the trial.[107]

Article 2(a) of the Directive defines the victim as "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence" and "family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death."[108] Notably, the Directive offers a new and revolutionary understanding of the notion of victims.[109] The latter encompasses primary as well as secondary victims of the offence.[110] The Directive emphasizes the need for an individual assessment of the victims of crime, which should guarantee that the specific needs and conditions of the victims are adequately taken into account.[111] Such an individual assessment should consider the severity of the crime suffered by the victims along with the bias and discriminatory motives to which the crime is informed, as well as the victims' personal characteristics (i.e.,

[106] The Directive thus turns into a focal point for the development of member states' domestic legislation in the field of victims' support and protection. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. *See* also Marco Bouchard, and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[107] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 472.

[108] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 2(a) (i) (ii).

[109] Susanna Vezzadini, "What About Restorative Justice Practices in Italy after the EU Directive 29/2012?" A Long Story of Cultural Difficulties and Misunderstanding," *Criminal Justice Issues - Journal of Criminal Justice, criminology, and Security Studies* (2018): 429.

[110] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 49-50. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 472.

[111] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 472.

conditions of vulnerability) and their relationships with the offender.[112]

Against this backdrop, the EU Directive labels, under Article 4, the right of the victims "to receive information from the first contact with a competent authority."[113] Among the information that the member states shall grant to the victims there is the right of the victims to be fully aware of the available restorative justice services.[114] Restorative Justice is defined by Article 2(d) of the Directive as "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."[115]

Accordingly, Article 12 of the Directive requires member states to take adequate measures to prevent victims from being repeatedly victimized or intimidated, "to be applied when providing any restorative justice services."[116]

From the wording of Article 12(1) it can be inferred that the Directive does not oblige member states to adopt restorative

---

[112] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 22.

[113] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 4.

[114] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 4(1)(j).

[115] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 2(d).

[116] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 12(1).

justice programs.[117] Rather, it leaves to the member states' discretion to decide which cases shall be dealt with by means of restorative justice procedures.[118] Yet, once restorative programs are initiated within the member states, they shall be conducted in accordance with the Directive's imperatives and safeguards.[119] The latter in essence being:

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."[120]

---

[117] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 12(1).

[118] Gabriele Fornasari and Elena Mattevi, "Giustizia Riparativa: Responsabilità, Partecipazione, Riparazione," *Università degli Studi di Trento* (2019): 17.

[119] Unlike the Council of Europe, the European Union is empowered to issue legally binding laws in certain areas of criminal and procedural law, such as the rights of the victims of crimes. Consolidated versions of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 82(2)(c). *See also* Gabriele Fornasari and Elena Mattevi, "Giustizia Riparativa: Responsabilità, Partecipazione, Riparazione," *Università degli Studi di Trento* (2019): 17.

[120] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 12(1).

Lastly, Article 12, under the second paragraph, preaches to the member states a need to ensure that the conditions for the referral of cases to restorative justice services are facilitated by means of tailored guidelines and procedures.[121]

In a nutshell, the EU Directive emphasizes the key role played by the victims in the process and the highly beneficial character of restorative justice services.[122] However, the Directive does not provide a comprehensive framework for restorative justice's regulation.

A recent attempt to provide such a regulatory framework came with the 2018 Council of Europe *Recommendation concerning Restorative Justice in Criminal Matters,* which inevitably represents the latest international soft law instrument concerned with restorative justice issues.[123] The Recommendation, as it is clearly enshrined under Article I, aims at safeguarding the rights and the interests of all the parties with a stake in the offence while maximizing the effectiveness of the proceedings to the greatest extent possible.[124] Against this backdrop, the Recommendation encourages member states to deploy restorative justice when dealing with criminal matters.[125] The Recommendation defines restorative justice as "any process

[121] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 12(2).

[122] Marco Venturoli, "La Tutela delle Vittime nelle Fonti Europee," *Diritto Penale Contemporaneo* (2012): 95 and 103-105.

[123] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8.

[124] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 1.

[125] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 1.

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."[126] Notably, the Recommendation envisages the possibility of initiating restorative justice programs at any stage of the criminal justice procedure, even after "a sentence has been passed or completed," thus potentially in the stages of enforcement and incarceration.[127] Accordingly, the Recommendation urges member states to establish a clear legal basis for the referral of cases to restorative justice programs.[128] Moreover, it preaches to the member states a need to cooperate amongst each other towards the development of restorative justice procedures.[129] For the purpose of accomplishing such a mission, national authorities should share relevant information and materials on restorative programs with other member states or relevant organizations established therein.[130]

The Recommendation also emphasizes the role of the facilitator, whose task is to guide the restorative encounters while ensuring that the parties are fully informed of their rights and of the consequences to be engaged in a restorative process.[131] The facilitator is asked, after having thoroughly informed the parties

[126] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 3.

[127] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 6.

[128] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Articles 21.

[129] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 64.

[130] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 64.

[131] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 25.

prior to the commencement of the procedure, to assess the case suitability to be dealt with as a restorative justice process.[132] Accordingly, the facilitator is granted adequate time and resources to carry out risk assessment procedures and preparatory works with the parties involved.[133] In light of the crucial functions performed by the facilitator, their recruitment is subject to strict conditions.[134] Accordingly, Article 40 and 41 of the Recommendation require the facilitators to have the necessary skills and capacities to guide the encounter in an intercultural setting and deliver restorative justice in an effective manner.[135] The Recommendation thus envisages the role of the facilitator as a broad role which is comprehensive also of the functions commonly fulfilled by the mediator.[136]

In a nutshell, the Recommendation is but clear evidence of the relevance that states attach to restorative justice and its beneficial implications in criminal settings. However, the Recommendation falls under the umbrella of nonbinding instruments and thus its adoption remains subject to the willingness of member states.

Moving on to the regulatory efforts undertaken by the United Nations, the United Nations Congress on the Prevention of Crime and the Treatment of the Offender issued, in 2000, the soft law

---

[132] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 28.

[133] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 29.

[134] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 36.

[135] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Articles 40 and 41.

[136] Marco Bouchard, and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

Vienna Declaration on Crime and Justice.[137] The latter invited the member states to develop "restorative justice policies, procedures, and programmes that are respectful of the rights, needs, and interests of victims, offenders, communities, and all other parties."[138] In line with this perspective, paragraph 27 of the Declaration encouraged member states to introduce domestic action plans in support of the rights of the victims, such as "mechanism for mediation and restorative justice".[139]

Shortly after the Vienna Declaration, the Economic and Social Council of the United Nations issued the resolution 2000/14 on *The Basic Principles on the use of Restorative Justice Programmes in Criminal Matters,*[140] which provided one of the first comprehensive definitions of restorative justice. The latter being "any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party."[141]

The basic principles entail crucial guarantees envisaged to safeguard those who take part in restorative justice processes.[142] These safeguards encompass the right of the victim and the offender to receive legal advice and to be fully informed

---

[137] Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century. A/CONF.187/4 (2000).

[138] Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century. A/CONF.187/4 (2000) [para 28].

[139] Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century. A/CONF.187/4 (2000) [para 27].

[140] United Nations, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. (2002) No. 2002/12. 24 July. In Resolutions and decisions adopted by the Economic and Social Council at its substantive session of 2002 (1-26 July), pp 54-59. United Nations Economic and Social Council, E/2002/INF/2/Add.2.

[141] 2002 UN Basic Principles, paragraph 3.

[142] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 23.

throughout the course of the trial,[143] the consensual character of the agreement reached by the parties,[144] and the judicial supervision of the agreement whose implementation's failure shall not be used against the offender in later criminal proceedings.[145] Such basic principles are embedded in a soft law non-binding resolution whose adoption depends on the will of the states.[146] Accordingly, the UN resolution urges member states to develop, through the help of an expert group, a set of standard procedures for the deployment of restorative practices in criminal settings.[147] In a nutshell, any restorative process carried out by the member states shall be guided by domestic guidelines on the conduct of intervention and on the protection of the rights and interests of the relevant stakeholders involved in the process.[148]

The United Nations Office on Drugs and Crime (UNODC) advanced the regulatory mission with the 2006 publishing of the *Handbook on Restorative Justice Programmes,* which entails detailed principles as to the applicability of restorative justice in criminal matters.[149] The handbook emphasizes the complementary role of the restorative justice programs by ascertaining that they can intervene at any stage of the criminal justice procedure.[150] More specifically, there are four stages of the criminal process at which a restorative process can be

[143] 2002 UN Basic Principles, paragraph 12(a)(b).

[144] 2002 UN Basic Principles, paragraph 7.

[145] 2002 UN Basic Principles, paragraph 16.

[146] United Nations Economic and Social Council, E/2002/INF/2/Add.2.

[147] 2002 UN Basic Principles, paragraph 11. *See* also Jonathan Doak, "The Victim and the Criminal Trial: A Survey of Recent Trends in Regional and International Tribunals," *Legal Studies* 23 (2003): 7. Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 17]. Ministry of Justice (NZ), *Restorative Justice: Best Practices in New Zealand* (2004), 5.

[148] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 24.

[149] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006.

[150] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 13].

initiated: "(*a)* at the police level (pre-charge); *(b)* prosecution level (post- charge but usually before a trial), *(c)* at the court level (either at the pre- trial or sentencing stages); and, *(d)* corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison.)"[151]

Notably, the UNODC Handbook is the sole document that explicitly sorts out the critical ingredients of a successful restorative process.[152] Those in essence being the parties' willingness to be engaged in a process that they consider to be safe, and the parties' common appreciation of the facts of the case (which will expectantly result in a shared outcome).[153]

More specifically, the Handbook labels:

1. "an identifiable victim,
2. voluntary participation by the victim,
3. an offender who accepts responsibility for his/her criminal behavior and
4. non-coerced participation of the offender."[154]

For the purpose of examining restorative justice suitability to environmental crimes, therefore, the present thesis turns to investigate how each of the critical ingredients set forth in the UNODC's Handbook on Restorative Justice applies in an environmental offending scenario.

---

[151] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 13].

[152] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 8].

[153] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 201.

[154] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 8].

B. Restorative Justice Suitability to Environmental Crimes

1. An Identifiable Victim

While traditional criminal justice focuses on the offender (punishment and recovery), restorative justice places the victim and his or her suffering at the very core of its agenda.[155] Restorative justice emphasizes the role of the victims as right-holders who are empowered to actively influence the outcome of the offence.[156] It is thus of no surprise that the first critical ingredient for a successful restorative process (as listed in the UNODC Handbook on Restorative Justice) is the 'identifiable victim.'[157]

While the labelling of victims seems to be an accomplishable task in cases such as those of sexual assault or murder, identifying the victims of environmental offences may prove to be a harder task.[158] Take, for instance, a case of a river polluting offence.[159] The direct victim of the polluting offence is the environment, which is to say the river and its components, i.e., human biota and the biosphere. The offence also affects those individuals who used to swim in the river or simply enjoy the view of the

---

[155] Valentina Maglione and Bianca Lucia Mazzei, "Nella Riforma Penale La Sfida Per Riparare il Dolore delle Vittime," available at https://www.ilsole24ore.com/art/nella-riforma-penale-sfida-riparare-dolore-vittime-AEUUR07?refresh_ce=1.

[156] Sara Castiglioni and Antonella Salvan, "L'esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l'Ufficio di Esecuzione Penale Esterna di Verona e Vicenza," *Il Mulino* (2012): 327.

[157] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 8].

[158] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 501.

[159] Mark Hamilton, "Restorative Justice Activity Orders: Furthering Restorative Justice Interventions in an Environmental and Planning Law Context?" *European Property Law Journal* 32 (2015): 551.

noncontaminated waterway. The harm caused to the river (i.e., a communal resource) affects the tourism flows of the area, and thus renders the community a further victim of the offence. Remote victims potentially include the National Park and Wildlife rangers, tasked with the oversight of the river's healthy status, and environmental volunteers, charged with the management of the vegetation around the river. Lastly, future generations are also likely to be affected by the offence, in that the harm to a natural resource may not always be utterly reparable.[160]

Individual victims (i.e., humans directly and indirectly affected by the environmental offence) can participate in the restorative process firsthand, and thus no identification or representation issue should be raised in this regard.[161] The 'direct' victims of environmental offences, however, are usually non-humans. They involve nature, native vegetation, and the terrestrial and marine life that has been hampered by the offence. It thus falls within the competent authorities' remit to proactively identify such a wide array of nonhuman victims.[162] Identifying nature as a victim of the offence is facilitated by the growing movement of recognizing nature as a subject of rights.[163] To name but a few: the Ecuadorian Constitution crystallized the Rights of Nature into positive law,[164] Bolivia followed the same approach by issuing the Law on the Rights of Mother Earth,[165] other

[160] Mark Hamilton, "Restorative Justice Activity Orders: Furthering Restorative Justice Interventions in an Environmental and Planning Law Context?" *European Property Law Journal* 32 (2015): 551.

[161] Mark Hamilton, "Restorative Justice Activity Orders: Furthering Restorative Justice Interventions in an Environmental and Planning Law Context?" *European Property Law Journal* 32 (2015): 552.

[162] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 501-2.

[163] Julien Betaille, "Rights of Nature: Why It Might Not Save the Entire World," *Journal for European Environmental & Planning Law* 16, no. 1 (March 2019): 36.

[164] Constitution of the Republic of Ecuador, Article 71.

[165] Ley de Derechos de la Madre Tierra, Ley 071 (2010) (Bol.).

countries, such as Colombia,[166] have identified the Rights of Nature through their case law.[167] The driving force behind the emergence of nature's rights has been the need "to grant nature legal standing,"[168] i.e., "the independent legal right to go to court."[169] The effectiveness of nature's legal personhood (as nature is incapable of vocalizing its victimization)[170] lies on how human guardians perform their functions.[171] The challenge is thus determining, once nature has been identified as a victim, who is entitled to effectively speak on behalf of the damaged environment.[172] On this account, multiple views have been proposed. According to Preston, governmental and non-governmental organizations may be the adequate representatives of the environment in restorative processes.[173] Hamilton instead believes that the more voices (speaking on behalf of the harmed nature) included in the process the better.[174] White thinks of indigenous people (in cases where the offence affects an aboriginal community) as the appropriate surrogate victims of the environment due to their close tie with nature.[175] Babcock

---

[166] The Columbian Supreme Court recognized the Amazon rainforest as a subject of rights. Corte Suprema de Justicia de Colombia 2018 Radicación N. 11001-22-03-000-2018-00319-01.

[167] Kristen Stilt, "Rights of Nature, Rights of Animals," Harvard Law Review Forum 134, no. 5 (March 2021): 279.

[168] Allison McKenzie, "Rights of Nature: The Evolution of Personhood Rights," *Joule: Duquesne Energy & Environmental Law Journal* 9 (2020-2021): 33.

[169] Hope M. Babcock, "A Brook with Legal Rights: The Rights of Nature in Court," *Ecology Law Quarterly* 43, no. 1 (2016): 18.

[170] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 501.

[171]Alice Bleby, "Rights of Nature as a Response to the Anthropocene," *University of Western Australia Law Review* 48, no. 1 (2020): 53.

[172] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 44].

[173] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 14.

[174] According to the author, these voices can be those of indigenous and non-indigenous communities, commercial operators, environmental experts and so on. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 222-3.

[175] Rob White, "Indigenous Communities, Environmental Protection and Restorative Justice," *Australian Indigenous Law Review 18,* no. 2 (2014/2015): 44-5.

maintains that qualified lawyers with recognized expertise in the field of environmental protection should speak on behalf of the harmed nature.[176] The multiple solutions that have been proposed to identify the adequate human representatives of the environment are nothing but evidence to the fact that the environment's lack of voice 'is not an insuperable problem.'[177] In a nutshell, the growing recognition of the rights of nature helps render nature as a victim as easily identifiable as human victims. Therefore, according to the first criterion, restorative processes may be a suitable response to environmental offences.

2. The voluntary Participation by the Victim

Restorative justice conceives of the crime as being primarily a harm suffered by people.[178] Thus, restorative justice aims at lowering the suffering of the victim rather than insisting on the punishment of the offender.[179] As a result, restorative justice grants to victims a voice and a key participatory role in the process. It allows the victims to be actively involved in the process as well as in the restoration of the harm.[180] The victims can thus advance their needs by telling their stories and expressing their feelings. Further, they can avail themselves of the possibility of asking questions directly to the offender.[181] The voices and inputs of the victims are heard and accounted for.[182]

---

[176] Hope M. Babcock, "A Brook with Legal Rights: The Rights of Nature in Court," *Ecology Law Quarterly* 43, no. 1 (2016): 49.

[177] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 14.

[178] Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015), 31.

[179] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 23-4].

[180] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 20.

[181] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 22].

[182] European Forum for Restorative Justice, *Effectiveness of Restorative Justice Practices: an Overview of Empirical Research on Restorative Justice Practices in Europe*, 2017 [2].

As a result, the idea of victims as nameless and faceless individuals is utterly abandoned in restorative processes.[183] However, the objectives of restorative justice may be attained only if the victims decide on their own accord to be engaged in the process. A victim who is obliged to take part in the process is unlikely to be willing to share their views as to the impacts the offence has had on them. Further, a coerced victim may not be ready to face the offender firsthand, and thus will further suffer from the encounter with the culprit.[184] In a nutshell, the victims' willingness to be engaged in the process is an ingredient that guarantees the potential success of the restorative program.

One may wonder the reasons as to why the victims of environmental offences may wish to participate firsthand in a restorative process. First and foremost, victims may crave to meet the offender and seek answers from them. Presumably, victims may be interested in understanding why they were the targets of the crime, what precisely occurred during the offence, and whether the offender has been held accountable for the consequences of their action. Second and relatedly, victims may be interested in participating in the restorative processes in order to gain some sort of compensation for the harm they have suffered or to ascertain if the offender, by means of the dialogues held with the victim, will be dissuaded from committing future environmental offences.[185] Therefore, in cases where the victims of the offence wish to take part in the process, restorative programs represent suitable responses to environmental crimes.

---

[183] David J Cornwell, F W M McElrea, John R Blad, and Robert B Cormier, *Criminal punishment, and restorative justice: past, present, and future perspectives,* (Winchester, UK: Waterside Press, 2006) 122.

[184] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 504.

[185] European Forum for Restorative Justice, *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017 [page 1].

3. The offender's Acceptance of Responsibility

The third critical ingredient of a restorative process is 'an offender who accepts responsibility for his/her criminal behaviour.'[186] The potential benefits of restorative processes are considerably undermined if the offender tends to underestimate the effects of the offence, in that the denial of responsibility might result in re-victimization.[187] The latter indicates the lamentable possibility that the victim will suffer from further harm if confronted with an offender who denies their liability.[188] Therefore, for a restorative program to be considered suitable to the case, the offender's acceptance of responsibility is crucial.[189]

Environmental offending may be intentional, accidental, or reckless. Environmental offences may be perpetrated without the full appreciation of the severity of the harm that has been caused.[190] It is no coincidence that environmental crimes are in most countries framed in terms of strict liability.[191] This implies

---

[186] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 8].

[187] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1484.

[188] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 507.

[189] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1484.

[190] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 504.

[191] An illustration of a strict liability offence is section 120(1) of the *Protection of the Environment Operations Act 1997* (NSW), which states: '[a] person who pollutes any waters is guilty of an offence'. *Protection of the Environment Operations Act* (PEO Act) s 120. In order to establish a breach of the abovementioned section of the Act, it is sufficient to prove that the pollution of the waters was caused by the offender's actions. It is irrelevant whether the offender has perpetrated the offence intentionally or accidentally. *See* also Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context,"

that all that is required for prosecution is the proof that the harm has been caused by a certain act carried out by a certain offender. Evidence that the offender has acted with the intention to cause the harm (the guilty mind, i.e., 'mens rea') is thus not needed to prosecute environmental offences. The absence of a criminal intent (i.e., strict liability) turns environmental crimes into an offending area where a considerable number of guilty pleas is attained.[192] A guilty plea, however, is not the sole indicator of the offender's acceptance of responsibility. Contrition and remorse (mostly evinced by an apology made truthfully to the victims) are also significant evidence of the offender's admission of liability.[193] In cases where environmental crimes stem from an act attributed to an entity rather than to a single individual, contrition and remorse shall be expressed by those who have the power to bind the company. In other words, it is crucial for RJ suitability that those in control of the offending corporate realm accept the responsibility for the acts committed by those under their control.[194]

Hence, 'offenders who acknowledge full responsibility for the [environmental] offence and demonstrate empathy for the victims of the offence' are the perfect candidates for restorative programmes. This is because they are likely to empathize with the victims and genuinely cooperate with them in the determination

---

University of New South Wales Law Journal 42*,* no. 4 (November 2019): 1484-5.

[192] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1484.

[193] Other means to express contrition and remorse are concrete actions to redress the wrongdoing and plans to avoid that the same offence will reoccur in future. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 196.

[194] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1487; Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 504.

of the appropriate outcome to repair the harm that has been caused to the environment.[195]

4. The Non-Coerced Participation of the Offender

Restorative justice pursues the reparation of the harm as its primary goal.[196] Reparation can come in different forms: material reparation, which generally results in concrete actions to restore the harm (e.g., by returning the property that has been stolen or by compensating the damage that the offence has caused) and symbolical reparation (e.g., by apologizing to the victims). Reparation originates from the appreciation that someone's own behavior resulted in someone else's suffering.[197] The appreciation of the nature and the extent of the harm, in turn, can only be attained by involving firsthand those affected by the crime and those who shall bear the responsibility of the offence.[198] This is the reason why the participation of the offender, like that of the victims, turns out to be a critical ingredient for a successful restorative process.[199]

By bolstering the dialogue and the interaction among the victims and the offender,[200] restorative processes compel the offender to listen to the victims' stories and feelings. By means

---

[195] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 505-7.

[196] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021[3].

[197] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 24].

[198] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021[3].

[199] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 8].

[200] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 10.

of this personal exchange of views, the offender becomes fully aware of the consequences that the offence has had on the victims.[201] The engagement in dialogues thus aids relevant stakeholders in better learning about the effects of their behaviors. To put it bluntly, restorative processes allow the offender to 'stand in the victim's shoes' and fully grasp the extent of the harm they have caused. The communicative and educative elements of the restorative process, in turn, contribute to the reintegration of the offender into the community.[202] Reintegration (i.e., the process through which the offender is fully re-immersed into the society) aims at repairing the relationships that the crime has broken.[203] It goes without saying that reintegration and education are largely dependent on the offender's willingness to learn from their misconducts and repair the harm resulting from them.[204]An offender who is obliged to take part in the process is unlikely to share information about the reasons behind the perpetration of the crime, to truly appreciate the impact of the offence, and to genuinely work towards the restoration of the harm.[205] Therefore, the offender's "non-coerced participation" in the process is as important as the victims' "voluntary participation" in the restorative program.[206]

In cases of environmental crimes, the offender may be interested in participating in restorative justice processes to show that they truly regret the wrongdoing, to apologize firsthand to the

---

[201] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 20-1.

[202] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 93-4 and 167.

[203] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 25].

[204] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 94.

[205] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 506.

[206] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 8].

victims, to restore their reputation (particularly relevant for the financial viability of offending corporations),[207] and to offer some sort of restoration to the harm they have provoked.[208] Thus, from the offender's perspective, restorative processes are potentially suitable responses to environmental crimes.

In conclusion, whenever the conditions set forth by the UNODC's handbook are satisfied, i.e., the victims are identifiable, both parties are willing to participate in the process, and the offender has accepted its responsibility, restorative justice will likely be a suitable and successful mechanism to deal with the aftermath of an environmental offence.

C. Models of Green Restorative Justice

Moving from the assumption of theoretical suitability to the question of which restorative method should be deployed in environmental offending scenarios is not straightforward.[209]

Since its emergence in the late 70s, new programs of restorative justice have appeared while the existing restorative practices modified and oftentimes utterly reshaped. Three models tend to currently prevail in the restorative justice's scenario.[210] According to the 2002 Basic Principles, "examples of restorative process include mediation, conferencing, and sentencing circles."[211] Along the same lines, the 2012 EU Directive on

[207] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 171.

[208] European Forum for Restorative Justice, *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017 [page 2].

[209] Carla Zamith Boin Aguair, Joao Salm, and Katia Herminia Martins Lazarano Roncada, "Restorative Justice and Environment," Associação dos Juízes Federais do Brasil – AJUFE (2020): 53.

[210] Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015), 53 and 56.

[211] 2002 UN Basic Principles, Paragraph 3.

Victims' rights labels "the victim-offender mediation, family group conferencing and sentencing circles" as examples of restorative justice services.[212]

Victim-offender mediation (VOM) is the most widely adopted restorative practice in Europe.[213] It is currently utilized as a form of post sentencing practice in England, Belgium, and the Netherlands.[214] Following the wording of the 1999 Council of Europe Recommendation, mediation refers to "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 crime through the help of an impartial third party (mediator)."[215] VOM is a process whereby the victim and the offender are brought together along with a mediator whose task is to structure and coordinate the encounter.[216] The presence of the mediator is urged to ensure that the meeting is carried out in a fair and balanced manner.[217] VOM allows those affected by the offence to meet with the culprit in a safe and controlled environment.[218] During the encounter, the victim is asked to tell their side of the story and how they have experienced the offence. The offender, in turn, besides responding to any queries the

[212] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Preamble [paragraph 46].

[213] Armando Macrillò, e Paola Balducci, *Esecuzione Penale e Ordinamento Penitenziario.* Milano: Giuffrè Francis Lefebvre, 2020, 848. Gabriele Fornasari and Elena Mattevi, "Giustizia Riparativa: Responsabilità, Partecipazione, Riparazione," *Università degli Studi di Trento* (2019): 75.

[214] Paula Kenny and Liam Leonard, *The Sustainability of Restorative Justice,* (United Kingdom: Emerald Publishing Limited, 2014), 109.

[215] Council of Europe Committee of Ministers, Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies), Article I.

[216] Paula Kenny and Liam Leonard, *The Sustainability of Restorative Justice,* (United Kingdom: Emerald Publishing Limited, 2014), 106.

[217] Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015), 60.

[218] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 26].

victims may have, is asked to describe what he has done and the reasons why they have perpetrated the offence. After having exchanged their views, the victim and the offender are aided by the mediator in reaching an agreement as to how to make amends. VOM thus fosters the relationships among the participants while building trust with the mediator.[219] Yet, VOM's narrow scope of application (victim/offender) might disregard any other party with a stake in the offence. Accordingly, VOM runs the risk of leaving unaddressed the issue of victims' representation, i.e., who should be the surrogate victim empowered to speak on behalf of the environment in a mediation encounter.[220]

Sentencing circles is a community-oriented practice which, differently from VOM's narrow scope of application (victim/offender), involves those who have been affected by the offence and those who shall bear the responsibility for it, their family members, the judge, the legal counsels, the prosecutor, and the whole community.[221] Each person is granted the possibility of speaking in the order established by the circle's disposition. The process is facilitated by the presence of a 'circle keeper,' who essentially fulfils the same function as that of the conference's facilitator.[222] Sentencing circles, sometimes referred to as 'peacemaking circles', are conducted for the purpose of reaching a broadly supported sentence that addresses the interests of all those involved in the offence.[223] Accordingly, sentencing circles are open to the public (i.e., the members of the community with a stake in the offence) and destined to tackle the most severe

[219] Paula Kenny and Liam Leonard, *The Sustainability of Restorative Justice,* (United Kingdom: Emerald Publishing Limited, 2014), 106.

[220] Carla Zamith Boin Aguair, Joao Salm, and Katia Herminia Martins Lazarano Roncada, "Restorative Justice and Environment," Associação dos Juízes Federais do Brasil – AJUFE (2020): 53.

[221] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 7.

[222] Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015), 64.

[223] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 26].

offences.[224] Many of the principles and values which inform peacemaking circles (such as integrity, respect, the value assigned to words etc.) are borrowed from aboriginal communities.[225] Resultantly, sentencing circles use traditional aboriginal circle rituals and practices.[226] The latter render circles more likely to succeed in cases where aboriginal people are directly involved. It is no coincidence that, as of today, circles have merely been used to deal with offences committed by Aboriginal adults in Canada.[227] Due to such a narrow scope of application, it seems to be premature to argue in favor of circles as a practice to be widely deployed in environmental offending scenarios.

Family group conferences (FGC) trace their origins in the Maori community (the New Zealand's aborigines), who have historically attributed great importance to family values.[228] Family group conferencing resembles circles in so far as it brings together the victim, the offender, their family members, and the community. Family group conferences are thus a form of encounter with a wider focus than the VOM, in that they include the presence of the victim' and the offender's family members alongside the representatives of the community. The FGC meeting, which is guided by an impartial facilitator, aims at shedding light on how the victims, their families, and the community have been damaged and what actions are needed on

[224] Grazia Mannozzi, "Problemi e Prospettive della Giustizia Riparativa alla Luce della 'Dichiarazione di Vienna,'" *Dottrina e Ricerche* (2001): 15.

[225] Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015), 64. Martin Wright, "In che Modo la Giustizia Riparativa è Riparativa?" *Convegno sul Tema 'Quali Prospettive per la Mediazione? Riflessioni Teoriche ed Esperienze Operative'* (2001): 155.

[226] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 26].

[227] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 7.

[228] Martin Wright, "In che Modo la Giustizia Riparativa è Riparativa?" *Convegno sul Tema 'Quali Prospettive per la Mediazione? Riflessioni Teoriche ed Esperienze Operative'* (2001): 154. Elena Mattevi, "Giustizia Riparativa ed il Sistema del Giudice di Pace," *Università degli Studi di Trento* (2012): 73.

behalf of the offender to restore such a harm.[229] During the community/family group conferencing, the discussions concerning the facts of the case and the modes of reparation of the harm are led by an independent facilitator.[230] A conference is deemed to be 'restorative' whenever it is collaborative and confidential in nature, it is based on voluntary participation, and the interests of the participants are placed at the very core of the encounter.[231] In contrast to sentencing circles, conferencing has been widely utilized in New Zealand,[232] Ireland, South Africa, South Australia, Minnesota, Montana, and Pennsylvania.[233] Recently, FGC begun also to spread in Europe, especially in Belgium and Austria.[234] By bolstering the interactions between relevant stakeholders,[235] conferencing has the potential to shed light on how the victims and their families have been damaged and what actions are needed on behalf of the offender to restore the harm.[236] It is thus the face-to-face conferencing that seems to be the restorative method with the greatest potential to widely deal with the aftermath of environmental offences.

Conferences could potentially be held at any stage of the criminal justice proceedings or operate as alternatives to prosecution. For the purposes of the present chapter, conferencing

---

[229] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 26].

[230] Grazia Mannozzi, "Problemi e Prospettive della Giustizia Riparativa alla Luce della 'Dichiarazione di Vienna,'" *Dottrina e Ricerche* (2001): 14.

[231] Ministry of Justice (NZ), *Restorative Justice: Best Practices in New Zealand* (2004) 34-7.

[232] In New Zealand, indeed, 30% of the annual juvenile trials are dealt with as a family group conferencing. Grazia Mannozzi, "Problemi e Prospettive della Giustizia Riparativa alla Luce della 'Dichiarazione di Vienna,'" *Dottrina e Ricerche* (2001): 18.

[233] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 26].

[234] Benedetta Bertolini, "Pensare le Alternative al Processo: La Diversione," *Sapienza Legal Papers* (2012): 32.

[235] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility," *UNSW Law Journal* 44 (2021): 488.

[236] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 26].

is understood to be 'embedded as part of sentencing not as a diversion from prosecution'. This implies that the model of 'back-end' conferencing is articulated as follows. The first step is the initiation of the environmental prosecution before a court. Following the formal commencement of the proceedings, the court assesses the facts of the case (by means of cross-examination when necessary). The third stage concerns the appreciation of the conferencing suitability to the case. The suitability assessment will be conducted pursuant to the criteria set forth by the UNODC's Handbook on Restorative Justice. In the fourth phase, the court suspends the proceedings for the conference to be held. In the fifth and last stage, the case is brought back to the judge for sentencing.[237] Notably, the back-end model of conferencing does not displace *in toto* conventional justice.[238] The judge maintains control over the establishment of the facts of the case and the content of the sentence.[239] In exercising such a supervisory role, the judge ensures that the procedural safeguards are respected and that the punishment of the offender is proportionate to the offence.[240] In sentencing the offender, the court considers the outcomes achieved at the conference[241] and modifies them whenever the accomplishment of the sentencing statutory purposes requires to do so.[242] Once the outcomes of conferencing are transposed into court's binding

[237] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility," *UNSW Law Journal* 44 (2021): 488 and 493-5.

[238] Janet Chan, Jane Bolitho, and Jenny Bargen, "Restorative Justice as an Innovative Response to Violence," *The Federation Press* (2015): 242.

[239] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 247.

[240] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1466.

[241] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 109.

[242] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1466.

orders, compliance with the agreement will be ensured by the enforcement mechanisms at the disposal of the court. In a nutshell, "the back-end model of restorative justice conferencing" ensures the bedrocks of procedural fairness, consistency in sentencing, proportion in punishment, and compliance with the agreed outcome.[243] The potential benefits and shortcomings of deploying such a suitable 'back-end model' of restorative conferencing to environmental offending scenarios are at the core of the following section.

D. Potential Benefits And Limitations of Deploying Restorative Justice Conferencing As a Mechanism to Address Environmental Harm: Theory And Practice

Environmental harm is inherently relational.[244] Environmental crimes claim many victims in that they not only affect the environment (which experiences the loss and degradation of habitats, species, and ecosystems), but also single individuals (whose health or property is hampered by the offence), the community (who suffers the loss of common resources), Aboriginal people (whose cultural and natural heritage has been violated) and future generations (in that the offence may impinge upon non-replaceable resources).[245] The chances that the victims' rights and needs go unrecognized in environmental prosecution, whose focus is on the state and the

[243] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1466 and 1470-1.

[244] As an illustration of the 'relational' character of environmental harm one can refer to the river case of Chapter 1.B(a). *See* also Stefano Porfido, "The Use of Restorative Justice for Environmental Crimes in the European Union's Legal Framework," *Queen Mary Law Journal* (2021): 112.

[245] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 31-2].

offender, are frighteningly high.[246] In contrast to the traditional responses to environmental crimes, restorative justice conferencing grants the victims a safe and structured environment to tell their side of the story and express their thoughts as to what needs to be done to repair the harm.[247] Restorative justice conferencing is thus an inclusive response to crime which has the potential to recognize and empower the wide range of environmental victims by providing them a voice and an active role in the process. In a nutshell, applying restorative justice conferencing to environmental offending scenarios has the potential to guarantee justice to environmental victims by granting them an active participatory role in the process and in the restoration of the harm.[248]

Restorative justice's inclusive character extends further by involving the so-called 'community of care' in the process.[249] The latter entail the micro-communities of relationships on which the offence directly or indirectly impinges upon.[250] When it comes to environmental crimes, the reason for the need to involve the affected community in the process is twofold. First, each crime affecting single individuals has echoing effects on the whole community,[251] whose interests in the protection of the

[246] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 32].

[247] Miranda Forsyth, Deborah Cleland, Felicity Tepper, Deborah Hollingworth, Milena Soares, Alistair Nairn, and Cathy Wilkinson*, "*A future Agenda for Environmental Restorative Justice," *The International Journal of Restorative Justice,* 4, Issue 1 (2021): 31-2.

[248] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 33-5].

[249] Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015) 37.

[250] Direct stakeholders such as the friends and the members of the family of the victim. Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 22; Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015) 37-8.

[251] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 22.

environment are impinged upon.[252] Second, laypeople may know the environment in which the offence did take place best.[253] In other words, the inputs provided by the representatives of the community can contribute to make the offender better aware of the collective impacts their action has had.[254] Therefore, by engaging with the affected community alongside the victims and the offender, environmental restorative justice has the potential to ameliorate the global response to the harm occasioned by the environmental offence.

Restorative justice conferencing has the potential to positively affect also those bearing the responsibility of the offence.[255] In contrast to traditional environmental prosecution where the parties' inputs are heard through the voices of their lawyers and representatives, restorative justice conferencing allows for the direct and personal interaction among the relevant stakeholders.[256] As a result of the mutual exchange of views, the offender finds himself in the position to fully appreciate the nature and the extent of the harm they have caused.[257] Restorative processes thus contribute to educate the offender about the collective impacts their action has had on the environment and the broader community. For instance, a restorative justice conferencing which involves indigenous communities might give

---

[252] Nicola Pain, Rachel Pepper, Millicent McCreath, and John Zorzetto, "Restorative Justice for Environmental Crime: An Antipodean Experience," *Australian Environment Review* (2016): 7-8.

[253] European Forum for Restorative Justice. *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017 [page 2].

[254] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 22.

[255] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 33].

[256] Miranda Forsyth, Deborah Cleland, Felicity Tepper, Deborah Hollingworth, Milena Soares, Alistair Nairn, and Cathy Wilkinson*, "*A future Agenda for Environmental Restorative Justice," *The International Journal of Restorative Justice,* 4, Issue 1 (2021): 30.

[257] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021 [page 3].

the offender insights as to the relevance of nature in indigenous cultures and traditions. The insights into the committed offence are likely to sensitize the offender and thus downplay the chances that the offender will commit like offences in future.[258] Restorative justice conferencing, therefore, redresses the wrongdoing while decreasing the chances of the offender's recidivism.[259] This deterrent effect (i.e., the unlikely reoccurrence of the harm by the offender) becomes crucial in the environmental context, where prevention of future harms is equally important as the restoration of the harm.[260]

The interactions allowed by the restorative process lead the parties to voluntarily agree to innovative and targeted outcomes aimed at repairing the damage that has been caused to the environment.[261] Restorative outcomes revolve around community services, compensatory restoration, actions targeting future behaviors, e.g., monitoring measures for environmental activities pursued by the offending party, apologies, and the restoration of the affected environment whenever that proves to be possible (e.g., restoring the species' diversity, the safety of places and habitats, and the ecosystems' heathy conditions).[262] Restorative

---

[258] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1468.

[259] European Forum for Restorative Justice. *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017 [page 4]; European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021 [page 2].

[260] Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2015) 33; Allan Rosas, "Issues of State Liability for Transboundary Environmental Damage," *Nordic Journal of International Law* 60, no. 1 (1991): 34.

[261] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 161 and 135.

[262] Miranda Forsyth, Deborah Cleland, Felicity Tepper, Deborah Hollingworth, Milena Soares, Alistair Nairn, and Cathy Wilkinson*, "*A future Agenda for Environmental Restorative Justice," *The International Journal of Restorative Justice,* 4, Issue 1 (2021): 30. European Forum for Restorative

justice conferencing can also solve environmental tensions by committing the offender to an action plan to restore the harm, thereby hastening the process of reintegration of the offender into the affected community.[263] In cases of environmental harm, if the sentencing of the offender is not accompanied by actions targeted at restoring the damage, the mere imposition of punishment turns out to be totally meaningless.[264] Therefore, using restorative conferencing in environmental offending scenarios boasts the benefit of attempting to restore the environment to its status *quo ante* in a more tailored and effective way than traditional environmental prosecution. In cases where the harm to the environment is not utterly repairable, restorative conferencing nevertheless boasts the benefits of proactively engaging with the victims and amending the relationships between the relevant stakeholders.[265]

By making the offender repair the harm firsthand, restorative justice conferencing contributes also to internalize the costs of abating and containing the harm to the environment.[266] One can speak of costs' internalization whenever the costs associated with the damage are borne by the individuals or the enterprises who have directly caused the harm to the environment.[267] The idea of costs internalization is embedded in the Polluter Pays principle,

---

Justice. *Thematic Brief on Restorative Environmental Justice*. Leuven, Belgium, 2017 [page 5].

[263] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 33].

[264] Brunilda Pali and Ivo Aertsen, "Inhabiting a Vulnerable and Wounded Earth: Restoring Response Ability," *International Journal of Restorative Justice* 4, Issue 1 (2021): 6.

[265] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1469.

[266] *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* (2018) 236 LGERA 291 [para 100].

[267] Pierre-Marie Dupuy and Jorge E Vinuales, *International Environmental Law* (Cambridge: Cambridge University Press, 2nd ed, 2018), 81-83.

which is a pivotal principle of sustainable development.[268] The principle, in its current formulation, preaches to the national authorities a need "to promote the internalization of environmental costs and the use of economic instrument, taking into account the approach that the polluter should, in principle, bear the costs of pollution."[269] By enabling reparative solutions for the environment, restorative justice is thus well-suited to be a modality through which the polluter-pays principle is operationalized and applied.[270]

The benefits of applying restorative justice conferencing to environmental matters thus range from the victims' rights recognition, the parties' active role in the process, the offender's education and likely desistance from reoffending, to more tailored and effective solutions to repair the harm that has been caused to the environment.[271] By using collective interactions among the parties, not only is the environment likely to be restored to the greatest extent possible, but also the relationships between the victim and the offender will eventually be repaired.[272] In summary, applying restorative justice to environmental offences grants many more benefits than simply achieving the parties' mutual understanding of the facts of the case through dialogues.[273] The following question should thus be what the trade-off for such an application of restorative justice to environmental cases amount to.

---

[268] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 23.

[269] United Nations Conference on Environment and Development, 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26, (June 1992), Principle 16.

[270] Brian Preston, "The Use of Restorative Justice for Environmental Crime," *Criminal Law Journal* 136 (2011): 23.

[271] Rob White, "Reparative justice, environmental crime, and penalties for the powerful," *Crime Law Soc Change* 67 (2017): 129.

[272] This is the so-called benefit of 'relational repair.' Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 251 and 174.

[273] Aiden Stark, "Environmental Restorative Justice," *Pepperdine Dispute Resolution Law Journal* 16, no. 3 (2016): 446-7.

Some argue, for instance, that restorative conferences demand more time and money when compared to traditional environmental prosecution.[274] Restorative conferences are indeed not fast or cheap procedures. The parties may take an interminable time to achieve an agreed solution that, notwithstanding the parties' mutual will, may be later dismissed by the court. In some cases, the parties may not even come to an accord at all. However, the extra time and money required for restorative processes can be justified in light of the better outcomes that restorative justice potentially achieves.[275] Restorative outcomes are more demanding than traditional outcomes in that the offender is asked to accept their liability and face the victims' suffering and anger firsthand.[276] In some cases, restorative justice might lead to a restorative compensation, whose value exceeds the value of the potential penalty established by a court in a traditional prosecution. Such a higher penalty would cover the costs associated with the restoration of the harm along with the costs of holding the conference. Moreover, the payment of a considerable sum would also aid the offender in restoring the reputation damaged by the environmental offence.[277] In a nutshell, the outcomes of restorative conferences offset the fear of lengthy and expensive procedures.

---

[274] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 175.

[275] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1470.

[276] Chaitanya Motupalli, "International Justice, Environmental Law, and Restorative Justice," *Washington Journal of Environmental Law and Policy* 8, no. 2 (July 2018): 349.

[277] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1470.

The targeted and responsive nature of restorative outcomes, however, has led some scholars to argue that restorative justice is a mechanism incapable of guaranteeing consistency in like offences.[278] Those in support of this view worry that the diverse attitudes of the parties involved in the processes, along with the responsive character of the restorative order to the harm that has been caused, might lead to widely divergent solutions for similar types of offences.[279] They also argue that, contrary to traditional prosecution where certain guidelines ensure consistency in sentencing, due process safeguards are not the primary concern of restorative justice.[280] This argument, however, is misplaced when it comes to restorative programs embedded as part of sentencing process,[281] where due process safeguards, such as the right to a fair trial, are secured by the supervisory function performed by the court.[282] The consistency critique falls short also because the lack of strict sentencing uniformity is not necessarily a drawback. The lack of uniformity enables the outcomes to be more flexible. Restorative outcomes are decided on a case-by-case basis and consequently result in more tailored solutions for the harm caused by the environmental offence.[283] As thoroughly explained above, tailored and innovative outcomes are but a point of strength of environmental restorative justice.

---

[278] Nicola Pain, "Encouraging Restorative Justice in Environmental Crime," *Newcastle Law Review* 13 (2018): 49.

[279] David J. Cornwell, F W M McElrea, John R Blad, and Robert B Cormier, *Criminal punishment, and restorative justice: past, present, and future perspectives,* (Winchester, UK: Waterside Press, 2006), 130. Nicola Pain, "Encouraging Restorative Justice in Environmental Crime," *Newcastle Law Review* 13 (2018): 49.

[280] Carrie C. Boyd, "Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work," *William & Mary Environmental Law and Policy Review* 32*,* no. 2 (Winter 2008): 509.

[281] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 175.

[282] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1466.

[283] Aiden Stark, "Environmental Restorative Justice," *Pepperdine Dispute Resolution Law Journal* 16, no. 3 (2016): 460.

Having outlined the beneficial implications of applying restorative justice to environmental offences, the thesis turns to consider whether such theoretical assumptions can be substantiated by any relevant case studies. The research is conducted with the aim of exploring whether there is room for a successful *real-world* application of environmental restorative justice. In order to back up this claim, the research considers the key elements that account for a successful real-world application, e.g., the parties' active engagement in the process, the offender's appreciation of the extent of the harm they have caused, the outcome of the restorative process and the benefits such outcomes bring to the victims.

1. Australia

In New South Wales, Australia, environmental offences are dealt with the *Protection of the Environment Operations Act* of 1997 (POEO Act).[284] The latter was amended in 2015 to specifically incorporate the restorative orders among the options available to the New South Wales Land and Environment Court (NSWLEC).[285] Section 250 of the POEO Act now states that "the court may order an offender to carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence (a restorative justice activity) that the offender has agreed to carry out."[286] The court to which the Act refers to is the NSWLEC, a specialized court intended to primarily intervene in environmental offending scenarios.[287]

The NSWLEC serves three broad functions:

[284] *Protection of the Environment Operations Act* (PEO Act).
[285] *Protection of the Environment Operations Act* (PEO Act) s 250(1)(A).
[286] *Protection of the Environment Operations Act* (PEO Act) s 250(1)(A).
[287] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 61].

- First, it serves as an administrative tribunal. It decides the merits of the appeals filed in the planning and building areas.
- Second, it exercises a supervisory function over those cases of civil enforcement of planning and building decisions.
- Third, it serves as a criminal court in so far as it is empowered to prosecute the offences against the environment committed in the country.[288]

The NSWLEC boasts two cases in which restorative justice was applied to environmental offences:[289] *Garrett v Williams* 2007[290] and *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* 2018.[291]

In the case *Garrett v Williams,* the construction and the excavation projects carried out by a mining company (Pinnacles Mines) led to the destruction of a number of Aboriginal artifacts as well as the damage of an Aboriginal site.[292] The defendant Craig Williams (the director of the Pinnacles Mines company) pleaded guilty for the violation of s 90(1) of the *National Parks and Wildlife Act* 1974 (NSW).[293] The latter at the time asserted that any interference with an aboriginal place or object, if carried out in absence of a permit issued by the Director-General, was considered to be an offence against the Act.[294] In order to better

[288] Rob White, "Indigenous Communities, Environmental Protection and Restorative Justice," *Australian Indigenous Law Review* 18, no. 2 (2014/2015): 45.

[289] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 61].

[290] *Garrett v Williams* (2007) 151 LGERA 92 [hereinafter "Williams"].

[291] *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* (2018) 236 LGERA 291 [hereinafter "Clarence Valley Council"].

[292] *Williams* (2007) paras 5 and 96. Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 62]. Rob White, "Indigenous Communities, Environmental Protection and Restorative Justice," *Australian Indigenous Law Review* 18, no. 2 (2014/2015): 45.

[293] *Williams* (2007) para 5.

[294] National Parks and Wildlife Act 1974 (NSW) s 90(1). Now the offence, which is framed in slightly different terms, is embedded under s 86 of the Act. Rob White, "Indigenous Communities, Environmental Protection and

manage the dispute, the judge of the case decided to suspend the sentencing hearing and inquire the parties' thoughts as to the adequacy of a restorative conference to ease the tensions at stake.[295] The restorative conference amounted to one meeting of six hours guided by an independent facilitator,[296] whose costs were borne by the defendant.[297] A member of the Aboriginal Land Council was appointed as the representative of the Aboriginal victims involved in the process.[298] In this way, the Aboriginal representatives were granted the chance to meet firsthand with the defendant and carry out a constructive dialogue with them.[299] During the conference, the Aboriginal representatives shared additional information about the aboriginal objects present in the area and their relevance for the community, whereas Mr. Williams explained to the victims certain aspects related to the Pinnacle Mines' activities and their business implications.[300] Mr. Williams further expressed their contrition and remorse by means of formal apologies.[301] The educational purpose of the conference was evidenced by the defendant's own words, in that they recognized that the conference allowed them to gain an in-depth understanding of the value of Aboriginal sites and Aboriginal objects.[302]

The conference resulted in an array of outcomes (considered by the judge to be 'part of the overall punishment of the

---

Restorative Justice," *Australian Indigenous Law Review* 18, no. 2 (2014/2015): 46.

[295] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 142.

[296] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 144.

[297] The costs were of 11.000$. *Williams* (2007) para 53.

[298] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 62].

[299] *Williams* (2007) para 49. Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 62].

[300] *Williams* (2007) para 61.

[301] *Williams* (2007) paras 102, 110, 113.

[302] *Williams* (2007) paras 110.

defendant')[303] designed to repair the harm.[304] The outcomes ranged from financial penalties paid to the victim (a sum of money was directly transferred into the National Parks and Wildlife Fund)[305] to the engagement of relevant stakeholders into the salvaging process of the damaged artefacts.[306] More specifically, the outcomes included a site visit by the Land Council of Pinnacles Mines, a conservation agreement to be entered into voluntarily by the parties, continuous interactions among the Land Council and Pinnacles Mines to bolster their relationship, the creation by Mr. Williams of the Wilykali Pinnacles Heritage Trust (to which Mr. Williams immediately transferred the sum of $32,000), and a set of solutions destined to prevent future offences from reoccurring.[307] The desirability of these outcomes is evident when compared to the $5000 penalty and/or the six months of conviction that would have alternatively been imposed by a court in absence of conferencing.[308] Therefore, the case *Garrett v Williams* represents an emblematic example of how the theoretical benefits of restorative conferencing, i.e., the victim's and the offender's active engagement in the process, the expression of contrition and remorse on behalf of the culprit, the tailored and innovative outcomes to repair the harm, might materialize in practice. However, it remains unknown whether the relationships between Mr. Williams and the Aboriginal community continue as of today. In like manner, whether the restorative conferencing reintegrated Mr. Williams into the

---

[303] *Williams* (2007) paras 117.

[304] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021 [page 9].

[305] Rob White, "Reparative justice, environmental crime, and penalties for the powerful," *Crime Law Soc Change* 67 (2017): 124.

[306] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 62].

[307] *Williams* (2007) paras 62-3. Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1479.

[308] *Williams* (2007) para 65.

society cannot be ascertained without interviewing Mr. Williams or the affected community.[309] Yet, what is certain is that at the moment the conference was concluded, the benefits of environmental restorative justice clearly presented themselves.

The *Clarence Valley Council* case dealt with the eradication of a scar tree, a cultural and historical sacred object for the local Aboriginal community.[310] The removal of the tree by the defendant (the Council) amounted to a violation of s 86(1) of the *National Parks and Wildlife Act* of 1974 (NSW).[311] The latter stated that "a person must not harm or desecrate an object that the person knows is an Aboriginal object."[312] After the very first day of the sentencing hearing, the council promptly accepted the initiation of a restorative justice conference to settle the dispute.[313] The conference provided the victims with a safe environment where to express their feelings as to the value of the scar tree as well as the impacts the eradication entailed.[314] During the conference, the Council Mayor, and General Mayor, together with all those who took part in the material eradication of the scar tree, made formal apologies to the representatives of the aboriginal people affected by the offence.[315] Like in *Williams*, the conference resulted in a series of actions intended to restore the harm to the maximum extent possible, prevent further offences from rehappening, and repair the relationships among the parties.[316] More specifically, the conference resulted in the

---

[309] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 148.

[310] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 62].

[311] *Clarence Valley Council* [2018] para 7.

[312] National Parks and Wildlife Act 1974 (NSW) s 86(1).

[313] *Clarence Valley Council* [2018] para 10.

[314] *Clarence Valley Council* [2018] paras 43-54. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 149.

[315] *Clarence Valley Council* [2018] para 20.

[316] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending

enhancement of the aboriginal communities' consultations procedures,[317] the increase of the chances of the Aborigines' employment in the Clarence Valley Council area, the development of a draft conference agreement which contained a 'cultural skills development workshop' intended to raise the Council's staff awareness of the Aboriginal culture and sacred elements,[318] and the creation of the *Scar Tree Restoration and Interpretation Project* aimed at assessing the environmental damage while using the leftover timber from the sacred tree in an appropriate manner.[319] These outcomes (taken into consideration by the judge when sentencing the offender)[320] were glaringly more desirable than the outcomes the court would have reached in absence of a conference.[321] In the absence of a conference, the potential penalty (even if reaching the maximum penalty of $10,000) would have been paid to the Consolidated Fund of the government, who was not required to invest the money in the recovery of the costs resulting from the offence.[322] The restorative conference, on the contrary, not only enabled a variety of outcomes to be achieved, but it also allowed for the council's active engagement in the process as well as their formal apologies to the Aboriginal people participating in the conference, which, in turn, served as concurring factors for the corroboration of the

---

Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1482.

[317] Through the Clarence Valley Aboriginal Advisory Committee.

[318] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 165.

[319] *Clarence Valley Council* [2018] para 19. Wijdekop, "Restorative Justice Responses to Environmental Harm," 63. European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC [10].

[320] *Clarence Valley Council* [2018] paras 106 and 128.

[321] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1482.

[322] Fines Act1996 No 99 NSW Legislation s 121(1). National Parks and Wildlife Act 1974 (NSW) s 86(1). Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1482.

council's contrition and remorse.[323] However, no publicly available information regarding the overall costs and duration of the conference exists as of today. Yet, the more desirable outcomes achieved in *Clarence Valley Council* offset the potential downsides of a lengthy and expensive procedure.

The cases of *Williams* and *Clarence Valley Council,* the only two cases in Australia concerned with restorative justice and environmental protection, are tangible proof of the beneficial implications of applying environmental restorative justice (provided that latter is suitable to deal with the case at stake).[324] For example, they highlight the recognition of the rights of the victims, the parties' active engagement in the process, the offender's education and remorse, the tailored and innovative outcomes to repair the harm, and the internalization of the costs of abating the harm caused to the environment. It should be borne in mind, however, that the cases of *Williams* and *Clarence Valley Council* dealt with aboriginal cultural offences. The latter are qualitatively different from the offences committed against the environment itself. Such a difference is crystal clear when it comes to victimhood. While environmental offences affect a wide array of victims (the environment, single individuals, the community, future generations, commercial operators), aboriginal cultural offences impinge upon the rights of indigenous people whose heritage has been hampered by the unlawful activity. Notwithstanding such a qualitative difference, these two types of offences share the pivotal commonality of

[323] Nicola Pain, "Encouraging Restorative Justice in Environmental Crime," *Newcastle Law Review* 13 (2018): 40.

[324] Both *Williams* and *Clarence Valley Council*'s suitability for conferencing (i.e., identifiable victims, the parties' willingness to engage in the process, and the offender's acceptance of responsibility) was assessed prior to the commencement of the restorative encounter. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 142 and 148-9. Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1483.

being regarded as "complex cases" due to the lack of consistent practice and the scant documentation about what works in the field.[325] In addition, the target of both offences is the environment and its components (be it sacred for aboriginal culture or not). As evidence of this, in both *Williams* and *Clarence Valley Council* the defendants pleaded guilty for the violation of the *National Parks and Wildlife Act* of 1974 (NSW), the domestic legislative act intended to preserve the natural and cultural heritage of the country.[326] Accordingly, both *Williams* and *Clarence Valley Council* fell under the jurisdiction of the NSWLEC, a specialized court "with jurisdiction over environmental crimes."[327] As a result, aboriginal cultural offences can be understood as a subcategory of environmental offences.[328] To this extent, *Williams* and *Clarence Valley Council* represent paradigmatic case studies for the purposes of the present dissertation in that they reveal that offending Aboriginal cultural heritage is a type of environmental offences that could especially benefit from the application of restorative justice.[329] Thus, one can hope that the NSW Land and Environment Court, by relying on the successful precedents set in *Williams* and *Clarence Valley Council*, will promote further the application of restorative conferences to environmental cases.[330]

---

[325] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 151-2.

[326] *Williams* (2007) para 5. *Clarence Valley Council* (2018) para 7.

[327] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 61].

[328] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 151.

[329] Nicola Pain, "Encouraging Restorative Justice in Environmental Crime," *Newcastle Law Review* 13 (2018): 47.

[330] Mark Hamilton, "Restorative Justice Intervention in an Environmental Law Context: Garrett v Williams, Prosecutions Under the Resource Management Act 1991 (NZ), and Beyond," *European Property Law Journal* 25 (2008): 271.

2. New Zealand

New Zealand has been a pioneer country in embracing restorative justice principles in environmental offending scenarios. 2002 represented a turning point for NZ domestic legal framework on restorative justice.[331] Such a framework is composed of the Sentencing Act of 2002[332] and the Victims' Rights Act of 2002.[333] The latter, under Section 9, provides for the possibility, upon the victim's request, to refer the matter to a person suitable to organize and lead a restorative justice encounter.[334] Following Section 8(j) of the Sentencing Act, the court "must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case."[335] Under Section 24A of the Sentencing Act, the court must suspend the proceedings and enable a restorative process to occur whenever the inquiries carried out pursuant to paragraph 2(a) of the Section 24A disclose that a restorative justice process is deemed to be an adequate response to the case at hand.[336] Section 8 of the Sentencing Act, together with Section 9 of the Victims' Rights Act, grants legitimacy to restorative processes (thus promoting their use) and ensures that the restorative outcomes are considered by the court when sentencing the offender.[337] The restorative justice provisions embedded in these acts ought to be conceived of as being applicable also to the

[331] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1471-2.

[332] Sentencing Act 2002 No 9 NZ Legislation.

[333] Victims' Rights Act 2002 No 39 NZ Legislation.

[334] Victims' rights act 2002 s 9.

[335] Sentencing act 2002 s 8(j).

[336] Sentencing act 2002 s 24A.

[337] Ministry of Justice (NZ), *Restorative Justice: Best Practices in New Zealand* (2004) 7.

proceedings initiated under the Resource Management Act,[338] which covers the majority of environmental offences prosecuted in New Zealand. Accordingly, restorative justice conferencing was applied to 33 cases concerned with environmental offences in the years between 2002 and 2012.[339] As of 2018, already 42 environmental cases in New Zealand were dealt with by means of restorative justice conferences.[340]

Among these cases, *Canterbury Regional Council v Interflow* represents a paradigmatic case study for the purposes of the present contribution.[341] The case concerned the Walnut Stream's contamination by means of chemical discharge.[342] The defendant, Interflow (NZ) Limited, pleaded guilty for the violation of Section 15(1)(a) of the Resource Management Act, which stated that "no person may, in the coastal marine area, dump any waste or other matter."[343] Subsequently, the offender availed himself of the possibility of having the matter dealt with as a restorative justice process.[344] After having conducted preliminary inquiries as to the suitability of the case for conferencing, the meeting was held and guided by an independent facilitator.[345] The conference saw the participation of the Interflow's legal counsel, Environment Canterbury (acting as

[338] Resource Management Act 1991 No 69 N Legislation.

[339] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 51].

[340] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021 [page 8].

[341] *Canterbury Regional Council v Interflow (NZ) Limited* [2015] NZDC 3323 [hereinafter "Interflow"].

[342] Interflow (2015) para 2.

[343] Resource Management Act 1991 No 69 N Legislation s 15(1)(a). Interflow (2015) para 1.

[344] Vanessa Sugrue, "What Happens When Values Are Put to Work? A Reflection in One Outcome from a Restorative Justice Conference in the Criminal Division of the District Court: Environment Warranted Judge Jurisdiction," *Resource Management Journal* (2015): 20.

[345] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 139.

representative of the environment and the community), and the Ōnuku Rūnanga (i.e., the Maori community) speaking on behalf of the Walnut Stream.[346] The Maori representatives shared information as to how the good status of the Stream affected the overall local community, shedding light on the close linkage which tied the people to the land.[347] The restorative conference resulted in the Interflow's donation of $80,000 to the Banks Peninsular Conservation Trust to carry out projects for the purposes of restoring and conserving the stream to the greatest extent possible.[348] The donation of double the potential fine (in absence of a conference the fine would have amounted to $33,750)[349] was a justifiable outcome in light of the attempt of the offender to show their genuine intention to repair the harm and restore their reputation.[350] Despite being aware of the lower eventual penalty, the offender decided to apologize, to express what they have learned from the offence, and to modify the company's internal procedures to secure that the same offence would not reoccur in future. In a nutshell, the restorative conference was highly beneficial for the local community and the stream itself in that it attained much more than what the settling for the court's fine could have achieved.[351] The *Interflow* case thus demonstrates how the theoretical benefits of conferencing, such as the victims' active engagement in the process, the

[346] Vanessa Sugrue, "What Happens When Values Are Put to Work? A Reflection in One Outcome from a Restorative Justice Conference in the Criminal Division of the District Court: Environment Warranted Judge Jurisdiction," *Resource Management Journal* (2015): 20. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 139.

[347] Interflow (2015) para 18.

[348] The judge was satisfied with the outcomes of the restorative conferencing and thus they convicted and discharged the offender. Interflow (2015) paras 43, 46, and 47.

[349] Interflow (2015) para 42.

[350] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 171.

[351] Vanessa Sugrue, "What Happens When Values Are Put to Work? A Reflection in One Outcome from a Restorative Justice Conference in the Criminal Division of the District Court: Environment Warranted Judge Jurisdiction," *Resource Management Journal* (2015): 21-2.

offender's appreciation of the collective impacts of their action, and the internalization of the costs of repairing the harm through elevated compensatory efforts, might materialize in *real-world* environmental offending scenarios.

3. Canada

A Community Environmental Justice Forum (CEJF) was established in Canada to deploy restorative justice principles in cases of companies' non-compliance with environmental legal provisions.[352] The CEJF consists of a 2,5-hour circle procedure guided by an independent facilitator.[353] The forum brings together the offender (both the director and the executives of the offending company), the community (participants chosen for the purpose of shedding light on the real impacts of the offence), and the enforcement agency. The purpose of the forum is to reach a shared agreement as to the adequate restitution for the offence. Thus, the meeting gives the chance to those who have been affected by the offence to directly engage in the determination of the outcome. Accordingly, CEJF's outcomes range from the enhancement of the long-term compliance (thus downplaying the chances of the company's recidivism) to positive actions to repair the harm and amend the relationships between the offender and the community.[354]

---

[352] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 65].

[353] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021 [page 7].

[354] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 65-9]. Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 107.

To date, CEJ's forums had been held nine times.[355]As an illustrative example, Teck Metals Ltd. Trail Operations was engaged in a CEJF to resolve the tensions arising from mercury's disposals into the Columbia River.[356] The forum brought together 'representatives of the company, employees, community, and environmental groups.'[357] As a result of the forum, the sum of $325,000 was donated to environmental collective activities.[358] Among the recipients of the donation there were the Federal Environmental Damages Fund, the Trail Wildlife Association Endowment Fund, and the LeRoi Community Foundation.[359] The offending company was also asked to publicly apologize through press release.[360] Lastly, the forum resulted in the company's modification of its internal environmental regulation. According to the regulatory authority, these internal changes contributed to decreasing the chances that the company would cause the same type of environmental accident to reoccur.[361] Therefore, the case is tangible proof of the beneficial implications of environmental restorative justice, such as the parties' active engagement in the process, the offending company's apologies to the victims and the offending company's likely desistance from reoffending.

[355] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 106.

[356] British Columbia. *Quarterly Environmental Enforcement Summary* (2nd Quarter 2011: April 1 – June 30), 16.

[357] Market Wire. "Teck Metals Reaches Agreement at Community Justice Forum," available at https://www.globenewswire.com/fr/news-release/2011/05/11/1350314/0/en/Teck-Metals-Reaches-Agreement-at-Community-Justice-Forum.html.

[358] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 109.

[359] British Columbia. *Quarterly Environmental Enforcement Summary* (2nd Quarter 2011: April 1 – June 30), 16.

[360] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 73].

[361] Mark Hamilton, *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement* (Cham: Palgrave Macmillan, 2021), 109.

The NSWLEC, the New Zealand, and the Canada experiences thus reveal that there is room for a successful application of restorative justice to environmental cases.

Concluding Remarks

In conclusion, the presence of the UNODC's Handbook on Restorative Justice among the international standards regulating restorative justice helps determine what makes restorative process suitable to environmental offending scenarios. More specifically, if the conditions set forth in the UNODC's Handbook are satisfied, i.e., the victims of the environmental offence are identifiable and willing to engage in the process, the offender accepts their responsibility and decides to participate in the process on their own accord, restorative justice is likely to fully achieve its objectives and thus be a successful response to environmental offences. The beneficial implications of applying restorative justice to environmental offending scenarios range from the victims' active participatory role in the process, the offender's education and likely desistance from reoffending, the innovative and targeted outcomes aimed at restoring the harm and amending the relationships between the relevant stakeholders, to the internalization of the costs of abating and controlling the harm caused to the environment. The practice linked to environmental restorative justice developed by the NSWLEC, New Zealand, and Canada demonstrates how such beneficial implications play out in *real-world* environmental offending scenarios. Having ascertained that the potential benefits of restorative justice in environmental offending contexts are substantiated by relevant case studies, the present contribution seeks to move forward to a further consideration. Namely, whether the Italian legislative framework can also represent a suitable candidate to embrace restorative justice principles in environmental offending scenarios.

III. CHAPTER 2 – RESTORATIVE JUSTICE IN THE ITALIAN LEGISLATIVE FRAMEWORK

A. Restorative Justice and the Italian Constitution

The term "restorative justice" refers to a model of justice which widely differs from the traditional retributive model of criminal justice. The latter conceives of sanctions as being the natural responses to a conduct carried out in violation of the law.[362] Restorative justice arose in Italy precisely as a reaction to the dissatisfaction with the retributive and punitive logic informing traditional criminal prosecution.[363] Restorative justice represents a new model of conceiving of criminal justice that upholds the reparation and restoration of the victims of the offense as its primary goal. The dialogue and the direct interactions among the victim and the offender are a central tenet of the restorative paradigm. Such interactions aid the victim and the offender in amending their relationship, help the offender fully appreciate the impacts of their actions, and lower the suffering and pain experienced by the victims.[364]

As far as Italy is concerned, criminal law doctrine has been one of the pioneer fields in showing interest in restorative justice. The reasons for such a sudden interest in restorative practices derive from the growing need of granting victims an adequate participatory role in the process and the urge to provide

[362] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 23.

[363] Grazia Mannozzi e Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 66.

[364] Luciano Eusebi, *Una Giustizia Diversa: il Modello Riparativo e La Questione Penale* (Milano: Vita e Pensiero, 2015), 8.

persuasive answers to the deadlock of the punitive criminal approach to justice. This twofold reason has resulted in the shortfalls of retributive sanctions being at the core of criminal literature discussions for some time now. In the wake of the international documents dealing with restorative justice, the Italian criminal literature has defined restorative justice as a process whereby the relevant stakeholders are brought together in order to jointly identify the most adequate way to deal with the aftermath of the offence. Italy has witnessed the development of a number of restorative practices in specific areas of criminal law procedure in the last decade. These include juvenile trials and the proceedings initiated before the justice of the peace.[365] Yet, the introduction of restorative justice in Italy has turned out to be not without its complexities (given that our legal system is little inclined to grant victims a leading role in criminal justice proceedings). Therefore, it seems to be appropriate for the purpose of the present dissertation to analyze the relationship between the principles of restorative justice and the constitutional principles by which the traditional criminal process is currently informed. The doubts surrounding restorative justice's constitutional legitimacy may indeed be the major reason as to why restorative practices face difficulties in being fully introduced into the Italian legal system.[366] It should be further emphasized that the restorative approach to justice arose in legal systems in which principles radically different from those of civil law used to be applied.[367]

The fear that restorative justice could potentially clash against a number of principles enshrined in the Italian Constitution permeates our criminal justice system. First and

[365] Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 22-3 and 44.
[366] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 1.
[367] Elena Mattevi, "Giustizia Riparativa ed il Sistema del Giudice di Pace." *Università degli Studi di Trento* (2012): 94.

foremost, restorative practices are feared to run afoul of the principle of mandatory prosecution embedded in Article 112 of the Italian Constitution.[368] The article stipulates that the prosecutor "has the obligation to institute criminal proceedings."[369] In other words, it falls within the prosecutor's remit to decide, at the end of the preliminary investigation stage, whether to dismiss the case or exercise the criminal action, i.e., carry out the prosecution. The prosecutor's choice, however, is far from being discretionary. The prosecutor will have to assess the credibility of the *notitia criminis* and carry out a prognostic evaluation as to the sustainability of the charge at trial i.e., the usefulness of the trial. The grounds on the basis of which the prosecutor can propose to the judge to dismiss the claim are embodied in an exhaustive list and subject to strict control. In plain language, the principle of mandatory prosecution enshrined in article 112 of the Italian constitution prevents the successful outcome of mediation from being considered as a means to avoid criminal prosecution. The doctrine, however, states that the prosecutor could legitimately seek the dismissal of the case when he/she could "identify normative grounds which, within the legal-formal procedure, would consecrate, even procedurally, the eventual positive outcome of mediation." In cases where the conciliatory prerequisites are normatively defined and the prosecutor's decision is subject to judicial review, the prosecutor could seek for a dismissal of the case based on the verification of the existence of such prerequisites.[370]

A further line of argumentation relies on the wording of the judgement 88/91 of the Italian Constitutional Court, which maintained that the criminal justice proceedings should not be

[368] Gabriella Di Paolo, "La Giustizia Riparativa Nel Procedimento Penale Minorile." *Diritto Penale Contemporaneo* (2019): 9.
[369] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 112].
[370] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 1-2.

instituted whenever they appear to be objectively superfluous.[371] Some argue that a timely reparation of the damage may reduce the social impact of the wrongdoing and of its harmful consequences, thereby rendering the damage "unnecessary" or "superfluous."[372] The damage is considered "superfluous" whenever it is deprived of its offensive and harmful character.[373] Following this line of thinking, reparation could represent a "rational limit" that, according to the jurisprudence of the Italian constitutional Court, would prevent criminal proceedings from being instituted whenever they seem to be manifestly "superfluous."[374] In plain language, reparation contributes to decreasing the offensiveness and harmfulness of a certain behavior. Whenever a conduct is deprived of its offensive and harmful character, the prosecution of the misbehavior, albeit in violation of a positive norm, turns out to be utterly "superfluous".[375]

It is also worth mentioning the potential controversial relationship between restorative practices and the procedural safeguards embedded in Article 111 of the Italian Constitution. The article asserts that "all court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials. In criminal law trials, the law provides that the alleged offender shall be promptly

[371] Corte costituzionale, Sentenza 88/1991.

[372] Simona Tigano, "Giustizia Riparativa e Mediazione Penale," *Rassegna Penitenziaria e Criminologica* (2006): 38. Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 2. Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 152.

[373] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 2.

[374] Corte costituzionale, Sentenza 88/1991. Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 152.

[375] Simona Tigano, "Giustizia Riparativa e Mediazione Penale," *Rassegna Penitenziaria e Criminologica* (2006): 38. Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 152-3.

informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defense. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusation."[376] Article 111 further ascertains that "in criminal law proceedings, the formation of evidence is based on the principle of adversary hearings."[377] Notably, restorative justice practices are mostly disengaged from the traditional evidentiary system. Restorative practitioners can potentially frame their own belief through methods which widely differ from those deployed by traditional criminal proceedings. This is partially occasioned by the high degree of informality to which restorative methods are generally informed. These indeed fall outside the scope of application of the constitutional guarantees envisaged to safeguard the alleged offender. Moreover, restorative practices are conducted by third party persons (such as the mediator) who do not form part of the jurisdictional apparatus. A further potential clash with article 111 may indeed be the difficulty in guaranteeing the impartiality of the mediator or, more generally, of the law practitioner empowered to lead the restorative encounter. The latter may uphold the same vision of things as that of the parties involved in the process, thereby losing the prerequisite of neutrality of which mediators should be guarantors.[378] However, the doubts surrounding restorative justice's compatibility with the safeguards of the "just process" embedded in article 111 of the Italian Constitution arise if restorative justice is conceived of as a mechanism extraneous to the criminal justice proceedings. Yet, as it will be discussed in the following paragraph, restorative practices are embedded in criminal prosecution rather than running in *diversion* to it.

---

[376] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 111].

[377] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 111].

[378] Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 124-7.

Another principle that might clash against the restorative justice paradigm is the presumption of innocence embedded in Article 27, paragraph 2, of the Italian constitution. The article states that "a defendant shall be considered not guilty until the final sentence has passed."[379] Traditionally, the ascertainment of the offender's responsibility and of the harmful consequences of the misbehavior shall be preceded by the assessment of the basic facts of the case. If the offender is engaged in a reparative program prior to the assessment of the basic facts of the case, the "presumption of innocence" might be endangered. Restorative programs assume that the alleged offender is depositary of a truth that he/she must admit in order to repair the harmful consequences stemming from it. Yet, the defendant should be considered, by implication, the least informed person of the facts of the case given the "right to silence" that is granted to him/her. Accordingly, restorative practices (held in a stage prior to the commencement of the proceedings) would rely on the appreciation of the facts of the case and of a "truth" deposited by the offender that should instead be obtained only after the criminal trial has come to an end.[380] Therefore, the complex relationship between restorative practices and the presumption of innocence (Article 27 paragraph 2 of the Italian Constitution) turns out not to be a matter of only minor concern. The attempt to apply a conciliatory approach to justice may thus generate multiple tensions. The major fear is that, for the purpose of healing the conflict, the ascertainment of responsibility, i.e., the logical assumption on which the conflict relies, is obliterated. A further danger is that, in the event that the mediatory attempt is unsuccessful, the statements made during the encounter could in some manner influence the subsequent criminal trial proceedings.

[379] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 27(2)].
[380] Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 149.

Take for instance, the potential misuse of the statements made by the defendant which could impinge upon the right to silence and, in more general terms, undermine the offender's right of defense.[381] The clash with article 27(2) will in all likelihood occur in cases where mediation was unsuccessful, and the case is then brought back to the ordinary procedure. Furthermore, had the mediation encounter been mandatorily preceded by a prior confession of liability on behalf of the defendant, restorative practices would further run afoul of the principle *nemo tenetur se detegere*, according to which no one can be forced to confess his/her own criminal responsibility. However, from the international standards dealing with restorative justice, it can clearly be inferred that what is needed to engage in a mediation process is the mutual recognition of the basic facts of the case, rather than the offender's admission of liability. The defendant's willingness to explore conciliatory paths, therefore, cannot be interpreted as an implicit admission of liability.[382]

With regards to the third paragraph of article 27 of the Italian constitution, which upholds the educational purpose chased by punishment ("punishment may not be inhuman and shall aim at re-educating the convicted"), it can be noticed that restorative justice aids in achieving such a purpose rather than clashing against it.[383] Restorative practices mostly result in shared outcomes which have the potential to educate and reintegrate the offender into the affected community in a more effective way than traditional punitive and retributive responses to crime.[384] In other

[381] Daniele Vicoli, "La Mediazione in Fase Esecutiva nel Sistema Italiano: il Quadro Normativo e le Dinamiche Applicative," Revista Brasileira de Direito Porcessual Penal 7 (2021): 2292.

[382] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 2-3.

[383] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 27(3)]. Marco Bouchard, and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[384] The Italian Supreme Court, in its judgment 688/1998, has asserted that the re-education of the offender consists of the offender's awareness of the

words, the educational purpose of criminal prosecution is more likely to be attained through restorative practices rather than traditional ones.[385]

Lastly, some have argued that restorative justice would potentially run afoul of the principle of legality, as enshrined under article 25 of the Italian Constitution.[386] The article maintains that "no case may be removed from the court seized with it as established by law" and that "no punishment may be inflicted except by virtue of a law in force at the time the offence was committed."[387] In plain language, the principle of legality enshrines the dutifulness of the repression of wrongful behaviors through instruments labelled by the legislator.[388] In other words, it is the law that should codify the models of criminal factual situations along with the sanctions applicable in cases where the requirements enshrined in such models are satisfied.[389] If the reservation of the law is construed in a non-absolute manner, however, the constitutional provision could be waived in those cases involving the application of measures, alternative to the

---

overarching need to comply with the laws and to conform their conduct with the behavioral standards established by the society. Eusebi, Luciano. *Una Giustizia Diversa: il Modello Riparativo e La Questione Penale* (Milano: Vita e Pensiero, 2015), 94. Simona Tigano, "Giustizia Riparativa e Mediazione Penale," *Rassegna Penitenziaria e Criminologica* (2006): 41. Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 117. Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 3.

[385] Simona Tigano, "Giustizia Riparativa e Mediazione Penale," *Rassegna Penitenziaria e Criminologica* (2006): 41. Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 3.

[386] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 25].

[387] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 25(1)(2)].

[388] Simona Tigano, "Giustizia Riparativa e Mediazione Penale," *Rassegna Penitenziaria e Criminologica* (2006): 40. Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 3.

[389] Patrizia Patrizi, *La Giustizia Riparativa: Psicologie e Diritto per il Benessere di Persone e Comunità* (Roma: Carocci Editore, 2020), 145. Simona Tigano, "Giustizia Riparativa e Mediazione Penale," *Rassegna Penitenziaria e Criminologica* (2006): 40.

traditional sanctions, which aim at promoting the offender's social reintegration through the granting of a more favorable treatment.[390] Moreover, this critique is destined to fall short if faced with the newly inserted delegating law n. 134/2021 and the officially drafted decree which codifies the organic discipline of restorative justice programmes, thereby rendering restorative justice an instrument explicitly labelled by the legislator.

In conclusion, it seems to be safe to say that the restorative justice tenets could in principle be safely integrated within our domestic regulatory system, albeit with particular caution as to the compatibility with the constitutional provisions.[391]

B. Restorative Justice as Complementary to the Criminal Justice System

Restorative justice arose precisely as a reaction to the dissatisfaction with the traditional retributive system and the crisis of the so-called Welfare State. Restorative justice revolves around five main pillars: the victim's and the offender's participatory role in the process, the victim's active role in the determination of the solution to repair the harm, the offender's acceptance of responsibility towards the victims, the offender's utter appreciation of the harmful consequences the offence has had, and the key role played by the community in the management of conflicts.[392]

---

[390] Simona Tigano, "Giustizia Riparativa e Mediazione Penale," *Rassegna Penitenziaria e Criminologica* (2006): 40. Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 3.

[391] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 3.

[392] Gilda Scardaccione, "Nuovi Modelli di Giustizia: Giustizia Riparativa e Mediazione Penale," *Rassegna Penale e Criminologica* (1997): 13.

It remains controversial whether restorative justice is to be construed as an alternative to the criminal justice system or as an alternative mechanism, albeit compatible with a more traditional justice system that does not rule out the rehabilitation and reintegration of the offender into the affected society. This leads to the question of whether restorative justice can in principle be deemed compatible with a judicial criminal system that is anchored in the offender's ascertainment of responsibility and the passive imposition of sanctions on behalf of the institutions so empowered.[393]

Restorative justice thus demands an important choice to be made prior to any re-shaping project: "alternativity" or "complementarity" between restorative justice and the criminal trial system?[394]

The perspective of "alternativity" conceives of restorative justice as a radically autonomous paradigm, capable of critically elaborating the concepts of crime and deviance and to be deployed as a technique of *diversion* from criminal prosecution. This perspective paves the way for those hypotheses foreseeing the progressive overcoming of traditional criminal law. It further encourages the formalization of responses to the offence capable of utterly disregarding the logic of segregation and exclusion.[395]

The "complementarity" perspective does not deny the conceptual and methodological autonomous character of restorative justice. However, it builds upon the potential linkages

---

[393] Gilda Scardaccione, "Nuovi Modelli di Giustizia: Giustizia Riparativa e Mediazione Penale," *Rassegna Penale e Criminologica* (1997): 12.

[394] Grazia Mannozzi and Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 68-9. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 482.

[395] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 23. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 482-3.

between restorative justice and the criminal justice system. This perspective pursues the ultimate aim of furthering a pathway of legal civilization that would promote a new "humanism," including but not limited to a procedural perspective. The latter would avoid the risk that the misuse of restorative practices could result in a weakening of individual rights and in the potential enhancement of a repressive criminal system.[396]

The option in favor of restorative justice as a complementary mechanism to the traditional criminal justice system i.e., two mechanisms that enhance one another, is to be preferred on the basis of at least three different arguments.[397]

Firstly, supranational sources indisputably conceive of restorative justice programs as complementary to criminal justice proceedings.[398] Accordingly, restorative programs and services can in principle be held at every stage and level of criminal proceedings. For instance, the 2018 Council of Europe *Recommendation concerning Restorative Justice in Criminal Matters* envisages the possibility of initiating restorative justice programs at any stage of the criminal justice procedure, even after "a sentence has been passed or completed," thus potentially also in the stages of enforcement and incarceration.[399] Furthermore, the United Nations resolution 2000/14 on *The Basic Principles on the use of Restorative Justice Programmes in Criminal Matters,* under paragraph 6, states that restorative justice programs should be generally available at all stages of the criminal justice

[396] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 483.

[397] Ministero della Giustizia. "Tavolo 13 – Giustizia Riparativa, Mediazione, e Tutela delle Vittime del Reato," available at https://www.giustizia.it/giustizia/it/mg_2_19_1_13.page. Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 48-9.

[398] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 483.

[399] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8, Article 6.

process.[400] Lastly, the 2006 *Handbook on Restorative Justice Programmes* published by the United Nations Office on Drugs and Crime (UNODC) emphasizes the complementary role of the restorative justice programs by ascertaining that they can intervene at any stage of the criminal justice procedure. More specifically, there are four stages of the criminal process at which a restorative process can be initiated: "(*a)* at the police level (pre-charge); *(b)* prosecution level (post- charge but usually before a trial), *(c)* at the court level (either at the pre-trial or sentencing stages); and, *(d)* corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison)."[401]

Second, it is crystal clear that restorative justice, which lacks any autonomous body of law, must rely on the preceptive dimension of criminal law in order to properly guide and manage its programs.[402] Restorative justice - even if it is largely informed by a philosophical paradigm aimed at overcoming the idea of revenge and retaliation - is, in fact, primarily conceived of as a "method" developed on the basis of a philosophical inspiration that enhances mediation, reparation, and the inalienability of the recognition of the "dignity" of single individuals. In light of the authentic and concrete functions fulfilled by restorative justice (i.e., the caring for the suffering of victims, the individual recovery of the offender and the initiation of pathways for the amendment of social ties) it can be ascertained that restorative justice relies on a "functional interdependence" with the criminal

[400] United Nations, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. (2002) No. 2002/12. 24 July. In Resolutions and decisions adopted by the Economic and Social Council at its substantive session of 2002 (1-26 July), pp 54-59. United Nations Economic and Social Council, E/2002/INF/2/Add.2 [paragraph 6].

[401] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes,* New York: United Nations Publishing, 2006 [page 13].

[402] Grazia Mannozzi and Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 362. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 483.

justice system. From the latter restorative justice borrows both the definition of conflicts - at least as long as it is placed within the framework of constitutional values, and it is consistent with the inviolable rights of the individual – and the complex realm of inalienable individual guarantees.[403]

Accordingly, in Western legal systems, restorative justice finds its legitimacy 'under the banner of the law' and not 'in place of the law.' This does not imply an understanding of restorative justice as a supplementary practice - and thus subordinate - to the penal system. Rather, it means recognizing how restorative justice, by positively enhancing the value of the dictate of the violated norm, succeeds in offering more adequate solutions (far from a retributive logic) to the need of justice for all the relevant stakeholders involved in the criminal process (i.e., victims, offenders, community).[404]

The call for restorative justice is precisely aimed at overcoming the logic of retribution by endorsing a relational reading and understating of the criminal phenomenon. The latter is thus understood primarily as a conflict that causes the rupture of symbolically shared social expectations. Restorative justice is thus an approach to justice that aims at tackling experiences of concrete injustice that break the relationships among people and community.[405]

Third, the complementarity of restorative justice is to be preferred on the basis of a logic-normative argument. Restorative justice lacks the capacity to assert itself as a universal paradigm

[403] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 483.
[404] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 50.
[405] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 50-1.

of conflict regulation because, precisely from the standpoint of concrete practicality, not everything can be subject to mediation (or reparation). Moreover, mediation or, in general, restorative practices, cannot be imposed. The victim of the offence, therefore, shall always be granted the possibility of seizing a court to claim his/her victimization and to obtain the recognition of his or her rights, including that of compensation. If the (consensual) paradigm of restorative justice is conceived of as being an autonomous one, the conflict would remain unaddressed in cases where the parties are unwilling to undertake a restorative path. In a nutshell, the consensual character of restorative justice paradigm demands, as a precondition, the mandatory and coercive nature of criminal law.[406]

In sum, each paradigm - the restorative justice paradigm and the legal-criminalist paradigm - finds in the other its completion. On the one hand, restorative justice offers criminal law profoundly renewed modes of conflict management, which are largely informed by a qualitative dimension and a finalistic orientation. On the other hand, criminal law offers restorative justice the definition of conflicts as crystallized in normative precepts, which are the "noble" part of criminal law itself. Yet, the criminal justice system must take a step back from the application of merely retributive and punitive sanctions (albeit smoothened by the re-educational aim pursued by traditional responses to crime).[407]

Therefore, it seems to be safe to say that restorative justice shall not depart from the rehabilitative paradigm of criminal law

[406] Grazia Mannozzi and Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 362-9. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 483-4.

[407] Grazia Mannozzi and Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 371. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 483.

justice. The latter provides for the normative framework from which restorative justice borrows the normative regulation of alternative measures and their modes of application. These include material reparation of the damage that has occurred, the work of public utility, and reconciliation with the victims affected by the offence.[408] In conclusion, notwithstanding the wide array of discussions surrounding the issue at stake, restorative justice ought to be considered as a complementary mechanism to the criminal prosecutorial system rather than as an alternative to the retributive model of justice.[409] Such a complementary understanding of restorative justice, as it will be further explained in paragraph *d*, is reflected in the wording of both the delegating act n. 134/2021 and the official draft of the implementing legislative decree, which uphold that access to restorative programs shall be granted "at any stage and level of the criminal proceedings."[410]

C. Restorative Justice Practices in Italy

1. Mediation in Juvenile Criminal Trials

The interest in restorative justice practices and victims' protection rights has sharply increased over the last decades. The Italian legislative framework has witnessed the proliferation of a

[408] Patrizia Patrizi, *La Giustizia Riparativa: Psicologie e Diritto per il Benessere di Persone e Comunità* (Roma: Carocci Editore, 2020), 139. Gilda Scardaccione, "Nuovi Modelli di Giustizia: Giustizia Riparativa e Mediazione Penale," *Rassegna Penale e Criminologica* (1997): 14.

[409] Sara Castiglioni and Antonella Salvan, "L'esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l'Ufficio di Esecuzione Penale Esterna di Verona e Vicenza," *Il Mulino* (2012): 328.

[410] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co. 18 lettera *c*]. Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 44].

series of initiatives with extremely diverse characteristics and scientific-cultural depth, arousing from relevant interests in many subjects (public and private). Among the practices of restorative justice envisaged to date, it is necessary to mention the conspicuous body of experiences developed in the juvenile sector. The juvenile field has indeed widely deployed mediation as an activity conducted *a latere* of criminal justice proceedings. The first initiatives in the field of juvenile criminal mediation (characterized by their interinstitutional character) were launched as early as 1995.[411] The potential benefits of deploying mediation in minor's criminal matters were strikingly evident. In contrast to criminal law and traditional criminal justice proceedings, which are structurally oriented towards ascertaining the facts of the case and punishing the offender from a static perspective (anchored in the superiority of the law and the judge when imposing the sanction), mediation represents a dynamic process carried out between the offender and the victim. The latter represent the main characters of an encounter conducted for the purpose of reaching the most adequate form of reparation for the committed offence. The pivotal difference between mediation and traditional criminal justice proceedings thus lies in the different role that dialogues and personal interactions between the perpetrator and the victim play therein. On the one hand, criminal justice proceedings narrowly focus on analyzing the facts of the case, i.e., the events that have occurred, in order to ascertain a truth that belongs to the past. On the other hand, mediation seeks to help the offender and the victim rediscover a truth in terms of relational actuality, thereby soliciting a dynamic process within which a mature, empowering confrontation is created. It is on these grounds that

[411] Maria Pia Giuffrida, "Giustizia Riparativa e Mediazione Penale. Un Percorso Sperimentale fra Trattamento e Responsabilizzazione del Condannato," *Il Mulino* (2013): 492.

mediation represents one of the most broadly deployed models of restorative justice.[412]

In Italy, mediation has mostly been used in juvenile criminal trials. Juvenile proceedings, largely regulated by the D.P.R 448/88, pursue an educational goal by fostering the gradual growth and empowerment of the minor while allowing for modes of reparation of the damage (thus overcoming the traditional punitive perspective of crimes). One of the main features of juvenile criminal trials lies precisely in the efforts pursued towards the fulfillment of the needs and interests of all those engaged in the process (especially by promoting the personal interactions between the victim and the offender). In line with this perspective, mediation in juvenile criminal trials is conceived of as being the possibility of promoting a solution to controversial situations (oftentimes particularly complex due to the specific circumstances in which the minor finds him or herself to be) through dialogical modalities aimed at gradually easing the tensions at stake.[413] Notably, mediation allows the young offender's to fully appreciate the wrongful character of his/her misconduct by facing up to the victim's pain and suffering firsthand.[414] The encounter might result in an attitudinal change of the minor, thereby hastening the process of reintegration of the young offender into the affected society.[415] Accordingly, mediation serves the invaluable re-educational purpose envisaged by article 27(3) of the Italian Constitution.[416] Therefore, it can be

[412] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 7.

[413] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 9-10.

[414] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 160.

[415] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 160.

[416] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 27(3)]. Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 160.

argued that when it comes to juvenile trials, mediation pursues two primary objectives: to reduce as much as possible the intervention of traditional criminal law and to diversify juvenile proceedings from adult proceedings.[417] The latter objective corresponds to the principles of juvenile justice envisaged by numerous international sources as well.

Among the earliest international documents in which the need to develop more organic legislation on conciliatory procedures was pursued are those related to the VII United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in New York in 1985. They advised states to encourage non-judicial systems of dispute resolution, so as to foster the possibility of recognizing the victim's right to reparation through non-judicial means such as mediation, conciliation, arbitration or any customary practices.[418] The UN Convention on the Rights of the Child, signed in New York on 20/11/1989, represented a milestone in the field of restorative justice and juvenile mediation; Article 40, 3rd paragraph, letter b, calls for States-Parties to adopt measures for the management of juvenile crimes by resorting to extra-judicial procedures, while still respecting individual guarantees.[419] The Convention, in addition to being a valuable tool for the promotion and protection of children's rights, is a useful normative source for urging, within the systems of individual states, the critical review of the way sanctions targeted at juveniles are applied.[420] The European Convention on the Exercise of Children's Rights, signed in Strasbourg in 1996, represented a further turning point for the use

[417] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 10.

[418] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 10.

[419] United Nations. 1989. "Convention on the Rights of the Child." Treaty Series 1577 (November) [Article 40(3)(b)].

[420] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 11.

of mediation in juvenile matters. Article 13 of the Convention requires member states to encourage, for the purpose of avoiding the commencement of criminal justice proceedings involving children, "the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties."[421] Further, it is worth mentioning the Council of Europe Recommendation (87) 20 whose article 2 encourages "the development of diversion and mediation procedures at public prosecutor level (discontinuation of proceedings) or at police level, in countries where the police force has prosecuting functions, in order to prevent minors from being subject to the criminal justice system and suffering the ensuing consequences."[422] Lastly, the abovementioned Council of Europe Recommendation (99) 19, aimed at further promoting and advancing member states' use of mediation in penal matters.[423] Although the majority of these documents are not binding upon member states, the principles and guidelines enshrined therein are likely to enhance member states' sensibility to and awareness of the methods of *diversion* from criminal prosecution, such as mediation and restorative practices.[424]

When it comes to the Italian domestic regulatory framework, the juvenile trial is largely regulated by the D.P.R. 448/88 entitled *Approvazione delle disposizioni sul processo penale minorile a carico di imputati minorenni,*[425] which sets forth the general

[421] Council of Europe. European Convention on the Exercise of Children's Rights. Strasbourg, 25.l.1996 [article 13].

[422] Council of Europe. Committee of Ministers. Recommendation No. R (87) 20 of the Committee of Ministers to Member States on Social Reactions to Juvenile Delinquency (Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers Deputies) [Article 2].

[423] Council of Europe Committee of Ministers. Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies).

[424] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 12.

[425] Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448.

principles surrounding the educational purpose of criminal proceedings affecting children.[426]

Art. 9 of Presidential Decree No. 448/1998 allows the public prosecutor and the judge at the preliminary investigation stage to acquire information about the minor, regarding his or her personality, family and social sphere.[427] This information ought to be acquired without any formal procedure and can be requested at any stage of the trial, provided that an in-depth analysis of the minor's personality is useful in the case at stake.[428] This provision represents a unique contribution to the field of juvenile prosecution in so far as the personality of the perpetrator, as it can be inferred from the second paragraph of Article 220 of the Code of Criminal Procedure, is generally not taken into consideration.[429] The ascertainment of the minor's personality helps with screening the juvenile's willingness to face up to the victim, to learn from his or her misconduct, and to consider initiating a process of genuine accountability (including through reparatory measures).[430] Once the above-mentioned information is acquired, the judge and the prosecutor can carry out prognostic evaluations of the child's behavior and readiness to participate in restorative and reconciliatory programs.[431] If such an assessment

---

[426] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 12.

[427] Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 9].

[428] Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 9].

[429] "Salvo quanto previsto ai fini dell'esecuzione della pena o della misura di sicurezza, non sono ammesse perizie per stabilire l'abitualità o la professionalità nel reato, la tendenza a delinquere, il carattere e la personalità dell'imputato e in genere le qualità psichiche indipendenti da cause patologiche." Codice di Procedura Penale, D.P.R. 22 settembre 1988 no. 477 (aggiornato al 29/04/2022).

[430] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 4.

[431] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 255.

ascertains the minor's predisposition to undertake a restorative path, the victims and the offender, after having expressly given their consent, may meet and confront each other with the help of a member of the Mediation Office.[432] The opportunity to lead a mediation encounter in the stage of preliminary investigation thus represents a suitable tool to solve the tensions at stake.[433]

Mediation and/or reparation practices - as early as the preliminary investigation stage - are further linked to the institution of "the declaration of the irrelevance of the fact," as referred to by Article 27 of the Presidential Decree 448/88.[434] Practice shows how a confrontation between the offender and the victim, at a very early stage of criminal justice proceedings, could be an excellent preamble for a declaration of irrelevance of the fact. This is especially the case if the outcome of such a confrontation is conciliatory or restorative.[435] In other words, the materials and information acquired in the course of the mediation process could represent useful tools in assessing the existence of the prerequisites of the declaration of the irrelevance of the fact.[436] These in essence include the tenuousness of the act, the occasional nature of the behavior, and the potential prejudice to the educational needs of the child resulting from the further course of the proceedings.[437] The judgment on the tenuity of the

[432] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 4.

[433] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 255. Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 160.

[434] Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 27].

[435] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 259.

[436] Gabriella Di Paolo, "La Giustizia Riparativa Nel Procedimento Penale Minorile," *Diritto Penale Contemporaneo* (2019): 5.

[437] Gabriella Di Paolo, "La Giustizia Riparativa Nel Procedimento Penale Minorile," *Diritto Penale Contemporaneo* (2019): 5.

fact involves, pursuant to 133 of the Criminal Code, a careful analysis of both the objective characteristics of the case as well as the subjective ones.[438] The modes of conduct represent a pivotal indicator: their accurate assessment could in fact downgrade the seriousness of the crime, which will not be evaluated by taking into account only the parameters used in relation to adult deviance, but also considering the particular situation of the minor as a subject in constant training. The judgment on the occasionality of the conduct implies, in turn, the need to find as much information as possible about the behavioral patterns of the young offender prior to committing the crime. Emerging from case law, the non-occasionality of the conduct cannot be inferred from a character considered to be inclined to delinquency. Occasional conducts can also be the result of impulsive choices driven by unconsciousness and lack of maturity, which, in accordance with psychological evidence, often belong to adolescents.[439] Lastly, the assessment of any inherent prejudice towards the child's educational needs aims at avoiding the disproportionate effects that might feasibly result from the use of criminal processes.[440]According to the aforementioned Article 27, therefore, if the requirements of the tenuousness of the act, the occasional nature of the behavior and the possible prejudice resulting from subjecting the child to criminal proceedings are jointly met, the judge may decide to issue a sentence of non-prosecution.[441] The judge's decision to lean towards this benevolent solution can certainly be encouraged by the peaceful composition of the conflict between the parties achieved through

[438] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22.

[439] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 14-5.

[440] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 262-3. Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 15.

[441] Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 27].

reparative or conciliatory efforts.[442] Reparation reached prior to trial results in a reduction of the extent of the damage and, consequently, it increases the chances of the offense to fall within the parameter for the assessment of the tenuousness of the facts.[443] Through mediation, one is able to promote the process of accountability of the juvenile, which, in all likelihood, will go a long way toward reinforcing the positive prognostic judgment about his or her future behavior and thus will help classifying that act as non-habitual.[444] In conclusion, it seems to be safe to say that mediation and reparation contribute to introducing evaluative elements into the process for the purpose of applying article 27 of the D.P.R. 448/88.[445]

Moreover, mediation is further largely applied in the *probation* process of the minor. By introducing the probation for minor offenders, the legislator aims at granting the minor a path to maturation through the implementation of an operational project drawn up by juvenile justice social services. The successful outcome of such a project would allow the state to waive the juvenile's punishment for the committed crime. The probation project presupposes the willingness of the juvenile to embark on an educational path and to commit to achieving the project's objectives by fulfilling the undertaken commitments.[446] Probation upholds the idea of responding to crimes by committing the offender to a project rather than imposing a harsh

[442] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 5.

[443] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 481. Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 5.

[444] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 5.

[445] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 15. Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 264-5.

[446] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 160-1.

punishment on them.[447] In line with this perspective, article 28 of the D.P.R 448/88 introduces, for the first time in the Italian legislative framework, the possibility of carrying out a dialogue between the judge, social services and the juvenile, with the purpose of determining the content of the operational project (primarily intended to serve reparative and conciliatory purposes).[448] Therefore, probation is mostly used when it is deemed necessary to defer the assessment of the juvenile's personality at a later stage, due to the likelihood that at the end of the probation period, the minor's conduct will be considered positive and thus the offense declared extinguished.[449]

Among the activities that are likely to be pursued within the probation project, mediation encounters between the juvenile offender and the victim certainly play a pivotal role.[450] Article 28 of the D.P.R. 448/88 represents a normative datum that explicitly refers to restorative practices.[451] Article 28 maintains that the judge, through the measure (order) by which the suspension of the trial and the period of *probation* is ordered, "may issue prescriptions directed at repairing the consequences of the crime and promoting the conciliation of the juvenile with the person offended by the crime, *as well as to issue an invitation to participate, where the conditions exist, in a restorative justice program.*"[452] The extra-trial interlude of juvenile probation is thus

[447] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 6.

[448] Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 28]. *See* also Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 6.

[449] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 6.

[450] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 161.

[451] Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 28].

[452] Article 83 of the officially drafted legislative decree implementing Law n. 134/2021 proposes to modify Article 28 of the Law 448/88 by adding "as well

the privileged place for the grafting of criminal mediation or other forms of restorative justice.[453] The positive outcome of the restorative encounters could then lead to a declaration of extinction of the crime due to the favorable outcome of probation.[454] However, there a number a controversial aspects to be considered when dealing with mediation – and in general restorative justice programs – in the *probation* process.[455] First and foremost, the consensual character of mediation could arguably be lost in all those cases where mediation is embedded in a probation *order*.[456] However, it should be borne in mind that the mandatory nature of the provision is limited to the promotion of a mediation encounter rather than the achievement of its conclusion.[457] Second and relatedly, mediation in the *probation* process is conducted at a late stage of the criminal justice proceedings and in no case prior to the preliminary hearing. This results in a mediation encounter being potentially arranged after several years from the moment the offence was committed. This phenomenon would arguably run afoul of the need to lead the encounter right after the events have occurred. Such a temporal

---

as to issue an invitation to participate, where the conditions exist, in a restorative justice program." Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonche' In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. 10 Agosto 2022. Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 28].

[453] Gabriella Di Paolo, "La Giustizia Riparativa Nel Procedimento Penale Minorile," *Diritto Penale Contemporaneo* (2019): 5.

[454] "Decorso il periodo di sospensione, il giudice fissa una nuova udienza nella quale dichiara con sentenza estinto il reato se, tenuto conto del comportamento del minorenne e della evoluzione della sua personalità, ritiene che la prova abbia dato esito positivo. Altrimenti provvede a norma degli articoli 32 e 33." Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448 [Articolo 29]. *See* also Gabriella Di Paolo, "La Giustizia Riparativa Nel Procedimento Penale Minorile," *Diritto Penale Contemporaneo* (2019): 5.

[455] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 163.

[456] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 163.

[457] Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 271.

aspect can impinge upon the invitation to mediation in so far as the victims might prefer forgetting about the offence rather than feeling uncomfortable by meeting the offender and talking about something that happened years before.[458]

2. Mediation in the *Probation* of Adult Culprits

Law No. 67 of April 28, 2014 has introduced, for the first time in Italy, the institute of *probation* for adult defendants.[459] This represents a novelty in the Italian prosecutorial system in that it presents the opportunity for a crime, neither committed by a minor nor falling within the jurisdiction of the justice of the peace, to be addressed by the Italian criminal justice system without passing through the quantification of a conviction sentence.[460] The introduction of the institute of *probation* in our system has arguably paved the way for a true Copernican revolution in the way of understanding punishment and the trial, turning it towards deflationary and re-educative instances. The driving force behind the introduction of the new institute is what is generally referred to as the three Rs test: reparation, re-education and retribution.[461]

Probation represents a further (though not free from complications) option to apply restorative justice in the Italian legislative framework.[462] The legislator, under article 464 bis of

[458] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 163.

[459] 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.

[460] Anna Lorenzetti, *Giustizia Riparativa e Dinamiche Costituzionali* (Milano: Franco Angeli, 2018), 62. Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 9.

[461] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 9.

[462] Davide Amato, "Quali Spazi per la Restorative Justice nell'Ordinamento Giuridico Italiano? La Mediazione dei Conflitti Ambientali. Linee Guida

the code of criminal procedure, labels the conditions on the basis of which the offender might have access to *probation,* that being the offender's efforts to ease the consequences of the offence through compensatory or reparatory actions and the attempt to promote, where possible, the mediation with the victim of the offence.[463] In other words, the treatment agreement (which is presented when requesting to have access to probation from a judge) might entail activities, determined by Social Services, such as the compensation to the victims, reparation of the negative consequences stemming from the wrongdoing, activities carried out for the community or work of social utility.[464] The program also promotes and advances further the use of restorative practices. In particular it promotes the victim-offender mediation in cases where its application seems to be adequate to ease the tensions at stake.[465] Article 464-bis of the Procedural Criminal Code indeed expressly provides that the treatment program accompanying the probation shall indicate a "conduct aimed at promoting, where possible, mediation with the offended person, and *the conduct of restorative justice programs*."[466] The framing of mediation as optional ("where possible") is consistent with the inherent consensual nature of this program. Therefore, mediation can be activated only if the victim is willing to participate. This

Operative e Testimonianze degli Esperti." *Camera Arbitrale di Milano* (2016): 175.

[463] Codice di Procedura Penale 2022. Aggiornato al Decreto Legislativo 8 novembre 2021, n 188 [Articolo 464bis, co.4, lett. B and C].

[464] Codice di Procedura Penale 2022. Aggiornato al Decreto Legislativo 8 novembre 2021, n 188 [Articolo 464bis, co.4, lett. B and C]. Susanna Vezzadini, "What About Restorative Justice Practices in Italy after the EU Directive 29/2012?" A Long Story of Cultural Difficulties and Misunderstanding," *Criminal Justice Issues - Journal of Criminal Justice, criminology, and Security Studies* (2018): 432.

[465] Susanna Vezzadini, "What About Restorative Justice Practices in Italy after the EU Directive 29/2012?" A Long Story of Cultural Difficulties and Misunderstanding," *Criminal Justice Issues - Journal of Criminal Justice, criminology, and Security Studies* (2018): 432.

[466] The official draft of the legislative decree implementing law n. 134/2021, under Article 29, proposes to add to letter c of Article 464bis of the Code of Criminal Procedure "the conduct of restorative justice programs." Codice di Procedura Penale 2022. Aggiornato al Decreto Legislativo 8 novembre 2021, n 188 [Articolo 464bis, co.4, lett. C].

need for the victim's consent fosters the view that mediation cannot be regarded as a conditio sine qua non for having access to probation.[467] Accordingly, the prescriptive character of the provision is limited to the requirement of verifying whether mediation could be suitable to the case at stake, thereby leaving the principle of voluntariness untouched.[468]

By Law n. 67 of April 28, 2014, the institution of trial suspension with probation has thus been explicitly extended to adults offenders.[469] Pursuant to Article 168-bis of the Criminal Code, the suspension of trial with probation is allowed, unlike in the juvenile penal system, only for offenses punishable with a fine or with a conviction sentence not exceeding the duration of four years.[470] Unlike the Presidential Decree n. 448 of 1988, the suspension of trial with probation for adults is thus limited to offenses of medium to low severity.[471] Yet, the experience gained in the juvenile sector should have suggested the legislator that criminal mediation and, in general, restorative justice, work best for crimes of medium to *high* severity, where the suffering of the victims and the need for reparation are greater.[472]

By cautiously approaching the restorative justice paradigm through *probation,* the Italian legislators have introduced foreign components into the traditional criminal system with respect to its

---

[467] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 11.

[468] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 165.

[469] 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.

[470] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Article 168bis].

[471] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 482.

[472] Davide Amato, "Quali Spazi per la Restorative Justice nell'Ordinamento Giuridico Italiano?" *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 175-6. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 482.

age-old retaliatory logic of afflictive content. Thereby, they have realized an intersection between the strictly punitive perspective – evidenced by the obligation of the alleged offender to perform work of public utility – and the restorative approach, materialized through mediation and the community-inclusive logic of conflict management. Through the institution of probation, the management of the consequences of the crime is no longer an exclusive concern of the criminal trial. Rather, it becomes a shared affair between the offender and the community.[473] Under the supervision of the adjudicating body - which, pursuant to Articles 464-quater and 464-quinquies of the Code of Criminal Procedure will have to assess the suitability of the treatment program, order any modifications or additions to the program, and supervise the possible need for variations to the program while in progress[474]- the management of the consequences of the crime is partially "outsourced."[475] Therefore, it becomes a relational phenomenon, which falls, first and foremost, on the offices of external criminal execution (henceforth, UEPE). These offices, pursuant to Article 141-ter disp. att. c.p.p., are responsible for carrying out investigative activities functional to the elaboration of the treatment agreement and for reporting periodically to the judge on the positive or negative developments recorded during the period of probation. Second and relatedly, the management of the conflict falls within the community's remit, represented by all the facilities, entities and institutions called upon to take care of the offender's therapeutic, reparative work, and volunteer path i.e., the offender's resocialization path. Through *probation*, the offender and the community - but also the victim, if the conditions exist for his or her involvement through mediation paths - have

[473] Grazia, Mannozzi, Viola Molteni, and Francesco Civiello, "La Messa alla Prova per Adulti: Riscontri Applicativi," *Sistema Penale* (2021): 5 and 8.
[474] Codice di Procedura Penale 2022. Aggiornato al Decreto Legislativo 8 novembre 2021, n 188 [Articolo 464quater and quinquies].
[475] Grazia, Mannozzi, Viola Molteni, and Francesco Civiello, "La Messa alla Prova per Adulti: Riscontri Applicativi," *Sistema Penale* (2021): 8-9.

the opportunity to regain control over the management of the conflict.[476]

Yet, the institution of *probation* warrants a further analysis as to the compatibility with article 27 of the Italian Constitution. In particular, some authors have argued that the activities embedded in the treatment program and carried out prior to the issuance of a sentence would constitute a violation of the presumption of innocence of the alleged offender. More specifically, such activities would imply an early application of punishment.[477] However, the constitutional court has clarified, in the wording of judgement 88/2001, that *probation* shall be conceived of as being a mechanism aimed at serving deflationary purposes while overcoming the crisis experienced by traditional criminal sanctions.[478] In a nutshell, *probation* represents a hybrid solution that combines the alternative reward-type mechanisms together with the desire to safeguard the needs of the victims affected by the offence.[479]

A concluding observation relates to what in principle the different model of justice that mediation and, more generally, restorative justice convey. While taking into account the primarily deflationary purpose of criminal litigation and prison overcrowding that the legislator was pursuing with Law n. 67/2014, there is no doubt that the introduction of the institution of adult probation constitutes a novelty in our system. In fact, for the first time, the decision over a crime falling within the jurisdiction of the ordinary judge was bound up with the outcome, which if positive might have extinguished the crime, of a program

[476] Grazia, Mannozzi, Viola Molteni, and Francesco Civiello, "La Messa alla Prova per Adulti: Riscontri Applicativi," *Sistema Penale* (2021): 9.
[477] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 13.
[478] Corte costituzionale, sentenza n. 91/2018.
[479] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 13.

consensually drawn up by the social services and the person concerned. Such a program could entail the use of direct mediation between the victim and the offender, thereby granting to mediation (and the profoundly innovative features it entails) formal recognition in the Italian criminal prosecutorial system.[480]

The hope is that the "cultural revolution" which began in terms of criminal law policy with Law n. 67/2014, may prompt the legislator to continue to increase the limits of punishment for which probation can be applied. All this having as its objective not only the deflation of the judicial load and prison overcrowding but also the effective social recovery of the offender and the satisfaction of the interests of the victim. These desired outcomes can be seen in light of a broader valorization of criminal mediation and restorative justice.[481]

3. The Conciliation Before the Justice of Peace

In the Italian criminal justice system, mediation and reparation in favor of victims found further recognition within the criminal proceedings initiated before the justice of the peace. The Legislative Decree n. 274/2000 states, "Provisions on the criminal jurisdiction of the justice of the peace," which in fact, introduced the regulation of the criminal jurisdiction of the justice of the peace.[482] The reform was carried out for a twofold purpose. On the one hand, it represented an attempt to decrease the workload of ordinary judges in relation to less severe offenses. On the other hand, it pursued the aim of introducing a widespread form of justice directed to "enhance the conciliation between the

[480] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* (Milano: Key Editore SRL, 2022), 167.

[481] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 14.

[482] Decreto Legislativo 28 agosto 2000, n. 274. "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 99, n. 468."

parties as the preferred means of conflict resolution."[483] Indeed, the inspiring principle for the jurisdiction of the justice of the peace was a Latin expression, *favor conciliationis:* the justice of the peace *must* "encourage, as much as possible, reconciliation between the parties" (Act No. 274/2000, Art. 2).[484] However, this founding principle risked remaining a dead letter if the offices and structures needed for VOM were inadequate.[485]

The 2000 reform, which came into force in 2002, by explicitly introducing a reference to mediation, sought to comply with the requirements set forth by the 1999 Recommendation of the Council of Europe on Mediation in Penal Matters.[486] The reform thus represented the first normative recognition of criminal mediation. This was done with the provision set forth in Article 2, paragraph 2, of the aforementioned legislative decree, where it was stipulated that "in the course of the trial, the judge must encourage, as far as possible, conciliation between the parties."[487] In plain language, the justice of the peace shall seek a compositional solution to the conflict at stake by choosing among a wide array of conciliatory/mediative measures, all of which could be traced back to the restorative justice paradigm.[488]

---

[483] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 14.

[484] Decreto Legislativo 28 agosto 2000, n. 274. "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 99, n. 468" [articolo 2]. Grazia Mannozzi, "Victim-offender Mediation in Areas Characterized by High Levels of Organized Crime," *European Journal of Criminology* (2013): 189.

[485] Grazia Mannozzi, "Victim-offender Mediation in Areas Characterized by High Levels of Organized Crime," *European Journal of Criminology* (2013): 189.

[486] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 14-5.

[487] Decreto Legislativo 28 agosto 2000, n. 274. "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 99, n. 468" [articolo 2].

[488] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 14.

Further support for a legislative recognition of mediation and reparation came with Article 29, 4th c., of Legislative Decree No. 274 of August 28, 2000, which provided that "the judge, when the offense is prosecutable on complaint (i.e., crimes for which the legal action is voluntary)[489] shall promote conciliation between the parties.[490] In this case, if it is useful to promote conciliation, the judge may postpone the hearing for a period not exceeding two months and, where necessary, may also make use of mediation activities, public or private centers and facilities in the territory," now substituted with *restorative justice's centers in the territory*.[491] Although the Italian legislation principally assigns the role of mediator to the Justice of the Peace in person, he/she can delegate this role to professional mediators, who must attend a course on the 'communicative' management of conflicts (due to the specific know-how based on psychological and criminological competences that the fulfillment of mediator's functions requires).[492] Unfortunately, the current application of VOM for crimes falling under the jurisdiction of the Justice of the Peace reveals limited interaction between the judges and mediation practitioners. For example, economic constraints oftentimes hinder the establishment and the day-to-day running

[489] Grazia Mannozzi, "Victim-offender Mediation in Areas Characterized by High Levels of Organized Crime," *European Journal of Criminology* (2013): 189.

[490] Decreto Legislativo 28 agosto 2000, n. 274. "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 99, n. 468" [articolo 29(4)].

[491] The official draft of the legislative decree implementing law n. 134/2021 proposes to modify "public or private centers and facilities in the territory" with "centers for restorative justice present in the territory." Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 72]. *See also* Maria Pia Giuffrida, "Giustizia Riparativa e Mediazione Penale. Un Percorso Sperimentale fra Trattamento e Responsabilizzazione del Condannato," *Il Mulino* (2013): 493. Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 316-7.

[492] Grazia Mannozzi, "Victim-offender Mediation in Areas Characterized by High Levels of Organized Crime," *European Journal of Criminology* (2013): 189.

of mediation centers, which overall have been operating longer in Northern Italy.[493]

Article 29, paragraph 4, legislative decree No. 274, cited above, contains a fundamental safeguard that would potentially solve one of the main controversial aspects of the use of mediation at the preliminary investigation stage, that being the compatibility of mediation with the constitutional principle of presumption of innocence (Article 27(2) of the Italian Constitution).[494] In this regard, the law places an express "prohibition on the use" of statements made by the parties during mediation for the purpose of deliberation.[495] In order to make mediation risk-free for the offender and not to undermine the constitutional principle of the presumption of innocence, the legislators have provided for the prohibition of the use of statements made by the parties during the mediation encounter for the purpose of deliberation.[496] This provision is consistent with the principle of confidentiality that must permeate the meeting between the parties. Such a principle enables the parties to achieve a free composition of the conflict which will expectantly result in a positive outcome for both parties. This argument, however, is persuasive only if the mediation encounter is led by an external body. In the case of a conciliation carried out by the judge, it would be difficult to completely rule out the risk that this judge, in the subsequent phase of the proceedings, would

[493] Grazia Mannozzi, "Victim-offender Mediation in Areas Characterized by High Levels of Organized Crime," *European Journal of Criminology* (2013): 189.

[494] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [articolo 27(2)]. Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 482.

[495] Grazia Mannozzi, "Giustizia Riparativa," *Giuffrè Editore* (2017): 482.

[496] Decreto Legislativo 28 agosto 2000, n. 274. "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 99, n. 468" [articolo 29(4)].

not be influenced by any information and statements gained during the conciliatory stage.[497]

In addition to allowing the use of mediation, Legislative Decree n. 274/2000 entails a second article attributable to the restorative paradigm. Article 35, under the heading "Extinction of the crime resulting from restorative conduct" provides that the justice of the peace may declare the crime extinguished if the defendant has, prior to the appearance hearing, repaired the damage caused by the crime by means of reparation and related restitution (given that the judge deems the reparatory efforts to be congruous to the needs of reprobation and prevention). If the defendant proves that he/she has not been able to provide for the reparation of the damage prior to the appearance hearing, and yet he/she manifests the intention to carry out a compensatory and restitutive conduct, the judge may suspend the trial for a period not exceeding the duration of three months."[498]

Therefore, the extinction of the crime due to restorative conducts as provided for in the law based on the criminal powers of the justice of the peace resembles the institution of probation (at least as far as the beneficial outcome for the defendant is concerned).[499] It should be specified, however, that reparation ought to be conducted in full only where it is objectively possible. Hypotheses of partial reparation would be allowed in the event that the defendant is in a condition of absolute indigence, but,

---

[497] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 15.

[498] Decreto Legislativo 28 agosto 2000, n. 274. "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 99, n. 468" [articolo 35]. Francesco Palazzo and Roberto Bartoli, "La Mediazione Penale nel Diritto Italiano e Internazionale," *Firenze University Press* (2011): 46. Grazia Mannozzi, *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* (Milano: Giuffrè Editore, 2005), 317.

[499] Marco Bouchard, "Breve Storia (e Filosofia) di Giustizia Riparativa," available at https://www.questionegiustizia.it/rivista/articolo/breve-storia_e-filosofia_della-giustizia-riparativa_237.php.

nevertheless, he/she has endeavored to compensate and eliminate the harmful consequences of the offence as much as possible.[500]

The danger linked to Article 35 is that the offender will deliberately use this procedure for the sole purpose of obtaining the extinction of the crime, without really believing in what he/she is doing or truly feeling the need to compensate the damage that his/her misconduct has caused. In fact, if such reparatory actions are not adequately preceded by a preparatory path, it is unlikely that the offender's real repentance can be obtained. Rather, a utilitarian use of such a procedure is more likely to occur. Moreover, the declaration of the extinction of the crime consequent to the reparation of the offense requires the judge to assess the adequacy of the reparation. It thus combines, once again, the role of the judge with that of the mediator, with respect to an institute that should instead fall beyond the scope of intervention of traditional justice systems. In order to better align the justice of the peace's microsystem to the principles of restorative justice (as enshrined in supranational sources) more emphasis should be given to the role played by the victim, which still appears to be excessively constrained, albeit in a lesser way than in the ordinary criminal proceedings.[501]

D. Restorative Justice's Future Regulation: Law n. 134/2021 and the Official Draft of the Implementing Decree

The publication of the Law Sept. 27, 2021, no. 134 – "Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei

[500] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 16.
[501] Sessa Stanislao, "La giustizia riparativa nell'ordinamento penale italiano," *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 16.

procedimenti giudiziari" – started the criminal trials and penalty system's official reform. The first organic reform in the field of criminal justice, approved by the Parliament, took place at the initiative of the Minister of Justice, Marta Cartabia.[502] The time horizon of the reform is as follows: the delegations of authority labelled in Article 1 are to be implemented by the government – by means of one or more legislative decrees - within one year from the law's entry into force (Oct. 19, 2022).[503] Accordingly, on the website of the Ministry of Justice it has been published, on August 10, 2022, the official draft – "Testi Bollinati" - of the implementing legislative decree.[504]

At the heart of the reform is the delegation criteria contained in Article 1 of the enabling act. The Parliament has delegated the government to carry out a vast reform targeting three thematic areas:

- the criminal process (art. 1, paras. 5-13, 24-26)
- the penalty system (art. 1, paras. 14-17, 21-23)
- restorative justice (art. 1, paras. 18-20)

The red thread that runs throughout the interventions is represented by the reduction of the justice's timings. The reform

[502] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021. Gian Luigi Gatta, "La Riforma Della Giustizia Penale: Contesto, Obiettivi, E Linee Di Fondo Della Legge Cartabia," *Sistema Penale* (2021): 1.

[503] The immediately prescriptive provisions of Article 1 paragraph 2, instead, came into force on October 19, 2021, after the ordinary *vacatio legis* period. LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co. 1-2].

[504] Ministero della Giustizia, "Riforma Penale, Ecco I Testi Bollinati," available at https://www.gnewsonline.it/riforma-penale-ecco-i-testi-bollinati/. Sistema Penale. "Riforma della Giustizia Penale: Lo Schema del Decreto Legislativo Approvato dal Consiglio dei Ministri e La Relazione Illustrativa," available at https://www.sistemapenale.it/it/documenti/riforma-processo-penale-testo-schema-decreto- e-relazione-illustrativa.

will pursue such a goal not only by altering the rules of the criminal process, but also with a wide array of interventions in the criminal justice system. These include interventions such as those related to eliminating punishment for a particular tenuousness of the fact, the suspension of the proceedings with probation of the defendant, and sanctions in lieu of short prison sentences, which are capable of producing significant procedural deflation effects. The restorative justice provisions also share the same purpose (which is further shared by the civil law provisions on mediation and alternative modes of conflict resolution). To reduce the length of the criminal process without giving up on fundamental procedural guarantees, and to lighten its load by identifying possible alternatives to trial and prison sentences are the basic objectives pursued by the articulated reform.[505]

Among the fundamental criteria that should inspire the legislative decrees is the need for an organic regulation of restorative justice. The enabling law conceives of restorative justice as being "in the interest of the victim and the offender," according to its own logic of reconciliation and re-composition of the conflict.[506] The organic nature of the normative regulation (art. 1 paragraph 18 letter *a*) will have to be met through the inclusion of the notion of restorative justice, the indication of the main restorative programs, access criteria, guarantees, persons entitled to participate, the modalities of carrying out the programs and the evaluation of their outcomes.[507] The organic discipline

[505] Gianluca Varraso, "La Legge 'Cartabia' E L'apporto Dei Procedimenti Speciali Al Recupero Dell'efficienza Processuale," *Sistema Penale* 2 (2022): 29. Filippo Marchetti, "Nuovi Incentivi Premiali Nella Disciplina Del Giudizio Abbreviato E Del Rito Monitorio: Riflessioni In Vista Dell'esercizio Della Delega," *Sistema Penale* 2 (2022): 65. Gian Luigi Gatta, "La Riforma Della Giustizia Penale: Contesto, Obiettivi, E Linee Di Fondo Della Legge Cartabia," *Sistema Penale* (2021): 5.

[506] Gian Luigi Gatta, "La Riforma Della Giustizia Penale: Contesto, Obiettivi, E Linee Di Fondo Della Legge Cartabia," *Sistema Penale* (2021): 20.

[507] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. a].

should also shed light on the functions performed by restorative justice. These include the reintegration of the perpetrator, the healing of the victim, and the restoration of the affected society.[508] This is a new perspective that will be developed in the interest of the victim and the offender.

According to the enabling act, the regulation is to be introduced in compliance with the provisions set forth by the Directive 2012/29/EU, which is conceived of as the European beacon for national legislation on the rights, assistance and protection of victims of crime. However, it should be pointed out that as of now while the enabling act is concerned with ensuring the victim's safety, free and informed consent, complete and objective information and confidentiality, it does not recall the provision contained in Art. 12(1)(c) of the 2012 Directive. i.e., the acknowledgment by the offender of the essential facts of the case.[509] Moreover, the text of the enabling act, in indicating the sources from which the characteristics of restorative justice are to be inferred, expressly refers to the principles enshrined in international documents. Although implicit, the reference to the 2018 Recommendation of the Committee of Ministers to Member States on Restorative Justice in Criminal Matters (CM/Rec (2018)8) is an obvious one. The Recommendation has the promotion of standards for the use of restorative justice in the context of criminal proceedings as its main objective. Such an objective should result in the safeguarding of the participants' rights and in the maximization of the effectiveness of the proceedings in meeting the participants' needs (Art. 1).[510] The

[508] Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[509] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[510] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018)

Directive's and the Recommendation's wording result in a compendium of principles indispensable for any national regulation adopted on the subject matter.[511]

Article 1 paragraph 18 letter *a* of the enabling act requires the implementing decree to adopt (in accordance with the wording of the EU Victims Directive and the principles enshrined in international documents) a definition of restorative justice. Following this imperative, the official draft of the implementing decree (published on August 10, 2022), defines restorative justice as "any program that enables the victim, the person named as the offender, and other members of the community, to participate freely, consensually, actively, and voluntarily in the resolution of the issues arising from the offense, with the help of an impartial, appropriately trained third party called a 'mediator.'"[512] Such a definition is constructed on the basis of international and European notions, which emphasize the active and voluntary participation of the parties in the process. This follows a free and informed consent of the participants before an impartial third party, with the goal of resolving issues arising from the crime. The article though adds some novelties such as, on the one hand, the express reference to the community – as indicated by the enabling act – and, on the other, a semantic refinement of the figure of the "offender", here referred to as the "person indicated as the author of the offence," to whom an autonomous definition is dedicated under Article 42, letter *c* of the drafted decree.[513] The

CM/Rec (2018)8 [Article 1]. Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 42.

[511] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 42.

[512] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 42 lettera a].

[513] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia

decree defines the person indicated as the author of the offence as "the person indicated as such by the victim prior to the filing of the complaint, the person under investigation, the defendant, the person subjected to personal security measure, the person irrevocably convicted, the person against whom a judgment of non-prosecution has been issued due to the lack of the condition of prosecution that is also pursuant to Article 344-bis of the Code of Criminal Procedure or due to an intervening extinguishing cause.[514] For the purpose of the organic regulation of restorative justice, the person named as the offender can either be a natural person or an entity with or without legal personality. The organic vocation of the present discipline and the prohibition of preclusions in relation to the type of crime or its seriousness, prescribed by the delegating legislature, require restorative justice programs to additionally be made available to entities in cases of administrative corporate liability for crimes under the Legislative Decree 231/2001 (such as the environmental crimes contained in Article 25-*undecies* of the decree).[515]

Article 1 paragraph 18 letter *b* of the enabling act defines the victim of the crime as "the physical person who has suffered physical, mental or emotional harm, or economic losses that were directly caused by a crime."[516] The article invites one to consider the victim of the crime to be "the family member of a person

---

Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 377. 10 Agosto 2022.

[514] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 42 lettera c].

[515] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 379. 10 Agosto 2022.

[516] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. b].

whose death was caused by a crime and who has suffered harm as a result of that person's death" and to define family member "as a spouse, a party of a same-sex civil union, a person living with the victim in an intimate relationship in the same household and on a stable and continuous basis, as well as relatives in the direct line, siblings and those who depend on the victim."[517] Here the delegating legislator proposes to introduce a definition of victim that fully reproduces the text of Article 2 of the Directive 2012/29/UE, except for one aspect. According to the delegating law, the notion of victim also includes, specifically, the party of a civil union between persons of the same sex who has suffered harm as a result of the death of the partner and who is equated with a family member of the victim. Such a reference makes it possible to extend the protection of the indirect victim even to those civil unions in which cohabitation is lacking, which is a necessary requirement to establish when a relationship can be regarded as "intimate." For "intimate" relationships, the stability and continuity of the relationship must be ascertained. These elements can be disregarded when the union has been consecrated in a public act recognized by the law. However, it should be emphasized that this definition of victim allows for the identification and recognition of the victim - in terms of the right to access support services - regardless of the existence of criminal proceedings (Article 8 paragraph 5 Directive 2012). In other words, the victim exists by the mere fact that a crime has been committed even if the legal qualification of the fact has not been formalized through a complaint. It cannot, however, lack a connection with a factual situation normatively considered as a crime by the national system of the state in which the act

[517] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. b].

occurred.[518] In accordance with the wording of Article 1 paragraph 18 letter *b* of the law 134/2021, Article 42 of the official draft of the implementing decree defines the victim as "the natural person who directly suffered any pecuniary or non-pecuniary damage stemming from the crime, as well as the family member of the natural person whose death was caused by the crime and who has suffered damage as a result of that person's death." It defines then family member as "the spouse, the party of a civil union pursuant to Article 1, Paragraph 1 of Law No. 76 of May 20, 2016, the *de facto* cohabitant referred to in Article 1, Paragraph 36 of the same law, the person who is linked to the victim or the person named as the perpetrator of the offense by a stable emotional bond, as well as relatives in the direct line, brothers, sisters and dependents of the victim or the person named as the perpetrator of the offense," thereby utterly mirroring the wording of the delegating law.[519]

Article 1 paragraph 18 letter *c* of the delegating act refers to the access to restorative programs. The article strongly recommends an initiative to "provide for the possibility of having access to restorative justice programs at any stage and level of the criminal justice proceedings and during the execution of the sentence. This is to be done at the initiative of the competent judicial authority, without any preclusion in relation to the type of crime or its severity, on the basis of the free and informed consent of the victim and the offender and with the positive assessment of the judicial authority on the usefulness of the program in relation to the access criteria defined under

[518] Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[519] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 42 lettera b e d].

subparagraph a)."[520] Most notably, access to restorative justice programs is subject to the initiative of the competent judicial authority. Therefore, the judicial authority should take the initiative in offering these programs. It will be, from time to time, also the Offices for External Criminal Execution and the Juvenile Justice Centers, the treatment team, within their respective competencies or the parties' advocates themselves who will suggest or solicit the restorative programs' preparation and formulation. More than taking the initiative, the competent judicial authority will have the task of adopting (after having conducted an evaluation of admissibility suitability and appropriateness) the measures containing restorative justice programs. Interestingly however, the enabling act opens restorative justice to the entire criminal universe. No preclusions are allowed either in terms of the case or the seriousness of the offence. Nevertheless, the concrete application of restorative justice programs will depend upon the procedural institutions that lend themselves to accommodating genuine restorative pathways. It will, therefore, be the limitations of having access to these institutions that will determine the area of effective use of restorative justice as to the extent of the criminal offences and the seriousness of the fact. It does not take much acumen to foresee that a feasible venue for restorative exercise will be the institution of the suspension of trial with probation. This is precisely precluded not only for those individuals accused of crimes punishable by more than six years' imprisonment but also for those crimes that do not seem to be suitable to restorative programs (paragraph 22 letter a of the enabling act). From the perspective of criminal execution, an extreme delicate profile will thus be constituted by the tenor of the delegation directive. The enabling act allocates restorative justice paths to the generality of

[520] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. c].

defendants and convicted persons, without any preclusion with regard to the type and gravity of the committed crimes. This is of course an unimpeachable principle on the abstract level but one of complex articulation on operational grounds. This is especially true when particular crimes, such as mafia and organized crime (crimes where it is necessary to prepare operational models and protocols that ensure the genuineness of the consent given by all parties to the restorative project and minimize the risk of repeated and secondary victimization) are taken into consideration.[521] The wording of letter *c* – access to restorative programs – is mirrored in Articles 43,44, and 45 of the officially drafted implementing decree. Article 43 of the drafted decree asserts that "Restorative justice in criminal matters conforms to the following principles:

(a) the active and voluntary participation of the person named as the offender and the victim of the offence and any other participants in the management of the prejudicial effects caused by the offence;

(b) the equal consideration of the interest of the victim of the offence and the person named as the offender;[522]

(c) the involvement of the community in restorative justice programs;

(d) the consent to participate in restorative justice programs;

(e) the confidentiality of the statements and the activities carried out in the course of restorative justice programs;

---

[521] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 102-3. Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[522] Such a principle implements the wording of Article 1 paragraph 18 letter *a* of the enabling act, which asks to establish the organic discipline of restorative justice in the interest of both the victim and the offender. The fact that restorative justice should not be deigned or delivered to promote the interest of either the victim or the offender ahead of the other is further emphasized in Article 12 of the 2012 EU Victims Directive. *See* Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 382. 10 Agosto 2022.

(f) the reasonableness and proportionality of any restorative outcomes consensually achieved;

(g) the independence of mediators and their equivalence to participants in restorative justice programs;

(h) the guarantee of the time necessary for the conduct of each program."[523]

Article 43, second paragraph, refers to the objectives of restorative justice which are "the recognition of the victim of the crime, the empowerment of the person named as the offender, and the reestablishment of the social ties with the community."[524] The explicit provision of the goals of restorative programs is not detached from the awareness that sometimes, due to the complexity of the restorative paths, these objectives are essentially programmatic horizons. The use of the verb "tend" by Article 43 is meant to emphasize how the inherent meaning of restorative justice remains untouched even where it is impossible to practically achieve these ideal goals.[525] The third and fourth paragraphs of Article 43 of the implementing decree restate the availability of restorative justice programs to all relevant stakeholders.[526] The plurality of stakeholders is further

[523] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 43].

[524] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 43(2)].

[525] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 383. 10 Agosto 2022.

[526] "3. Access to restorative justice programs is provided to individuals who have an interest in them with the guarantees provided by this decree and is free of charge. 4. Access to restorative justice programs is always favored, without any discrimination and with respect for the dignity of each person. It may be restricted only in cases of concrete danger to participants resulting from the conduct of the program." Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In

emphasized by Article 45 of the implementing decree, concerning the participants of restorative programs. The latter states that "the following may participate in restorative justice programs, with the safeguards set forth in this Decree:

(a) the victim of the offence;

(b) the person named as the offender;

(c) other persons belonging to the community, such as family members of the victim of the crime and the person named as the offender, support persons reported by the victim and the person named as the offender, bodies and associations representing interests harmed by the crime, representatives or delegates of the state, regions, local authorities or other public bodies, public security authorities, social services

(d) anyone else with an interest."[527]

Restorative justice programs in criminal matters are thus open to involving the community not only as a recipient of restorative policies, but also as a "social actor" who takes an active role in the resolution of the conflict. This further emphasizes the public nature of criminal justice. Such a nature never is left as a "private matter" between the victim of the crime and its perpetrator. Therefore, the principle of accessibility to restorative programs tends to be in essence an absolute one. Accordingly, those who wish to participate in a restorative justice program, following adequate information and expression of consent (always revocable) must be put in a position to participate in the restorative program, without anyone being able to prevent them from doing so, except the judicial authority, in the case of the existence of a concrete danger to the participants, arising from the

Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 43(3)(4)].

[527] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 45].

program itself.[528] Article 44 of the implementing decree deals further with the access to restorative programs. The article states that "restorative justice programs governed by this decree are accessible without preclusion in relation to the type of crime or its severity. 2. The programs referred to in paragraph 1 may be accessed at any stage and level of the criminal proceedings, in the executive phase of the punishment and security measure, after the execution of the same and at the outcome of a judgment of non-prosecution, due to the lack of the condition of prosecution, also pursuant to Article 344-bis of the Code of Criminal Procedure, or due to an intervening extinguishing cause of the crime. 3. In the case of crimes prosecutable on complaint, the programs referred to in paragraph 1 may be accessed even before the complaint is filed."[529] Paragraph three therefore further expands the perimeter defined under paragraph two only to crimes prosecutable on complaint. This provision establishes the possibility of accessing the restorative programs even before the complaint is filed. In this way, on the one hand, it is possible to access a restorative justice program before and regardless of the possible institution of criminal proceedings. On the other hand, a real deflationary effect on the institution of proceedings can be sought. Thus, the organic framework of restorative justice allows for a spectrum of possibilities for restorative encounters even where the "classical" criminal justice terminates its mandate. [530]

---

[528] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 384-6. 10 Agosto 2022.

[529] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 44].

[530] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 385. 10 Agosto 2022.

According to Article 1 paragraph 18 letter *d*, the legislative decree implementing the enabling act will have to provide specific guarantees for the access to restorative justice programs. In particular, letter *d* of Article 1 paragraph 18 of the delegating act reiterates to "provide, in any case, that specific safeguards for access to restorative justice programs include: the full, timely and effective information of the victim of the crime and the offender, as well as, in the case of minors, of the exercisers of parental responsibility, the available restorative justice services; the right to linguistic assistance of non-native speakers; the responsiveness of restorative justice programs to the best interests of the victim, the offender and the community; the retractability of consent at any time; the confidentiality of statements made in the course of the restorative justice program, unless there is the consent of the parties or, alternatively, if the disclosure is essential to prevent the commission of imminent or serious crimes and unless the statements themselves constitute a crime, as well as their non-usability in criminal proceedings and during the execution of the sentence."[531] These guarantees include complete, timely and effective information given to both the perpetrator and the victim about the restorative justice services available along with language assistance for non-native speakers. Completeness and effectiveness depend solely on whether the perpetrator and the victim can rely on an interview with a competent practitioner. In the generic encounter between the citizen/user and the judicial system much depends on the care of websites and the organization of the URP. In this case the real guarantee for effective information is given to the perpetrator, by the competence of judicial staff, UEPEs, and the advocacy (Article 19 Recommendation 2018) and, to the victim, by the existence of specific services for their assistance. Services that, at the present

[531] LEGGE 27 Settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. d].

time, are a rarity.[532] The guarantees enshrined in letter *d* of the delegating act are reflected in Article 47 (right to information), Article 48 (consent to participate to restorative programs), Article 49 (right to language assistance), Article 50 (duty of confidentiality), Article 51 (non-usability of the statements made during the restorative encounter in criminal proceedings), and Article 52 (protection of secrecy) of the drafted decree.[533] The framework of procedural guarantees in the organic discipline ensures, at a systematic level, the maximum extension of such guarantees for all those involved. The temporal deployment of this spectrum of protections is very broad, operating from the first contact with the judicial authority (or with one of the subjects referred to in paragraph 2 of Article 47) and stretching beyond the phase of execution of the sentence.[534]

According to the delegating law, the legislative decrees will have to describe programs responsive to the interests of the victim, the perpetrator and the community (Article 1 paragraph 18 letter *a* of the enabling act). The restorative models find their greatest expression in programs that effectively generate some sort of dialogues between the parties, extended to the immediate circle or even to members of civil society and institutions. It would perhaps be much more useful and even simpler from a legislative perspective to have recourse, at least in Italy, of three basic restorative models: the 'giving' model, through the material

[532] Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[533] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articoli 47,48,49,50,51,52].

[534] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 387-8. 10 Agosto 2022.

reparation of restitution and compensation; the 'reintegrative' model through the carrying out of socially useful activities and public utility work; and the 'telling' model, through dialogue and meetings between the parties. Each of these three models will have to be structured in programs whose restorative content will be more or less effective depending on the restorative capacity of the parties involved. In any case, the proper content of the restorative program will depend on the in-depth work of the practitioners on both the side of the perpetrator and the victim. Accordingly, any program should entail the essential elements of restorative justice. Namely these include: the active participation of the victim and the offender, the reparation of the harm caused to the victim, the offender's acceptance of liability, the involvement of the affected community, and the confidential character of the encounter.[535] Following this perspective, Article 53 of the drafted implementing decree is devoted to restorative programs. The Article states that "restorative justice programs conform to the relevant European and international principles and are carried out by at least two mediators with the safeguards provided by this decree. They include:

(a) mediation between the person named as the offender and the victim of the offence, also to be extended to parental groups or with the victim of an offence other than the one for which the offence is being prosecuted;

(b) restorative dialogue;

(c) any other mediator-led dialogic program carried out in the interest of the crime victim and the person named as the offender."[536] Notably, Article 53 provides for an open-ended and

[535] Claudia Mazzucato, "La giustizia riparativa in ambito penale ambientale. Confini e rischi, percorsi e potenzialità," In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 143-6. Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 107-9. Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[536] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al

non-exhaustive list of restorative justice programs. It thus leaves room for the operation of programs not specifically mentioned, given the constant evolution and incessant refinement of restorative justice methods.[537]

Letter *e* of Article 1 of the enabling law is of crucial importance for the purpose of providing the organic regulation of restorative justice. Article 1 paragraph 18 letter *e* of the enabling act requires one to ensure "that the favorable outcome of restorative justice programs are evaluated in the criminal proceedings and in the execution of the sentence."[538] It also asks one to provide "that the inability to implement a restorative justice program or its failure shall not produce negative effects on the victim of the crime or the offender in the criminal proceedings or in the execution."[539] From the earliest day of the use of criminal mediation in juvenile justice, this thorny topic has been subject to debate. Mediators have always been jealous of their extraneousness to trial logic and have historically claimed the need not to undermine their evaluative function – at times adjudicative – of the parties' conduct. In contrast, juvenile judges have often claimed, in turn, their institutional mission, aimed at ascertaining not only the basic facts of the case but also the personalities of young offenders. It seems beyond doubt that in the ordinary criminal process the assessment of the mediator (or

---

Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 53].

[537] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 397. 10 Agosto 2022.

[538] LEGGE 27 Settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. e].

[539] LEGGE 27 Settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. e].

facilitator) should strictly adhere to the indication of the outcome – positive or negative – of the restorative program. For the adult, there is no room for criminal personological investigation, unless it involves pathologies affecting the defendant's capacity to understand.[540] Article 42 letter *e* of the implementing decree defines, in accordance with the delegating act, the restorative outcome as "any agreement, resulting from the restorative justice program, aimed at repairing the offense and suitable for representing the mutual recognition that has taken place and the possibility of rebuilding the relationship between the participants."[541] Notably, Article 42 mirrors the definition of "restorative outcome" enshrined in the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters."[542] The definition responds to two opposing needs. On the one hand, the need for the binding nature – "tassatività" – determinacy and precision of criminal justice. On the other hand, the need to capture in the normative text the flexibility, and even the 'creativity', of restorative justice programs. The definition revolves around the headwords "agreement," "reparation of the offense," "mutual recognition," and "relationship." These concepts, borrowed from the science of restorative justice, pursuant to Article 42, represent the nature of the "outcome" of the restorative method itself. Article 42 is to be closely related to Article 56 of the drafted decree, which, by referring to the "restorative outcome," signals the 'symbolic'

---

[540] Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[541] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 42 lettera e].

[542] "Restorative outcome" means an agreement reached as the result of a restorative process. Examples of restorative outcomes include restitution, community service and any other programme or response designed to accomplish reparation of the victim and community, and reintegration of the victim and/or the offender. ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000) [I (2)].

outcome (formal statements or apologies, behavioral commitments including public or community-oriented activities, agreements regarding the attendance of people or places) or the 'material' form of outcome (compensation for damages, restitution, working to elide or mitigate the harmful or dangerous consequences of the crime or prevent it from being brought to further consequences). Notably, Article 56 of the drafted decree introduces a new and richer curvature to restorative conducts, which can be both material and symbolic. Both the symbolic and material examples of outcomes are thus non-exhaustive categories.[543] Letter *e* of the delegating act is further implemented by Article 58 of the drafted decree. Such an article requires the judicial authority, for its determinations, "to evaluate the conduct of the program and, also for the purposes of Article 133 of the Criminal Code, any restorative outcome."[544] Article 58, by referring to Article 133 of the Criminal Code, introduced an additional criterion to be used for the purpose of determining the content of the sentence i.e., having participated in a restorative justice program, when such a program has resulted in a restorative outcome. When exercising the discretion provided for in Article 133 of the Criminal Code, the judge thus takes this further element into account as part of the overall assessment that he/she is called upon to make. The judge obviously will also consider the fulfillment of behavioral obligations, or their non-fulfillment due to reasons not attributable to the defendant. In conclusion, it can

[543] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 56(1)(2)].

Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINE 380 e 401. 10 Agosto 2022.

[544] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 58].

be stressed that the entire organic discipline of restorative justice (embedded in the criminal justice proceedings) is pervaded by the prohibition of *in malam partem* assessments of the possible failure or interruption of the restorative justice program.[545]

Letter *f* of Article 1 paragraph 18 of the enabling act deals with the role of the mediator. It preaches the legislators "to regulate the training of mediators experts in restorative justice programs, taking into account the needs of victims and offenders, and their skills in managing the effects of the conflict as well as the possession of a basic knowledge about the criminal justice system."[546] It further requires one "to provide the requirements and criteria for the exercise of the professional activity of mediators experienced in restorative justice programs and the manner of accreditation of mediators at the Ministry of Justice, ensuring the characteristics of impartiality, independence and equality of the role."[547] The formation of the mediator should be informed by the principles enshrined in the Council of Europe Recommendation (99) 19 and in the *Guidelines for a better implementation of the existing Recommendation concerning mediation in penal matters.* The former, under Article 24, asserts that "mediators should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence. Therefore, it must take into account conflict resolution skills, the specific requirements of working with victims and offenders and

[545] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 403. 10 Agosto 2022.

[546] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. f].

[547] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. f].

basic knowledge of the criminal justice system."[548] The latter states that "member states should recognize the importance of establishing common criteria to permit the accreditation of mediators and/or institutions which offer mediation services and/or who train mediators. Because of the increased mobility throughout Europe, measures should be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc."[549] The drafted decree, under Articles 59 and 60, deals with the formation of mediators who are experts in restorative justice programs. The former Article is dedicated to the mere formation of the mediators. The latter instead is devoted to the requirements and criteria for the exercise of the professional activity and the manner through which mediators can be accredited at the Ministry of Justice. The relevance of the role played by the mediator in restorative justice programs prompted the legislators to design, in the first norm (Article 59), a professional figure with multidisciplinary and transversal skills, suitable for ensuring the listening of the emotional journeys of the participants and the re-elaboration of traumatic events, as well as behaviors that, by integrating the social disvalue typical of the crime, could be, are, or have been the subject of judicial ascertainment. Article 60 further recalls the mediators' possession of a degree certificate of at least a bachelor's degree (which is a necessary requirement to the training course) and then it requires the proof of the passing of the final examination of the course in question and the internship referred to in paragraph 3 of Article 59, as well as the inclusion in the list referred to in paragraph two of the same article.[550]

---

[548] Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8 [Article 24].

[549] European Commission for the Efficiency of Justice (CEPEJ). Guidelines for a better implementation of the existing Recommendation concerning mediation in penal matters. CEPEJ (2007) 13.

[550] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti

Letter *g* requires one to "identify the essential and uniform levels of services for restorative justice, ensuring that they are provided by public facilities under the responsibility of local authorities and in accordance with the Ministry of Justice; provided that the presence of at least one of the aforementioned public facilities is ensured in each district of the court of appeals and that, for the conduct of restorative justice programs, they may make use of the expertise of mediators accredited by the Ministry of Justice, guaranteeing in all cases the safety and reliability of the services as well as the protection of the parties and the protection of the victims of crime from intimidation, retaliation and phenomena of repeated and secondary victimization."[551] In carrying out the programs, these facilities may use experienced mediators accredited by the Ministry of Justice. As long as the enabling act maintains a certain vagueness, it seems quite evident that two organizational cultures of restorative justice are facing one another. One such culture enhances, through a local lens, the territory, the reintegrative perspective of the offender into the affected community and the attention paid to the victims. The other prefers the pursuit of uniform programs at the national level and enhances the existing structure of juvenile justice services and the external criminal execution offices that have long been sensitized to restorative justice. We should believe that coordination and even impulsiveness on the part of the central administration cannot be disregarded. The Ministry of Justice, through its experiences in juvenile justice and its relations with the foreign realm, has now gained an in-depth understanding of restorative justice. On the contrary, local governments are less

Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 59 e 60] and Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINE 404-8. 10 Agosto 2022.

[551] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. g].

familiar with judicial pathways that accommodate restorative justice programs. They have prevailing institutional duties on the educational side for juvenile offenders. These being social reintegration of prisoners or offering employment opportunities to defendants undergoing probation. However, they have no competence in the preparation of social benefit programs grafted onto judicial proceedings. Yet, at the local level, the third sector and the social and health services are well acquainted with the restorative needs of the victims who turn to them to obtain physical and psychological reparation for the harm resulting from unlawful acts. An organic discipline of restorative justice cannot be separated from an organizational design that unifies treatment and justice services, public and private, center and periphery. A centralized body is also indispensable for the accreditation of mediator and/or facilitator figures according to the criteria that will be established by the legislative decrees. In light of the two European normative sources (the 2012 EU Directive and the 2018 Council of Europe Recommendation) and the interwoven character of restorative justice and victim assistance, the need for the establishment of a unified national body cannot be doubted.[552] Accordingly, the drafted decree, under Article 61, identifies the Ministry of Justice as the entity responsible for coordinating restorative justice services throughout the country.[553] More specifically, the Ministry of Justice is called upon to manage the resources to be invested, propose essential levels of services, and monitor the services provided. For the purposes of fulfilling these functions, the Ministry of Justice makes use of an *ad hoc* body - called the National Conference for Restorative Justice - in which

[552] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 134-5. Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[553] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 61]

representatives of the 20 regions and two autonomous provinces sit together with six experts who are vested with technical and scientific advisory functions. The members of the National Conference for Restorative Justice ensure liaison with the regions and local realities, with the regional and autonomous province representatives having the opportunity to report at the National Conference on the experiences and specific needs of the territory they govern.[554] Article 63 of the drafted decree, in further implementing letter *g* of Article 1 paragraph 18 of the enabling act, governs the procedure for identifying the local entities in which to establish Restorative Justice Centers. Given the extreme variety of the existing restorative justice experiences, sometimes in the hands of municipalities, at times in the hands of provinces, and at times promoted through regional laws, the choice of the legislator was to avoid directly identifying the local entities in charge of the establishment of the centers. On the contrary, in deference to the principles of subsidiarity, differentiation and adequacy, the legislators chose to entrust an *ad hoc* body - the Local Conference for Restorative Justice - with the task of fulfilling this onerous function. The provision of the Local Conference is functionally capable of identifying the best solution on a case-by-case basis, thereby avoiding the rigidities of a single model of service organization that would unlikely meet the need to safeguard each territory's peculiarities.[555]

It should be further noted that for the implementation of the restorative justice discipline, the enabling law (Art. 1, para. 19) provides for the expenditure authorization of more than four

[554] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINE 409. 10 Agosto 2022.

[555] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINE 412. 10 Agosto 2022.

million euros.[556] Such a financial authorization is not without significance, especially if we consider that thus far the lack of the necessary financial coverage has hindered the development of restorative justice. Also, in the context of the current reform, financial coverage is provided only for the trial office and for restorative justice.[557] The funding is, therefore, enough to ensure the preparation of the basic structures necessary for the operation of restorative justice services including: training of practitioners, establishment of central and peripheral bodies, accreditation procedures of mediators/facilitators, supervision, creation of the data base/management, service charter, evaluation of an external agency.[558] In a nutshell, the funding is tangible proof of the strong political determination and strategic and cultural relevance of the reform, which promises to raise the quality and efficiency of the criminal justice system.[559] Such a strong political determination is further reflected in Articles 66 and 67 of the drafted decree, which implemented the regulation of the financing of Restorative Justice Centers.[560]

In the wording of the Minister of Justice, restorative justice "is not an instrument of leniency. Nor does it express a weak approach in criminal matters. Rather, it is a very demanding tool that requires the offender to take full responsibility in front of the victim and the community by means of freely agreed encounters

[556] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.19].

[557] Gian Luigi Gatta, "La Riforma Della Giustizia Penale: Contesto, Obiettivi, E Linee Di Fondo Della Legge Cartabia," *Sistema Penale* (2021): 20.

[558] Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[559] Gian Luigi Gatta, "La Riforma Della Giustizia Penale: Contesto, Obiettivi, E Linee Di Fondo Della Legge Cartabia," *Sistema Penale* (2021): 20.

[560] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 66-7].

led with the help of an impartial facilitator." With restorative justice, she added, "the system opens up the possibility of a justice system capable of taming the rage of violence and rebuilding civic bonds among citizens."[561]

Concluding Remarks

Restorative justice is a judicial mechanism which boasts a unique approach and methodology to achieve justice. Notwithstanding such an autonomous character, restorative justice does not aspire to substitute *in toto* the criminal justice system. Rather, restorative justice pursues a progressive and reasonable coordination with the latter, in order to stand as a corrective tool to the existing procedural and sanctioning dynamics that largely disregard the role of the victim in the process.[562]

Sanctions are widely acknowledged as the criminal system's Achilles' heel. This is evidenced by the progressive mitigation to which traditional criminal sanctions have been subject to. The death penalty (alongside any form of corporal punishment) have been abolished, and the application of sanctions other than conviction fostered throughout all Europe.[563] However, the utter demise of the retributive paradigm is still far from being achieved; the endeavor of all legal practitioners, especially those who deal with juvenile trials, should take the lead towards a rethinking and reshaping of the penal system. The latter should be informed by personalized reparatory actions aimed at restoring the

[561] Valentina Maglione and Bianca Lucia Mazzei, "Nella Riforma Penale La Sfida Per Riparare il Dolore delle Vittime," available at https://www.ilsole24ore.com/art/nella-riforma-penale-sfida-riparare-dolore-vittime-AEUUR07?refresh_ce=1.

[562] Patrizia Patrizi, *La Giustizia Riparativa: Psicologie e Diritto per il Benessere di Persone e Comunità* (Roma: Carocci Editore, 2020), 134.

[563] Patrizia Patrizi, *La Giustizia Riparativa: Psicologie e Diritto per il Benessere di Persone e Comunità* (Roma: Carocci Editore, 2020), 134.

consequences of the offence through pathways enriched by humanizing motivations. This change in mindset should result in a new way of understanding the concept of freedom, according to which the illicit conduct voluntarily engaged in the past is no longer understood as a mere prerequisite for the offender's punishment. Rather, it is conceived of as the basis of a serious commitment (including reparative efforts) to make those who have violated the law fully aware of how to regain control over their own future and, in this way, their own freedom. Only by embracing this new perspective will the destiny of humanity, within which minors play a privileged role, fully benefit from a change in mindset capable of counteracting the negative impulses resulting in violence and injustices.[564] This change in mindset has arguably luckily commenced with the issuance of the delegating act n. 134/2021 and the publication of the drafted decree of August 10, 2022.

[564] Michele Riondino, "Giustizia Riparativa e Mediazione Minorile," *Pontificia Università Lateranense* (2009): 17-8.

IV. CHAPTER 3 – RESTORATIVE JUSTICE AND ENVIRONMENTAL PROTECTION: THE ITALIAN PERSPECTIVE

A. Environmental Protection in the Italian Criminal System: the Implementation of the EU Directive 2008/99/CE on the Protection of the Environment Through Criminal Law

The environment can be defined in several ways. According to a restrictive interpretation, the environment entails the biosphere's components (water, air, earth) and the fauna and flora that inhabit it. A broader definition conceives of the environment as including also urban structures, landscapes and cultural heritage.[565] The term "environment" thus refers to a concept that tends to be macroscopic and difficult to determine, manifesting an intrinsic structural complexity due to its multifaceted and multidimensional character.[566] Accordingly, a major part of the Italian criminal law doctrine maintains that "in the normative language, the environment, although continually evoked, is neither defined nor definable."[567] In other words, it would not be possible to identify a notion of environment that "is appreciable in legal terms and that, at the same time, is not too generic, elusive and, therefore, essentially useless."[568]

---

[565] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 3.

[566] Mario Valiante, *Manuale di Diritto Penale dell'Ambiente* (Milano: Giuffrè Editore, 2009), 2-4. Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 10.

[567] Luca Ramacci, *Diritto Penale dell'Ambiente* (Italy: CEDAM, 2009), 5. Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 10.

[568] Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 10.

In the Italian constitutional framework, the environment has been recognized as a legal asset of constitutional significance. The Constitutional Law 3/2001 explicitly labelled the environment as an asset worth of protection.[569] More specifically, Article 117 of the Italian Constitution asserts that the state has exclusive legislative powers in the protection of the environment, the ecosystem, and cultural heritage,[570] whereas the enhancement of cultural and environmental properties falls under the concurring legislation of the Regions and the State.[571] The jurisprudence of the Constitutional Court unanimously upholds that the environment is no longer merely a subject to be studied. Rather, it is a legal asset of primary and cross-cutting constitutional significance.[572] Furthermore, Article 9 of the Italian Constitution, as modified by the Constitutional Law 1/2022, asserts that the Republic will safeguard the environment, biodiversity, and ecosystems, in the interest of future generations.[573] Lastly, Article 41 of the Italian Constitution, as modified by the Constitutional Law 1/2022, states that "private economic enterprise is free and it may not be carried out against the common good or in such a manner that could damage health, safety, *environment,* liberty, and human dignity."[574] The article further asserts that "the law shall provide for appropriate programmes and controls so that public and private-sector

---

[569] Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 11.

[570] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [Articolo 117(2)(s)]. Luca Ramacci, *Diritto Penale dell'Ambiente* (Italy: CEDAM, 2009), 15.

[571] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [Articolo 117(3)].

[572] Corte costituzionale, Sentenza 367/2007. Corte costituzionale, Sentenza 378/2007. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 23. Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 11. Mario Valiante, *Manuale di Diritto Penale dell'Ambiente* (Milano: Giuffrè Editore, 2009), 5-6.

[573] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [Articolo 9]. Luca Ramacci, *Diritto Penale dell'Ambiente* (Italy: CEDAM, 2009), 13.

[574] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [Articolo 41(2)].

economic activity may be oriented and coordinated for social and *environmental* purposes."[575]

The Law n. 68/2015, entitled "Disposizioni in materia di delitti contro l'ambiente," has introduced Title VI-bis in the Italian Criminal Code which codifies criminal factual situations concerned with the environment.[576] Along with the Legislative Decree n. 121/2011, Law n. 68/2015 has further introduced the liability of entities derived from environmental crimes in the Legislative Decree 231/2001.[577] With Law 68/2015 the Italian legislators intended to implement the EU Directive 2008/99/CE on the protection of the environment through criminal law,[578] thereby strengthening the protection of the environment as an invaluable legal asset.[579]

The subject matter of the EU Directive was to establish "measures relating to criminal law in order to protect the

[575] Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298 [Articolo 41(3)].

[576] Legge 22 maggio 2015, n.68. Disposizioni in materia di delitti contro l'ambiente. (GU n. 122 del 28-5-2015). Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 79.

[577] Decreto Legislativo 7 luglio 2011, n. 121. Attuazione della direttiva 2008/99/CE sulla tutela penale dell'ambiente, nonché della direttiva 2009/123/CE che modifica la direttiva 2005/35/CE relativa all'inquinamento provocato dalle navi e all'introduzione di sanzioni per violazioni. Legge 22 maggio 2015, n.68. Disposizioni in materia di delitti contro l'ambiente. (GU n. 122 del 28-5-2015). Marina Poggi D'Angelo, "La Procedura Estintiva Ambientale: L'Idea dell'Inoffensività/Non Punibilità in Ottica Riparatoria e Deflattiva," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2022): 54.

[578] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28.

[579] Alexander Harry BELL, "L'Inquinamento Ambientale al Vaglio della Cassazione. Quel che è Stato Detto e Quel (Tanto) Che Resta da Dire Sui Confini Applicativi dell'Articolo 452-*bis* del Codice penale," *Rivista Trimestrale di Diritto Penale dell'Economia* (2022): 16. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 79.

environment more effectively."[580] The European Community felt the urge to apply criminal penalties (rather than administrative and civil lawsuits) to those reprehensible conducts affecting the environment.[581] Accordingly, the Directive required member states to adopt more deterrent means against activities harming the environment.[582] These comprehend the activities that cause, or are likely to cause, significant deterioration of the quality of air (including the stratosphere), soil, water, fauna and flora (including the conservation of species).[583] More specifically, the

[580] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 1].

[581] Annalisa Lucifora, "Spunti di Comparazione e Nuove Prospettive di Armonizzazione del Diritto Penale dell'Ambiente: Scelte di Politica Criminale e Tecniche di Tipizzazione," *Rivista Trimestrale di Diritto Penale dell'Economia* 32 (2019): 196. Andrea Satta, "Gli Obblighi Comunitari di Tutela Penale Ambientale alla Luce della Direttiva 2008/99/CE e del Trattato di Lisbona," *Rivista Penale* 12 (2010): 2. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 20. Luca Ramacci, *Diritto Penale dell'Ambiente* (Italy: CEDAM, 2009), 20-1. Carlo Ruga Riva, "La Fattispecie di Inquinamento Ambientale: Uno Sguardo Comparatistico," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2018): 4.

[582] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 3].

[583] These activities include: (a) the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after- care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste ([1]) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; (g) trading in specimens of protected wild fauna or flora species or

Directive preached to member states that such conducts would constitute a criminal offence (under national law) when unlawful and committed intentionally or with at least serious negligence.[584]

The 2008 Environment Directive seems to be offering a number of insights to the domestic legislation. Firstly, the Directive induces the legislator to reflect further on the overall normative framework insofar as it provides indications so as to frame the normative factual situations in terms of damage or at least of concrete danger.[585] Second and relatedly, in cases where the protection of protected plant or animal species (rather than of the air, water etc.) is taken into consideration, the search for the concrete offensiveness of the punishable conduct is implemented through the exclusion of the offence in cases where the action "concerns a negligible quantity of such specimens and has a negligible impact on the state of conservation of the species."[586] Similarly, in the case of habitat protection within a protected site, relevance is circumscribed only to those cases where the action has caused significant deterioration of the habitat.[587] Finally, as

parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; (h) any conduct which causes the significant deterioration of a habitat within a protected site; (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 3]. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 79-80.

[584] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 3]. *See* also Andrea Satta, "Gli Obblighi Comunitari di Tutela Penale Ambientale alla Luce della Direttiva 2008/99/CE e del Trattato di Lisbona," *Rivista Penale* 12 (2010): 2-3. Claudia Larinni, "Obblighi Europei di Incriminazione e Responsabilità Colposa." *Rivista Penale* (2020): 3-6.

[585] Annalisa Lucifora, "Spunti di Comparazione e Nuove Prospettive di Armonizzazione del Diritto Penale dell'Ambiente: Scelte di Politica Criminale e Tecniche di Tipizzazione," *Rivista Trimestrale di Diritto Penale dell'Economia* 32 (2019): 198. Antonio Gullo, "Delazione e Obblighi di Penalizzazione di Fonti UE," *Diritto Penale Contemporaneo* (2016): 12.

[586] Antonio Gullo, "Delazione e Obblighi di Penalizzazione di Fonti UE," *Diritto Penale Contemporaneo* (2016): 12.

[587] Antonio Gullo, "Delazione e Obblighi di Penalizzazione di Fonti UE," *Diritto Penale Contemporaneo* (2016): 12.

already mentioned elsewhere, the Directive obliges member states to adopt criminal sanctions (without specifying their typology, thereby leaving their determination to the discretion of member states).[588] Yet, sanctions must, in any case, be effective, proportionate and dissuasive.[589]

Against this backdrop, the Italian legislature enacted the Law n. 68 of 2015 which was adopted precisely for the stated purpose of transposing the EU Environment Directive into national legislation.[590]

1. The Regulation of Environmental Crimes Ex Arts 452-*bis* et seq. of the Italian Criminal Code

The approach endorsed by Law 68/2015 is no longer exclusively anthropocentric. Rather, the environment is protected as a relevant good in itself, regardless of the immediate injury or endangerment of human beings. Nevertheless, there is no shortage of cases in which it is precisely the injury of one or more

[588] Annalisa Lucifora, "Spunti di Comparazione e Nuove Prospettive di Armonizzazione del Diritto Penale dell'Ambiente: Scelte di Politica Criminale e Tecniche di Tipizzazione," *Rivista Trimestrale di Diritto Penale dell'Economia* 32 (2019): 199. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 5].

[589] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 5].

[590] The Directive is binding upon Ital pursuant to Article 117 of the Italian Constitution. The Article asserts that "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations." *See also* Antonio Gullo, "Delazione e Obblighi di Penalizzazione di Fonti UE," *Diritto Penale Contemporaneo* (2016): 12-3 and Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 20. Edoardo Mazzanti, "La Protezione Penale dell'Ambiente come Diritto Umano. Inquadramento e Rilievi Critici," *La Legislazione Penale* (2019): 15. Giuseppina Bonfissuto, "L-Eco-Delitto di 'Omessa Bonifica' e Le Sue Prime Applicazioni Nelle Aule di Giustizia. Brevi Note a Margine di GUP, Trib. Di Fermo 21/01/21." *Rivista Trimestrale di Diritto Penale Dell'Ambiente* (2021): 32-33. Carlo Ruga Riva, "La Fattispecie di Inquinamento Ambientale: Uno Sguardo Comparatistico," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2018): 2.

individuals or the endangerment of public safety that becomes relevant.[591] The new law thus profoundly changes the previous approach to criminal prosecution. The previous approach conceived of the environment as being protected by numerous cases of abstract danger (defect of authorization, exceeding of threshold values etc.). Most of this previous approach is of a contravention nature and thus largely inadequate to prosecute the most serious facts, due to both the exiguity of the sanction and the short limitation periods.[592] This gap in protection previously was filled by the jurisprudence through the recourse to non-specific cases, in particular to the crime of an atypical disaster.[593]

The late reform departed from the previous approach by introducing specific criminal factual situations of damage or concrete danger, sanctioned with high penalties and for which the doubling of the statute of limitations was provided (article 157 of the Criminal Code as amended by law 68/2015).[594] Moreover, it

---

[591] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 80.

[592] Licia Siracusa, "L'Attuazione della Direttiva Europea sulla Tutela dell'Ambiente Tramite il Diritto Penale," *Diritto Penale Contemporaneo* (2011): 2-3. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 80.

[593] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 80.

[594] "1. La prescrizione estingue il reato decorso il tempo corrispondente al massimo della pena edittale stabilita dalla legge e comunque un tempo non inferiore a sei anni se si tratta di delitto e a quattro anni se si tratta di contravvenzione, ancorché puniti con la sola pena pecuniaria. 2. Per determinare il tempo necessario a prescrivere si ha riguardo alla pena stabilita dalla legge per il reato consumato o tentato, senza tener conto della diminuzione per le circostanze attenuanti e dell'aumento per le circostanze aggravanti, salvo che per le aggravanti per le quali la legge stabilisce una pena di specie diversa da quella ordinaria e per quelle ad effetto speciale, nel qual caso si tiene conto dell'aumento massimo di pena previsto per l'aggravante. 3. Non si applicano le disposizioni dell'articolo 69 e il tempo necessario a prescrivere è determinato a norma del secondo comma. 4. Quando per il reato la legge stabilisce congiuntamente o alternativamente la pena detentiva e la pena pecuniaria, per determinare il tempo necessario a prescrivere si ha riguardo soltanto alla pena detentiva. 5. Quando per il reato la legge stabilisce pene diverse da quella detentiva e da quella pecuniaria, si applica il termine di tre anni 4. 6. I termini di cui ai commi che precedono sono raddoppiati per i reati di cui agli articoli 375, terzo comma, 449, 589, secondo e terzo comma, e 589-bis, nonché per i reati di cui all'articolo 51, commi 3-bis e 3-quater, del codice di procedura penale. I termini di cui ai commi che precedono sono altresì raddoppiati per i delitti di cui al titolo VI-bis del libro secondo, per il

should be further pointed out that up to this point in time the norms aimed at protecting the environment were embodied in special laws. The reform instead included these new types of crimes affecting the environment within the Italian Criminal Code, which thereby highlights the relevance the environment enjoys as an invaluable legal asset.[595]

The Law 68/2015 codified the crimes of environmental pollution (Article 452-*bis* of the Italian Criminal Code), environmental disaster (Article 452-*quater* of the Italian Criminal Code), negligent offences against the environment (Article 452-*quinquies* of the Italian Criminal Code), trafficking and abandonment of highly radioactive material (Article 452-*sexies* of the Italian Criminal Code), impediment to control (Article 452-*septies* of the Italian Criminal Code) and omitted remediation (Article 452-*terdecies* of the Italian Criminal Code), to which the attention now turns.

Environmental pollution (Article 452-*bis* of the Italian Criminal Code) refers to the conduct of any person who causes impairment or a significant and measurable deterioration of water or air, or of extensive or significant portions of the soil or subsoil, or of an ecosystem, biodiversity, including agricultural, and flora or fauna.[596] When the pollution occurs in a natural protected area or an area of landscape, environmental, historical, artistic,

---

reato di cui all'articolo 572 e per i reati di cui alla sezione I del capo III del titolo XII del libro II e di cui agli articoli 609-bis, 609-quater, 609-quinquies e 609-octies, salvo che risulti la sussistenza delle circostanze attenuanti contemplate dal terzo comma dell'articolo 609-bis ovvero dal quarto comma dell'articolo 609-quater." Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 157]. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 80. Enrico Cottu, "La Prescrizione dei Reati Ambientali: Efficacia, Coerenza, Ragionevolezza?" *Diritto Penale Contemporaneo* (2018): 272-4.

[595] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 80.

[596] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*bis*].

architectural or archaeological value, or causes harm to protected animal or plant species, the penalty is higher.[597] Notably, environmental pollution is constructed as a case of damage to environmental matrices. Thereby, it radically changes the traditional contravention protection paradigm hinging on abstract danger to the environmental asset. The factual situation draws upon an event (in the naturalistic sense) that can affect either a single environmental matrix i.e., water or air, or extensive or significant portions of the soil or subsoil, or an ecosystem as a whole - the set of living organisms, the surrounding physical environment, and the related bionic and chemical-physical relationships - or biodiversity, including agricultural, flora, or fauna. This free-form offence ("anyone who causes") requires the event to be etiologically linked to the abusive conduct.[598] The event can be caused through both an active or omissive conduct, in cases where specific legal obligations to prevent certain environmental contamination are incumbent on the parties.[599] Accordingly, omissive conduct will also be relevant to the extent that legal obligations to prevent environmental contamination incumbent on the parties are either found in regulatory sources or in the prescriptions contained in the permit.[600] The active or omissive conduct must be carried out 'unlawfully.' Abusive conducts are not only referring to activities carried out *sine titulo*, but also to those activities, albeit authorized, carried out in violation of laws, regulations, or administrative prescriptions contained in the authorization itself.[601] Abusive conducts could,

[597] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*bis*].

[598] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 254-6.

[599] Andrea Franco, "Il Reato di Inquinamento Ambientale e la Verifica dell'Idoneità dei Modelli di Organizzazione e Gestione a Prevenirne la Commissione: Profili Problematici," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 10. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 82.

[600] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 256.

[601] CORTE DI CASSAZIONE PENALE Sez. 3^ 03/11/2016 (ud. 21/09/2016) Sentenza n.46170. Alexander Harry BELL, "L'Inquinamento Ambientale al

indeed, also be considered those carried out in the presence of a formally valid title. However, in reality they are illicitly granted, provided that the necessary verification of the existence of the agent's criminal intent is conducted.[602] Abusively conducted, therefore, does not mean clandestinely conducted. Rather, an abusive conduct is in violation of state or regional laws (on the environment, occupational hygiene and safety, urban planning, public health, etc.) or in violation of administrative requirements contained in the permit. In the latter case, the violations are not purely formalistic but represent a substantial circumvention of the conditions for the lawful exercise of the activity impacting the environment.[603] The event referred to by Article 452-*bis* consists of an 'impairment' or 'deterioration' of the environment.[604] The two terms seem to refer to different degrees of severity of the environmental damage. Deterioration refers to an alteration of the environment that is naturally reversible. Impairment instead designates the alteration of the environment that can be remedied only through human activities such as remediation or restoration.[605] In other words, impairment means a condition of risk or danger that can be defined as a "functional imbalance," because it affects the normal natural processes related to the

---

Vaglio della Cassazione. Quel che è Stato Detto e Quel (Tanto) Che Resta da Dire Sui Confini Applicativi dell'Articolo 452-*bis* del Codice penale," *Rivista Trimestrale di Diritto Penale dell'Economia* (2022): 19. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 84.

[602] Andrea Franco, "Il Reato di Inquinamento Ambientale e la Verifica dell'Idoneità dei Modelli di Organizzazione e Gestione a Prevenirne la Commissione: Profili Problematici," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 12. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 84-5.

[603] Licia Siracusa, "I Delitti di Inquinamento Ambientale e di Disastro Ambientale in una Recente Proposta di Riforma del Legislatore Italiano," *Rivista Trimestrale di Diritto Penale dell'Economia* 28 (2015): 216-7. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 258.

[604] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*bis*].

[605] Licia Siracusa, "I Delitti di Inquinamento Ambientale e di Disastro Ambientale in una Recente Proposta di Riforma del Legislatore Italiano," *Rivista Trimestrale di Diritto Penale dell'Economia* 28 (2015): 218-9. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 83.

specificity of an environmental matrix. Deterioration instead refers to a "structural imbalance" characterized by a decay in the state or quality of normal natural processes and consisting of a reduction of that which constitutes its object so as to considerably diminish its value or prevent, even partially, its use.[606] The factual situation described by Article 452-*bis* requires, however, the damage to exceed a certain threshold. This is evidenced by the words "significant" and "measurable."[607] The former refers to a more qualitative aspect of the damage.[608] The latter, instead, emphasizes the need for a concreteness of the damage and the possibility of objectively quantifying the level of pollution.[609] The term "significance" is to be considered in relation to the environment only, and thus without any projection toward the physical integrity of the people who inhabit it.[610] Article 452-*bis* is thus constructed as a free-form offence envisaged to protect the environment regardless of any harmful or dangerous

[606] CORTE DI CASSAZIONE PENALE Sez. 3^ 03/11/2016 (ud. 21/09/2016) Sentenza n.46170. Alexander Harry BELL, "L'Inquinamento Ambientale al Vaglio della Cassazione. Quel che è Stato Detto e Quel (Tanto) Che Resta da Dire Sui Confini Applicativi dell'Articolo 452-*bis* del Codice penale," *Rivista Trimestrale di Diritto Penale dell'Economia* (2022): 19-20. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 262. Andrea Franco, "Il Reato di Inquinamento Ambientale e la Verifica dell'Idoneità dei Modelli di Organizzazione e Gestione a Prevenirne la Commissione: Profili Problematici," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 15.

[607] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*bis*].

[608] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 83.

[609] CORTE DI CASSAZIONE PENALE Sez. 3^ 03/11/2016 (ud. 21/09/2016) Sentenza n.46170. Alexander Harry BELL, "L'Inquinamento Ambientale al Vaglio della Cassazione. Quel che è Stato Detto e Quel (Tanto) Che Resta da Dire Sui Confini Applicativi dell'Articolo 452-*bis* del Codice penale," *Rivista Trimestrale di Diritto Penale dell'Economia* (2022): 20. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 83. Licia Siracusa, "I Delitti di Inquinamento Ambientale e di Disastro Ambientale in una Recente Proposta di Riforma del Legislatore Italiano," *Rivista Trimestrale di Diritto Penale dell'Economia* 28 (2015): 220. Giuseppe Battarino, "Funzione General-Preventiva del Diritto Penale dell'Ambiente. 'Informazione Ambientale Integrata," *Rivista Trimestrale di Diritto Penale Dell'Ambiente* (2021): 72-3. Andrea Franco, "Il Reato di Inquinamento Ambientale e la Verifica dell'Idoneità dei Modelli di Organizzazione e Gestione a Prevenirne la Commissione: Profili Problematici," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 16.

[610] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 257.

consequences affecting people.[611] People's physical integrity is subjected to special protection through other provisions,[612] such as Article 452-*ter* of the Italian Criminal Code, which labels the "death or injury resulting from environmental pollution."[613] However, this provision has raised numerous questions. First and foremost, the question of whether Article 452-*ter* is to be interpreted as an autonomous criminal factual situation or as an aggravating circumstance of the crime of environmental pollution. If one seeks to adhere to the *voluntas legis*, one must opt for the second solution. There are many considerations, however, that would instead lean toward the hypothesis of the autonomous figure of crime i.e., the provision is contained in a different article and more importantly, it does not constitute a higher degree of offence of the same legal asset. Rather, it is an offence that impinges upon a different legal asset.[614]

The law 68/2015 has introduced the crime of environmental disaster under Article 452-*quater* of the Italian Criminal Code.[615] Other than the cases referred to in Article 434 of the Italian Criminal Code (the so-called atypical disaster), Article 452-*quater* refers to the conduct of anyone who unlawfully causes an environmental disaster, namely the irreversible alteration of the stability of an ecosystem, or the alteration of the stability of an ecosystem whose elimination is particularly onerous and likely to be achieved only through exceptional measures, or an offence against public safety due to the relevance of the action in view of the extent of the impairment caused or of its harmful effects or

---

[611] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 82.

[612] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 257.

[613] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*ter*].

[614] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 86-7.

[615] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quater*].

the number of people injured or exposed to danger.[616] When the disaster occurs in a natural protected area or an area of environmental, historical, artistic, architectural or archaeological value, or causes harm to protected animal or plant species, the penalty is higher.[617]

Article 452-*quater* has been introduced for the purpose of solving the problems deriving from the codified crime of atypical disaster and the absence of a crime targeting the *environmental* disaster. Article 452-*quater* is a free-form offence that punishes any conduct, albeit omissive, which has caused an environmental disaster.[618] In order to define an environmental disaster, the Article refers to both an irreversible alteration of the stability of an ecosystem – or the alteration whose elimination is particularly expensive and achievable only with exceptional measures - and the offence against public safety.[619] Yet, these two indicators of environmental disaster are alternative rather than concurring factors.[620] The major issue surrounding the wording of Article 452-*quater* revolves around the clause "other than the cases referred to in Article 434 of the Italian Criminal Code (so-called

[616] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quater*].

[617] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quater*].

[618] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 87-8.

[619] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quater*]. Licia Siracusa, "I Delitti di Inquinamento Ambientale e di Disastro Ambientale in una Recente Proposta di Riforma del Legislatore Italiano," *Rivista Trimestrale di Diritto Penale dell'Economia* 28 (2015): 229-30. Andrea R. Di Landro, "Il Requisito dell'Alterazione dell'Equilibrio di un Ecosistema al Crocevia tra i Delitti di Inquinamento e Disastro Ambientale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 93.

[620] Andrea R. Di Landro, "Il Requisito dell'Alterazione dell'Equilibrio di un Ecosistema al Crocevia tra i Delitti di Inquinamento e Disastro Ambientale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 94. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 88. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 277.

atypical disaster)."[621] This clause implies that it falls within the scope of application of Article 452-*quarter* being any case involving environmental alteration, whereas under Article 434 being any other form of disaster.[622] Thereby, such a clause avoids the *abolition criminis* of those offences involving severe environmental contamination which are not falling under the scope of application of Article 452-*quater*. In other words, the introduction of the clause served the purpose of avoiding the termination of the criminal proceedings initiated to prosecute crimes of atypical disaster.[623] A further issue concerns the moment of consummation of the offence. The offence is generally considered consumed with the *immutatio loci*, i.e., the alteration of the environmental conditions.[624] However, the identification of such a moment may prove to be a hard task. This is partly because the event may be the result of the sum of a series of microevents all of which concur to the materialization of the environmental disaster.[625]

Negligent offences against the environment (Article 452–*quinquies* of the Italian Criminal Code) refers instead to some of the crimes specified above i.e., the crimes of environmental pollution pursuant to Article 452-*bis* of the Italian Criminal Code

---

[621] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quater*]. Ginevra Ripa, "Disastro Ambientale e Pubblica Incolumità: la Corte di Cassazione Circoscrive il Campo di Applicazione della Fattispecie," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2018): 2-3.

[622] Licia Siracusa, "I Delitti di Inquinamento Ambientale e di Disastro Ambientale in una Recente Proposta di Riforma del Legislatore Italiano," *Rivista Trimestrale di Diritto Penale dell'Economia* 28 (2015): 225-6. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 89. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 275.

[623] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 275.

[624] Roberto Losengo, et al. "La Legge sugli Ecoreati 5 Anni Dopo: un Primo Bilancio," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 117. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 89.

[625] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 89.

and the crime of environmental disaster codified by Article 452-*quater* of the Italian Criminal Code and caused by *negligence*. If the commission of those offences results in the *risk* of environmental pollution or environmental disaster the penalties are reduced.[626] Given the importance of the protected legal asset (i.e., the environment), the legislators granted advanced protection by also providing for the criminal liability in cases of negligeable acts from which not only damage, but also mere danger has resulted.[627] The provision of acts caused due to negligence further recalls the 2008 EU Environment Directive which, however, had limited itself to considering cases of *serious* negligence.[628] Notwithstanding Article 452-*quinquies* explicitly invokes the provisions of environmental pollution and environmental disaster, it ought to be construed as an autonomous offence rather than as a mitigating circumstance.[629] In a nutshell, Article 452-*quinquies* codifies new offences of concrete rather than abstract danger. Therefore, there is no overlap between the newly introduced provision and the existent contraventions codifying cases of abstract danger in the field.[630]

Trafficking and abandonment of highly radioactive material (Article 452-*sexies* of the Italian Criminal Code) refers to the conduct of any person who unlawfully disposes of, purchases,

---

[626] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quinquies*].

[627] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 90.

[628] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 3]. *See* also Andrea Satta, "Gli Obblighi Comunitari di Tutela Penale Ambientale alla Luce della Direttiva 2008/99/CE e del Trattato di Lisbona," *Rivista Penale* 12 (2010): 2-3. Claudia Larinni, "Obblighi Europei di Incriminazione e Responsabilità Colposa." *Rivista Penale* (2020): 3-6. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 285.

[629] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 90. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 284.

[630] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 285-6.

receives, transports, imports, exports, procures for others, possesses, transfers, abandons or discards highly radioactive material.[631] The penalty is increased if the offence results in the danger of impairment or deterioration of water or air, or extensive or significant portions of the soil or subsoil, or of an ecosystem, biodiversity, including agricultural, and the flora or fauna.[632] If the offence results in danger to life or the safety of individuals, the penalty is increased.[633] Article 452-*sexies* is a rather complex provision in that it entails an hypothesis of abstract danger ("any person who unlawfully disposes of, purchases, receives, transports, imports, exports, procures for others, possesses, transfers, abandons or unlawfully discards highly radioactive material") and two aggravating circumstances of concrete danger ("the penalty is increased if the offence results in the danger of impairment or deterioration of water or air, or extensive or significant portions of the soil or subsoil, or of an ecosystem, biodiversity, including agricultural, and the flora or fauna. If the offence results in danger to life or the safety of individuals, the penalty is increased").[634] Article 452-*sexies* further entails a severability clause which excludes the provision of more severe offences from the scope of application, such as the activities organized for illegal trafficking of waste (Article 260 of the Italian Environmental Protection Act), which will be referred to below.[635]

---

[631] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*sexies*].

[632] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*sexies*].

[633] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*sexies*].

[634] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*sexies*]. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 92. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 287-8.

[635] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 92.

The crime of impediment to control ex art. 452-*septies* of the Italian Criminal Code, as currently formulated, does not exclude hermeneutical problems, related to the crime events, to the circumscription of the protected controls, and to the subjective element underpinning the offence.[636] The crime of impediment to control refers to the conduct of anyone who, by denying access, setting up obstacles or artificially changing the state of places, prevents, obstructs or circumvents environmental and occupational safety and hygiene supervision and control activities, or jeopardizes their outcomes.[637] On the one hand, the framing of the law aims at protecting the good course of public administration. On the other hand, it provides an advanced form of protection of the environment, in so far as the offence is framed in prodromic terms.[638] From this perspective, Article 452-*septies* can be conceived of as a crime of danger.[639] The low frequency of application of the crime of "impediment to control" seems to suggest that the function performed by the aforementioned case was purely symbolic in nature. The driving force behind the criminal provision, was not, therefore, the need to fill a regulatory gap. Rather, it was the felt need to threaten criminal sanctions against anyone who obstructs the controlled activities in environmental matters, for the purpose of enhancing the normative regulation towards the protection of the environment as a legal asset.[640]

---

[636] Andrea Rugani, "Osservazioni in Tema di 'Impedimento del Controllo,' *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2022): 61.

[637] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*septies*].

[638] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 93.

[639] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 290. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 93.

[640] Andrea Rugani, "Osservazioni in Tema di 'Impedimento del Controllo,' *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2022): 78. Giuseppe Battarino, "Funzione General-Preventiva del Diritto Penale dell'Ambiente. 'Informazione Ambientale Integrata," *Rivista Trimestrale di Diritto Penale Dell'Ambiente* (2021): 70.

Article 452-*terdecies* – "omitted remediation" - refers to anyone who, being obliged to do so by the law, by a court order or by a public authority, fails to clean up, restore or recover the state of a given place.[641] Remediation is defined, pursuant to Article 240 letter *p,* as the set of actions to eliminate the sources of pollution and pollutants or to reduce the concentrations of the same sources in soil, subsoil and groundwater to a level equal to or lower than the values of the risk threshold concentrations (CSR).[642] Restoration instead designates the environmental and landscape's rehabilitation interventions, oftentimes constituting a complement to the remediation or permanent safety interventions, which allow to recover the site to the actual and final versatility for the intended use (in accordance with the urban planning instruments).[643] The recovery of the state of place does not seem to significantly differ from the restoration of the affected environment. Accordingly, the referral of Article 452-*terdecies* to both the restoration and the recovery of the state of places seems to be redundant.[644] The obligation referred to in Article 452-*terdecies* can arise either from the law or from an order of a judge or public authority.[645] To this extent, Article 452-*terdecies* differs from Article 257 of the Italian Environmental Protection Act. The latter covers contravention cases punishable on the grounds of negligent behaviors. The former instead punishes solely willful

[641] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*terdecies*].

[642] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 240 lettera p].

[643] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 240 lettera q].

[644] Di Landro, Andrea R. "I Problemi Relativi al Delitto di Omessa Bonifica-Ripristino. In Particolare, Quali Responsabilità per L'Autore del Danno Ambientale e Quali per Gli Altri Soggetti?" *Rivista Trimestrale di Diritto Penale dell'Economia* 31 (2018): 355-6.

[645] Andrea R. Di Landro, "La Funzione Ripristinatoria nel Diritto Penale Ambientale: La Bonifica ed il Ripristino Ambientale. Uno Studio De Iure Condito e De Iure Codendo," *Itinerari di Diritto Penale* (2020): 10. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 94.

misconducts.[646] Moreover, according to Article 257 of the Italian Environmental Protection Act, the perpetrator of the act is the polluter.[647] Pursuant to the wording of Article 452-*terdecies* instead the perpetrator can be "anyone who, being obliged to do so by the law, by a court order or by a public authority, fails to clean up, restore or recover the state of the place."[648] If the local authorities acquire notice of the potential pollution of a site without the knowledge of the person responsible for the pollution, the onus is on the Province to carry out appropriate investigations aimed at identifying the person responsible for the event, who, having been identified, must be warned to comply (Articles 244, paragraph 2, and 245, paragraph 2, T.U.A.). If the polluter cannot be identified or, having been identified, fails to clean up the pollution, our regulatory system requires that the environmental damage be repaired in any case, either voluntarily by the owner, operator or other party concerned (Art. 245, paragraphs 1 and 2 T.U.A.) or mandatorily, in lieu, by the public administration (Art. 244, paragraph 4 and 250 T.U.A.).[649] Therefore, the perpetrator of the offence can also be the public officials who have not fulfilled the abovementioned procedural requirements in lieu of the polluter who does not comply or that has not been identified.[650]

---

[646] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 291-2. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 95.

[647] Fabiana Pomes, "Omessa Bonifica dei Siti Inquinati Ex Art. 257 TU Ambiente e Predisposizione del Progetto di Bonifica: La Cassazione Torna Sul Tema," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 10.

[648] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*terdecies*].

[649] Giuseppina Bonfissuto, "L-Eco-Delitto di 'Omessa Bonifica' e Le Sue Prime Applicazioni Nelle Aule di Giustizia. Brevi Note a Margine di GUP, Trib. Di Fermo 21/01/21." *Rivista Trimestrale di Diritto Penale Dell'Ambiente* (2021): 41.

[650] Andrea R. Di Landro, "I Problemi Relativi al Delitto di Omessa Bonifica-Ripristino. In Particolare, Quali Responsabilità per L'Autore del Danno Ambientale e Quali per Gli Altri Soggetti?" *Rivista Trimestrale di Diritto Penale dell'Economia* 31 (2018): 359.

The Law 68/2015 has further introduced in the Italian Criminal Code a number of provision applicable to all the types of offences above-mentioned.[651] Among those are the Article 452-*octies* and Article 452-*novies*.[652] The former, entitled "Aggravating circumstances," asserts that if the association referred to in Article 416 is aimed (exclusively or concurrently) at committing any of the foregoing "environmental" crimes, the penalties are increased. Likewise, if the association referred to in Article 416-*bis* of the Italian Criminal Code (mafia-style crime syndicate) is aimed at committing any of the foregoing "environmental" crimes or acquiring the management or control of economic activities, concessions, authorizations, contracts or public services relating to environmental matters, the penalties are increased.[653] In any case, the penalties are increased in both cases if the association includes public officials or public service officers that perform environmental functions or services.[654] Such a provision is clearly aiming at countering the widespread and threatening phenomenon of "eco-mafia".[655] The latter, entitled "environmental aggravating circumstances," asserts that the penalty is increased by one-third to one-half in the case of a teleological connection between an act already provided for as a crime and one or more of the crimes provided for in Title VI-bis or the T.U.A. or any other legal provisions envisaged to protect the environment.[656] Article 452-*novies* is of key importance for its mention of the Italian Environmental Protection Act – the Italian Legislative Decree no. 152/2006, mostly referred to as the

---

[651] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 95.

[652] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*octies e novies*].

[653] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*octies*].

[654] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*octies*].

[655] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 95.

[656] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*novies*].

T.U.A. The T.U.A., also known as the Italian Environmental Code, simplifies and reorganizes existing environmental legislation in six key areas: waste and remediation, water, soil protection, air pollution, environmental procedures, and environmental damage.[657] The T.U.A. embodies a number of offences concerned with the environment: unauthorized discharge of industrial wastewater containing hazardous substances and discharge of those same substances in violation of the requirements specified in the authorization (Article 137(2) and (3) of the Italian Environmental Protection Act), discharge of industrial wastewater in violation of tabled limits (Article 137(5), first and second sentences of the Italian Environmental Protection Act), violation of prohibitions to discharge sewage directly into the soil, groundwater and subsoil (Article 137(11) of the Italian Environmental Protection Act), discharge into the sea by ships or aircraft of substances for which there is a total ban on spillage (Article 137(13) of the Italian Environmental Protection Act), collection, transport, recovery, disposal, trade and brokerage of waste without the required authorization, registration or notification (Article 256(1), letters a) and b) of the Italian Environmental Protection Act), construction or operation of an unauthorized landfill (Article 256(3) first and second sentences of the Italian Environmental Protection Act), unauthorized mixing of waste (Article 256(5) of the Italian Environmental Protection Act), temporary storage of hazardous medical waste at the place of production (Article 256(6) of the Italian Environmental Protection Act), contamination of the soil, subsoil, surface waters and groundwaters and failure to disclose this to the relevant authorities (Article 257(1) and (2) of the Italian Environmental Protection Act), preparation and use of false waste analysis certificate (Article 258(4) and Article 260-bis(6) and (7) of the Italian Environmental Protection Act), illegal trafficking of

[657] Mario Valiante, *Manuale di Diritto Penale dell'Ambiente* (Milano: Giuffrè Editore, 2009) 233.

waste (Article 259(1) of the Italian Environmental Protection Act), activities organized for illegal trafficking of waste (Article 260 of the Italian Environmental Protection Act), violations of the waste traceability control system (Article 260-bis(8) of the Italian Environmental Protection Act), air pollution (Article 279(5) of the Italian Environmental Protection Act).[658] Article 452-*novies* of the Italian Criminal Code considers a teleological aggravating factor, aggravating an act that is already provided for as a crime if it is teleologically oriented to the commission of any environmental crimes.[659] Such a teleological nexus, according to the wording of the law, seems to exist between a crime of means and a crime of purpose (provided for in Title VI-*bis* or by the T.U.A or any other legal provisions envisaged to protect the environment). It would seem, therefore, that all the offences of a contravention nature provided for in the T.U.A. (water pollution, atmospheric pollution, illegal management of waste) would be excluded among the crime-purpose referred to by Article 452-*novies*. Crimes such as illegal combustion of waste (art 256bis of the T.U.A.) and any other crimes provided for by legal provisions envisaged to protect the environment would instead be included. Therefore, the new provision enshrined under Article 452-*novies* offers a more comprehensive and exhaustive form of protection of the environment: any offense (including a contravention) that is committed for the purpose of carrying out one of the new environmental crimes (or already existing environmental crimes, such as those contained in the T.UA.) is thus punishable by a penalty increased by one-third to one-half.[660]

---

[658] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006. Mario Valiante, *Manuale di Diritto Penale dell'Ambiente* (Milano: Giuffrè Editore, 2009), 113-5.

[659] Licia Siracusa, "I Delitti di Inquinamento Ambientale e di Disastro Ambientale in una Recente Proposta di Riforma del Legislatore Italiano," *Rivista Trimestrale di Diritto Penale dell'Economia* 28 (2015): 237. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 45.

[660] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*novies*]. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 44-5.

The Title VI-*bis*, however, is not the sole novelty introduced by the Law n. 68/2015.

2. Administrative Corporate Liability for Environmental Crimes ex D.lgs 231/01

Practice has widely shown that the most serious dangers and damages caused to the environment stem from business activities.[661] As can be inferred from public opinion and mass media, the most significant criminal proceedings are generally referred to by the name of the industrial plants (ILVA, Eternit etc.) from which the pollution originated.[662] The legislators, by means of the Legislative Decree no. 121/2011 and the Law 68/2015, introduced the liability of entities derived from environmental crimes in the Legislative Decree 231/2001.[663] This was done with the purpose of complying with the commitments derived from the directive 2008/99/EC on the criminal protection of the environment.[664]

The 2008 Environment Directive maintained that "member states shall ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading

[661] Annalisa Lucifora, "Spunti di Comparazione e Nuove Prospettive di Armonizzazione del Diritto Penale dell'Ambiente: Scelte di Politica Criminale e Tecniche di Tipizzazione," *Rivista Trimestrale di Diritto Penale dell'Economia* 32 (2019): 212.

[662] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 76.

[663] Decreto Legislativo 7 luglio 2011, n. 121. Attuazione della direttiva 2008/99/CE sulla tutela penale dell'ambiente, nonché della direttiva 2009/123/CE che modifica la direttiva 2005/35/CE relativa all'inquinamento provocato dalle navi e all'introduzione di sanzioni per violazioni. Legge 22 maggio 2015, n.68. Disposizioni in materia di delitti contro l'ambiente. (GU n. 122 del 28-5-2015). Marina Poggi D'Angelo, "La Procedura Estintiva Ambientale: L'Idea dell'Inoffensività/Non Punibilità in Ottica Riparatoria e Deflattiva," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2022): 54.

[664] Giovanni Liberati, "L'Imputazione della Responsabilità degli Enti nei Reati Ambientali," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 61.

position within the legal person, acting either individually or as part of an organ of the legal person"[665] and that "member states shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties."[666] Accordingly, Law n. 68/2015 and the Legislative Decree n. 121/2011 modified the Legislative Decree n. 231/2001 for the purpose of introducing the corporate administrative liability for environmental crimes.[667]

To date, numerous offences in the area of illegal waste management and water pollution, as well as in the area of air pollution (e.g., the offence of exceeding the emission limit values and air quality limit values provided for by sectorial regulations), make up the catalogue of predicate offences - offences giving rise to the liability of the entity - under Article 25-*undecies* of Legislative Decree n. 231/2001, as amended by Legislative Decree n. 121/2011.[668]

Among the offences that may generate corporate liability are those labelled under articles 137, 256, 257 of the Italian Environmental Protection Act, i.e., unauthorized discharge of

[665] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 6].

[666] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28 [Article 7]. Annalisa Lucifora, "Spunti di Comparazione e Nuove Prospettive di Armonizzazione del Diritto Penale dell'Ambiente: Scelte di Politica Criminale e Tecniche di Tipizzazione," *Rivista Trimestrale di Diritto Penale dell'Economia* 32 (2019): 212.

[667] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 81. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 76-7.

[668] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001. Annalisa Lucifora, "Spunti di Comparazione e Nuove Prospettive di Armonizzazione del Diritto Penale dell'Ambiente: Scelte di Politica Criminale e Tecniche di Tipizzazione," *Rivista Trimestrale di Diritto Penale dell'Economia* 32 (2019): 214. Fabiana Pomes, "Procedura Estintiva delle Contravvenzioni Ambientali e Funzione Ripristinatoria del Diritto Penale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 71,

industrial wastewater containing hazardous substances and discharge of those same substances in violation of the requirements specified in the authorization (Article 137(2) and (3) of the Italian Environmental Protection Act), discharge of industrial wastewater in violation of tabled limits (Article 137(5), first and second sentences of the Italian Environmental Protection Act), collection, transport, recovery, disposal, trade and brokerage of waste without the required authorization, registration or notification (Article 256(1), letters a) and b) of the Italian Environmental Protection Act), construction or operation of an unauthorized landfill (Article 256(3) first and second sentences of the Italian Environmental Protection Act), contamination of the soil, subsoil, surface waters and groundwaters and failure to disclose this to the relevant authorities (Article 257(1) and (2) of the Italian Environmental Protection Act).[669]

Besides the crimes contained in the Legislative Decree n. 152/2006, many of the environmental crimes contained in the newly inserted Title VI-*bis* of the Italian Criminal Code are also attributable to entities.[670] The Law n. 68/2015 has indeed introduced, for the purpose of complying with the abovementioned 2008 EU Environment Directive, the administrative corporate liability for the newly codified environmental crimes.[671]

Among the predicate offences of the decree are indeed listed the crimes of environmental pollution (Article 452-*bis* of the

[669] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006. Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [articolo 25-*undecies*].

[670] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 77.

[671] Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 81.

Italian Criminal Code),[672] environmental disaster (Article 452-*quater* of the Italian Criminal Code),[673] negligent offences against the environment (Article 452-*quinquies* of the Italian Criminal Code),[674] trafficking and abandonment of highly radioactive material (Article 452-*sexies* of the Italian Criminal Code).[675] Notably, the crimes of impediment to control (Article 452-*septies* of the Italian Criminal Code) and omitted remediation (Article 452-*terdecies* of the Italian Criminal Code) are not labelled among the offences that give rise to the administrative corporate liability of the entity.[676]

Following this perspective, there seems to be ample room for the refinement of a penalty system tailored to companies and entities that are responsible for behaviors that damage the environment. The punitive system considered by the aforementioned Legislative Decree 231 of 2001 provides for pecuniary sanctions, interdictory sanctions, and confiscation.[677]

---

[672] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*bis*].

[673] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quater*].

[674] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*quinquies*].

[675] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*sexies*].

[676] Roberto Losengo, et al. "La Legge sugli Ecoreati 5 Anni Dopo: un Primo Bilancio," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 147-8. Andrea R. Di Landro, "La Funzione Ripristinatoria nel Diritto Penale Ambientale: La Bonifica ed il Ripristino Ambientale. Uno Studio De Iure Condito e De Iure Codendo," *Itinerari di Diritto Penale* (2020): 13. Maurizio Bellacosa, "L'Equità nella Giustizia Penale" in *La Strada Giusta: L'Equità Come Pratica* eds Samuele Sangalli (Italy: Luiss University Press, 2017) 100-3.

[677] Art. 9.1. Le sanzioni per gli illeciti amministrativi dipendenti da reato sono: a) la sanzione pecuniaria; b) le sanzioni interdittive; c) la confisca; d) la pubblicazione della sentenza. 2. Le sanzioni interdittive sono: a) l'interdizione dall'esercizio dell'attività; b) la sospensione o la revoca delle autorizzazioni, licenze o concessioni funzionali alla commissione dell'illecito; c) il divieto di contrattare con la pubblica amministrazione, salvo che per ottenere le prestazioni di un pubblico servizio; d) l'esclusione da agevolazioni, finanziamenti, contributi o sussidi e l'eventuale revoca di quelli già concessi; e) il divieto di pubblicizzare beni o servizi. Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [articolo 9].

The first type of sanctions (of unfailing application) is structured along the lines of the "per quota" system. This system serves the purpose of better adapting the penalty to the real economic capacity of the entity concerned.[678] Such a system appears to be capable of having positive repercussions in terms of both general and special prevention.[679] Firstly, the recipients would not be able to rely on a possible disproportion between the threatened sanction and their own economic conditions, so as to make the offence committed favorable to them. Second and relatedly, the quantification of the sanction in the light of the real economic and patrimonial capacities of the entity prevents particularly favorable conditions from making the entity itself insensitive to the afflictive character of the pecuniary sanction. The provision of interdictory sanctions is animated by analogous purposes. This type of sanction is intended to carry out not only a deterrent-intimidation function, but also an instance of special prevention in the form of neutralization of the risk of crime. In addition, one should not overlook the potential of the post-factum repentance conduct, capable of influencing the *quantum* or even the *an* of the penalty. This provision highlights how the sanction system "is not inspired by a draconian and indiscriminate punitive logic." Rather, it aims at "declaratively privileging the perspective of the protection of goods along with the prevention of the risk of the commission of the offence."[680] This change in perspective will be at the core of the following paragraphs.

---

[678] Paola Balducci, *L'Ente Imputato: Profili di Efficienza e di Garanzia nel Processo De Societate* (Torino: Giappichelli Editore, 2013) 25-6. Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 250.

[679] Massimiliano Dova, "Vi è Spazio per una Pena Prescrittiva – Reintegratoria in Materia Ambientale?" *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2021): 25. Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 250.

[680] Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 251.

B. Restorative Justice in Criminal-Environmental Areas

1. "Ravvidimento Operoso" Ex Art. 452-*decies* of the Italian Criminal Code

Environmental criminal law has recently welcomed a trend towards the provision of an increasing number of specific obligations to repair, restore or rehabilitate the environment. Such a trend appears to be in tune with the most recent guidelines of criminal policy, which tend to conceive of punishment not merely as a tool to prevent the materialization of offensive situations, but also as a spur for the restoration of the status *quo ante delictum*.[681] Criminal law doctrine, however, observes how the "ever-increasing recourse to such sanctioning instruments" represents "a symptom and a consequence of the lack of effectiveness revealed by 'classic' criminal sanctions." Nonetheless, the "key features of restorative sanctions depart from the functional and educational role served by traditional criminal sanctions. The afflictive content of the restorative sanction is not anchored in the culpability, thereby it remains indifferent as to the intentional or negligent character of the committed offence." Such a trend would seem, therefore, to allay both the retributive and the rehabilitative component of traditional punishment. Yet, while not disregarding such a possible outcome, it ought to be emphasized how the provision of a "reward measure" for those who proceed to reinstate the injured interest "fulfills an appreciable function of re-education of the offender in so far as he/she is obliged to repair the damage caused by the offence at his/her own expense." Accordingly, the offender is likely to be "more aware of the value" that the protected legal asset assumes

[681] Dario Micheletti, "Il Reato di Contaminazione Ambientale. Interpretazioni a Confronto sull'Articolo 51*bis* d.lgs. n. 22/1997," *Rivista Trimestrale Diritto Penale dell'Economia* (2004): 107.

for the entire system. Moreover, the restoration condition would in practice act as a sanction alternative to the prison sentence. It would be, in essence, "a kind of pecuniary penalty directly tailored to the damage or danger that has been caused, which requires, unlike the traditional penalty imposed by the judicial dictum, a constructive and positive action on behalf of the offender."[682] In accordance with this line of thinking, criminal law would find its source of legitimacy in its effectiveness.[683] It would further hold at the core of its agenda the protection of the invaluable legal asset it safeguards, thereby "advancing the social need for protection over the social need for punishment."[684]

Article 452-*decies* of the Italian Criminal Code provides for a special hypothesis of "ravvedimento operoso" for the crimes against the environment labelled under the Title VI-*bis* of the Criminal Code and the crime referred to by Article 260 of the Italian Environmental Protection Act i.e., activities organized for illegal trafficking of waste.[685] Article 452-*decies* states that "the penalties provided for the crimes referred to in this title, for the crime of criminal association referred to in Article 416 as aggravated pursuant to Article 452-*octies*, as well as for the crime referred to in Article 260 of Legislative Decree No. 152, as amended, shall be decreased by one-half to two-thirds in respect of the person who takes steps to prevent the criminal activity from being carried to further consequences, or, prior to the declaration of the opening of the first-degree hearing, concretely provides for the safety, reclamation and, where possible, the restoration of the

[682] Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 253.

[683] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 27-9.

[684] Costanza Bernasconi, *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza* (Pisa: Edizioni ETS, 2008), 254.

[685] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Title VI-*bis*]. Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 260]. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 96.

pre-disturbed state of the affected places. The penalties shall be decreased by one-third to one-half with respect to the person who concretely helps the police or the judicial authority in the reconstruction of the facts, the identification of the perpetrators or the diversion of resources relevant to the commission of crimes."[686]

The first mitigating factor requires the termination of the wrongful behavior along with positive actions to restore the offense (to be conducted prior to the declaration of the opening of the hearing).[687] This provision is consistent with the reward strand experienced by the most serious crimes, such as terrorism, mafia activity, and narcotics smuggling. In these scenarios, strong mitigating factors tend to counteract the prospect of severe penalties. The prospect of the threat of harsh punishment and the promise of mild treatment should precisely push the agent to engage in restorative conducts.[688] Reward measures have long been present in environmental criminal law. One can think of Article 257 of the Italian Environmental Protection Act which grants impunity to anyone who has utterly remedied the harmful consequences of their misbehavior,[689] Article 140 of the Italian Environmental Protection Act which entails mitigating factors in relation to the offence of water pollution[690] and the cases of a

[686] Notably, the Article does not apply to legal persons. Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*decies*]. Roberto Losengo, et al. "La Legge sugli Ecoreati 5 Anni Dopo: un Primo Bilancio," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 117.

[687]Andrea R. Di Landro, "La Funzione Ripristinatoria nel Diritto Penale Ambientale: La Bonifica ed il Ripristino Ambientale. Uno Studio De Iure Condito e De Iure Codendo," *Itinerari di Diritto Penale* (2020): 55-56.

Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 303.

[688] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 303.

[689] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 257].

[690] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 140].

subject with a suspended sentence for compensating the damage and executing safety, remediation and restorative works.[691]

The second mitigating factor enshrined in Article 452-*decies* is granted to anyone who concretely provides for the safety, reclamation of and, where possible, the restoration of the state of the sites.[692] In the field of environmental protection, therefore, reintegrative conducts can take three different forms. These forms, while having partially different connotations, appear to be part of a unified whole. Securing, remediation and restoration (sometimes gathered together under the all-inclusive term of "recovery" - as in the case of Art. 452-*duodecies* of the Italian Criminal Code) seem to be placed in a logical and temporal progression. Such a progression goes from the gradual elimination of risk factors to the restitution of the site to its original usability.[693] The activity for the securing of sites is subject to multiple definitions under the Italian Environmental Protection Act.[694] Article 240 letter *m* defines the emergency safety as "any immediate or short-term intervention, to be implemented under the emergency conditions referred to in subparagraph (t) in the event of sudden contamination events of any nature. This is designed to contain the spread of primary sources of contamination, prevent their contact with other matrices present on the site and remove them, pending any further remediation or operational or permanent safety."[695] Article 240 letter *n* defines the operational safety as "the set of interventions

[691] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articoli 139, 255, 257, 260]. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 27-8.

[692] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*decies*].

[693] Massimiliano Dova, "Vi è Spazio per una Pena Prescrittiva – Reintegratoria in Materia Ambientale?" *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2021): 20.

[694] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 304.

[695] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 240 lettera m].

carried out at a site with operating activities designed to ensure an adequate level of safety for people and the environment, pending further permanent safety or remediation interventions to be carried out when the activity ceases. They also include contamination containment measures to be put in place on a transitional basis until the remediation or permanent safety measures are carried out, in order to prevent the spread of contamination within the same matrix or between different matrices. In such cases, appropriate monitoring and control plans must be prepared to verify the effectiveness of the adopted solutions."[696] Last but not least, Article 240 letter *o* refers to permanent safety as "the set of interventions designed to permanently isolate the pollutant sources from the surrounding environmental matrices and to ensure a high and definitive level of safety for people and the environment. In such cases, monitoring and control plans and limitations of use with respect to the provisions of urban planning instruments must be provided."[697] For the purpose of Article 452-*decies,* the securing of the contaminated sites is to be construed as permanent safety. Therefore, the application of the mitigating factors is conditional upon a high and definitive level of safety for people and the environment.[698] Reclamation instead is defined, pursuant to Article 240 letter *p,* as the set of actions to eliminate the sources of pollution and pollutants or to reduce the concentrations of the same sources in soil, subsoil and groundwater to a level equal to or lower than the values of the risk threshold concentrations (CSR).[699] Lastly, restoration designates the environmental and landscape's rehabilitation interventions, oftentimes constituting a complement to the remediation or permanent safety interventions,

[696] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 240 lettera n].

[697] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 240 lettera o].

[698] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 304.

[699] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 240 lettera p].

which allow the site to recover to the actual and final versatility of the intended use (in accordance with the urban planning instruments).[700] Restoration is also referred to by Article 452-*duodecies* of the Italian Criminal Code.[701] The Article asserts that "when pronouncing a judgment of conviction or application for punishment at the request of the parties pursuant to Article 444 of the Code of Criminal Procedure for any of the crimes provided for in this title, the court shall order the recovery and, where technically possible, the restoration of the state of sites, placing the execution at the expense of the convicted person and the persons referred to in Article 197 of this Code."[702] According to Article 452-*decies* the restoration should be pursued where possible *tout court*.[703] Article 452-*duodecies* refers instead to restoration in cases where it is *technically* possible.[704] This difference in wording leaves open the question as to whether the duty to restore pursuant to Article 452-*decies* is excluded in all such cases where restoration is impossible due to technical issues or matters of a different nature, such as economical concerns.[705]

Thus, it seems to be possible to glimpse at how such a normative structure tends to encourage the activation of *post-delictum* restorative conducts at different stages of the

[700] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 240 lettera q].

[701] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*duodecies*]. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 27. Roberto Losengo, et al. "La Legge sugli Ecoreati 5 Anni Dopo: un Primo Bilancio," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 120.

[702] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*duodecies*].

[703] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*decies*].

[704] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*duodecies*]. Andrea R. Di Landro, "La Funzione Ripristinatoria nel Diritto Penale Ambientale: La Bonifica ed il Ripristino Ambientale. Uno Studio De Iure Condito e De Iure Codendo," *Itinerari di Diritto Penale* (2020): 112-3.

[705] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 304. Francesco Antolisei, *Manuale di Diritto Penale: Parte Speciale II* (Milano: Giuffrè Editore, 2016), 97-8.

proceedings, ranging from the phase prior to the establishment of the trial to the one following its conclusion.[706] Furthermore, in the meshes of these provisions, it seems to be possible to discern an opportunity - granted by the normative instruments - to carry out a constructive dialogue between the parties. Such a dialogue should aim at best to contain the risk, whose intensity (as we have seen) can increase over time and whose force is destined to expand to environmental resources other than those initially affected. It should be further emphasized that, in this case, such a perspective does not correspond to a trait explicitly attributable to the normative provision. Rather, it represents a possible interpretation, albeit compatible with the norms, which is suggested here as being consistent with the issues discussed and the questions raised.[707] In line with this perspective, the commitment to "prevent the criminal activity from being carried to further consequences," which gives rise to the mitigating factor provided for in Article 452-*decies*, could also imply a certain awareness of the described "dynamic" attitude of the offences against the environment.[708] Then, the fostering of the sharing of knowledge available to the parties could result in conducts that are more effective in containing the risk.[709] It is thus believed that only an enhancement of conciliatory conduct would achieve tangible results in repairing the damage, taking into account the victim's needs and calling for social pacification, while at the

[706] Elena Cadamuro, "L'Irrilevanza Penale del Fatto nel Prisma della Giustizia Riparativa," *Padova University Press* (2022): 159. Giuseppe Rotolo, "Occasioni di Dialogo fra le Parti alla Luce della Riforma del Diritto Penale dell'Ambiente," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 169.

[707] Giuseppe Rotolo, "Occasioni di Dialogo fra le Parti alla Luce della Riforma del Diritto Penale dell'Ambiente," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 169.

[708] Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Articolo 452-*decies*]. Giuseppe Rotolo, "Occasioni di Dialogo fra le Parti alla Luce della Riforma del Diritto Penale dell'Ambiente," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 169.

[709] Giuseppe Rotolo, "Occasioni di Dialogo fra le Parti alla Luce della Riforma del Diritto Penale dell'Ambiente," in *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 169.

same time offering an innovative solution to ease the tensions generated by the commission of the crime, thereby strengthening the community's sense of security.[710]

In conclusion, it seems to be safe to say that Article 452-*decies* might represent the chance to make use of the possibilities offered by restorative justice in the management of environmental offences, perhaps by placing more typically restorative conduct alongside those expressly provided by law.[711]

2. The Extinguishing Procedure of Article 318-*bis* of the D.lgs 152/2006

A further disputed issue relates to the compliance of the extinguishing procedure enshrined in Articles 318-*bis* et seq. of the Legislative Decree n. 152/2006 with the principles of restorative justice.[712] The Law n. 68/2015 has indeed introduced a diversionary procedure enabling the out-of-court settlement of certain minor criminal violations of the Environmental Code i.e., the Legislative Decree n. 152/2006.[713] More specifically, the Law n. 68/2015 introduced a reward mechanism intended to extinguish some of the offences against the environment labelled in the

[710] Elena Cadamuro, "L'Irrilevanza Penale del Fatto nel Prisma della Giustizia Riparativa," *Padova University Press* (2022): 162.

[711] Davide Amato, "Quali Spazi per la Restorative Justice nell'Ordinamento Giuridico Italiano?" *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 178. Elena Cadamuro, "L'Irrilevanza Penale del Fatto nel Prisma della Giustizia Riparativa," *Padova University Press* (2022): 159.

[712] Adriano Martufi, "La 'Diversione' Ambientale tra Esigenze Deflattive e Nuove Tensioni Sistemiche: Alcune Annotazioni in Merito alla Speciale Proposta Estintiva Prevista per le Contravvenzioni del D.lgs. 3 Aprile 2006, n. 152," *Diritto Penale Contemporaneo* (2018): 293. Andrea R. Di Landro, "La Funzione Ripristinatoria nel Diritto Penale Ambientale: La Bonifica ed il Ripristino Ambientale. Uno Studio De Iure Condito e De Iure Codendo," *Itinerari di Diritto Penale* (2020): 73-4.

[713] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 318bis et seq].

Decree n. 152/2006.[714] This is a particularly important innovation which was immediately greeted with a widespread favor as it is understood as a "regulatory device" envisaged as the best and most immediate form of environmental protection. In other words, it represents the quickest way to achieve the behavioral repentance which not only ensures the best environmental care but renders it unnecessary to institute costly and in many ways ineffective proceedings.[715] The Title VI-*bis* of the Decree enshrines a complex process which revolves around the exclusion of disqualifying penalties provided that the criminal factual situation has been regularized.[716] The mechanism provided for in the Title VI-*bis* applies to those offences that have not caused any concrete or current damage or danger.[717] Accordingly, for the purposes of applying the extinction system, it is necessary to carry out an assessment of the factual situation in order to verify whether the activity carried out, even if related to an alleged crime

---

[714] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 318-*bis*].

[715] Alessandro Melchionda, "La Procedura di Sanatoria dei Reati Ambientali: Limiti Legali e Correzioni Interpretative in *Malam Partem*," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2021): 4. Dario Franzin, "La Procedura Estintiva delle Contravvenzioni Ambientali al Vaglio della Corte Costituzionale: Limiti e Ragionevolezza della Deroga del Principio della Retroattività della *Lex Mitior,*" *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 93-4.

[716] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Title VI-bis]. Camera Arbitrale di Milano, "Quale Futuro Per La Gestione dei Conflitti Ambientali?" *Open Space Technology* (2018): 12. Vincenzo Paone, "Dopo Tre Anni dall'Entrata in Vigore della L. n. 68/2015, Persistono Criticità in Tema di Estinzione delle Contravvenzioni Ambientali," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 13.

[717] The absence of concrete or current damage or danger, which allows access to the extinction procedure must be assessed in "concrete terms": in terms of harmlessness/ non punishability. Marina Poggi D'Angelo, "La Procedura Estintiva Ambientale: L'Idea dell'Inoffensività/Non Punibilità in Ottica Riparatoria e Deflattiva," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2022): 37. Pasquale Fimiani, "Gli Aspetti Problematici nel Sistema di Estinzione dei Reati Ambientali del Titolo VI-*bis* del T.U.A," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 27. Dario Franzin, "La Procedura Estintiva delle Contravvenzioni Ambientali al Vaglio della Corte Costituzionale: Limiti e Ragionevolezza della Deroga del Principio della Retroattività della *Lex Mitior,*" *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 94. Vincenzo Paone, "Dopo Tre Anni dall'Entrata in Vigore della L. n. 68/2015, Persistono Criticità in Tema di Estinzione delle Contravvenzioni Ambientali," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 8.

of danger, has actually caused damage, or a concrete danger of damage to the environment (for example, an unauthorized activity could be carried out in compliance with the management conditions provided by the law).[718] In carrying out such an assessment, other provisions of Part VI-bis should be considered. In particular, Article 318-ter, paragraph 3, for which "with the prescription, the determining body may impose specific measures aimed at putting an end to dangerous situations or the continuation of potentially dangerous activities,"[719] and Article 318-septies, paragraph 3, which, reproducing Art. 24, paragraph 3, Legislative Decree No. 758/1994, provides that "the elimination of the harmful or dangerous consequences of the contravention by means other than those indicated by the supervisory body are assessed for the purposes of applying Art. 162-bis of the Criminal Code."[720] The extinction procedure is structured as follows. Article 318-*ter* states that "for the purpose of eliminating the ascertained contravention, the supervisory body, in the exercise of the judicial police functions referred to in Article 55 of the Code of Criminal Procedure, or the judicial police, shall issue to the offender an appropriate prescription technically asseverated by the specialized body competent in the subject matter, to be fulfilled within a deadline not exceeding the period of time technically necessary."[721] The content of the prescription is not imposed by the law. Rather, it is left to the discretion of the supervisory body. Yet, the "elimination of the

[718] Pasquale Fimiani, "Gli Aspetti Problematici nel Sistema di Estinzione dei Reati Ambientali del Titolo VI-*bis* del T.U.A," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 28-9. Vincenzo Paone, "Dopo Tre Anni dall'Entrata in Vigore della L. n. 68/2015, Persistono Criticità in Tema di Estinzione delle Contravvenzioni Ambientali," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 8.

[719] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 318-*ter*].

[720] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 318-*septies*].

[721] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 318-*ter*]. Fabiana Pomes, "Procedura Estintiva delle Contravvenzioni Ambientali e Funzione Ripristinatoria del Diritto Penale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 63.

ascertained contravention" is the objective of the prescription. Therefore, the prescription needs to consist of the obligation to keep the demeanor imposed by the criminal precept violated. It seems to be safe to say that the supervisory body may impose particular modes of compliance in light of the specific circumstances of the case.[722] Once the prescription has been issued, if a subsequent investigation ascertains that the restorative action has complied with the directions provided by the supervisory body, the offender is allowed to administratively pay a sum equal to one-fourth of the maximum edictal fine. The payment of such a penalty, along with the prior regularization (both must be ritually communicated to the prosecutor), determines *ipso iure* the extinction of the offence, binding the prosecutor to the request of the dismissal of the case and the preliminary investigation judge to its order.[723] Despite the fact that the extinguishing effect depends upon the twofold condition of the restoration of the situation in accordance with the law and the administrative payment of a certain sum, the core of the reward mechanism is represented by the first element, namely, the reparation of the offence by the offender.[724] From an ontological point of view, the mechanism is thus characterized by a counter-conduct (late compliance) aimed at neutralizing the offence that the protected legal good has suffered, which resembles the above-mentioned scheme of "ravvedimento

[722] Adriano Martufi, "La 'Diversione' Ambientale tra Esigenze Deflattive e Nuove Tensioni Sistemiche: Alcune Annotazioni in Merito alla Speciale Proposta Estintiva Prevista per le Contravvenzioni del D.lgs. 3 Aprile 2006, n. 152," *Diritto Penale Contemporaneo* (2018): 293-6. Pasquale Fimiani, "Gli Aspetti Problematici nel Sistema di Estinzione dei Reati Ambientali del Titolo VI-*bis* del T.U.A," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 31-2.

[723] Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006 [Articolo 318-*quater*]. Camera Arbitrale di Milano, "Quale Futuro Per La Gestione dei Conflitti Ambientali?" *Open Space Technology* (2018): 12.

[724] Fabiana Pomes, "Procedura Estintiva delle Contravvenzioni Ambientali e Funzione Ripristinatoria del Diritto Penale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 64.

operoso," albeit in a non-voluntary character.[725] At the same time, there is no doubt that the novelty paves the way for a new interpretation to the postulate of strict consequentiality between crime and punishment (*nullum crimen sine poena* which could arguably be substituted by the more realistic *nullum crimen sine remedio*).[726] This is done by orienting the environmental sanctioning system toward paradigms inspired more by the effective protection of the protected legal interest than by the indefectible imposition of the punishment pursuant to the edictal framework.[727] Yet, the criminal factual situations to which the extinguishing procedure enshrined in Article 318-*bis* applies remain firmly anchored in the area of criminal protection and thus do not result in decriminalized offences. This last observation offers some insights to help reflect further on the compatibility of the newly introduced procedure with the principles of restorative justice. The difficulty of bringing the analyzed procedure closer to the paradigm of restorative justice lies on the procedural cadences that characterize the mechanism introduced by the Law n. 68/2015. In essence, restorative justice aims at granting a dialogic and open space for reconciliation between the perpetrator of the offence and the victims. In addition, restorative justice aims at enhancing the offender's genuine accountability through forms of creative reparation. Restorative justice is thus characterized by the voluntary participation of each of the parties affected by the offence and by the informality of the practices adopted. On the contrary, in the extinguishing procedure enshrined in Title VI-*bis* each of the acts performed by the relevant stakeholders follows a

[725] Adriano Martufi, "La 'Diversione' Ambientale tra Esigenze Deflattive e Nuove Tensioni Sistemiche: Alcune Annotazioni in Merito alla Speciale Proposta Estintiva Prevista per le Contravvenzioni del D.lgs. 3 Aprile 2006, n. 152," *Diritto Penale Contemporaneo* (2018): 297.

[726] Fabiana Pomes, "Procedura Estintiva delle Contravvenzioni Ambientali e Funzione Ripristinatoria del Diritto Penale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 65.

[727] Adriano Martufi, "La 'Diversione' Ambientale tra Esigenze Deflattive e Nuove Tensioni Sistemiche: Alcune Annotazioni in Merito alla Speciale Proposta Estintiva Prevista per le Contravvenzioni del D.lgs. 3 Aprile 2006, n. 152," *Diritto Penale Contemporaneo* (2018): 302.

rigid and constrained procedure: the offender has no power of initiative (this falls within the supervisory body's remit), while the judge cannot review the merits of the decisions of that body, unless he/she finds "the supervisory body's culpable inertia or inexperience in the activation or management of the procedure." Moreover, the fact that the prescription can, in some cases, entail an afflictive content and result into measures that significantly impinge upon the legal position of the offender, further separates the procedure of Title VI-*bis* from the conciliatory nature of restorative justice. In conclusion, "this new diversion scheme can be regarded as a form of de facto decriminalization, based on a bargaining process which – in principle - sits at odds with the aims of restorative justice."[728] Yet, such an injunctive model necessarily entails a reflection on the crime by the offender and a reconsideration of his or her conduct, which, as a result of a voluntarily undertaken procedure, comes to comply with the violated provisions. In such a case, therefore, the ontological lack of a 'victim' makes any form of interlocution impossible. Nevertheless, the conduct last described seems to arguably fall within the restorative justice paradigm.[729]

3. Reparatory Measures Pursuant to Article 17 of the D.lgs 231/01

The possibility of applying restorative justice principles to environmental crimes needs to be considered in light of the wording of the Legislative Decree 231/2001. The Decree, as extensively explained above, introduced the administrative

[728] Adriano Martufi, "La 'Diversione' Ambientale tra Esigenze Deflattive e Nuove Tensioni Sistemiche: Alcune Annotazioni in Merito alla Speciale Proposta Estintiva Prevista per le Contravvenzioni del D.lgs. 3 Aprile 2006, n. 152," *Diritto Penale Contemporaneo* (2018): 304 and 293.

[729] Davide Amato, "Quali Spazi per la Restorative Justice nell'Ordinamento Giuridico Italiano?" *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 177.

corporate liability for environmental crimes under Article 25-*undecies*.[730] Environmental crimes thus certainly form a part of the catalogue of predicate offences that could give rise to, provided that the conditions set forth by Article 5 of the Decree are satisfied, the liability of legal persons and the criminal proceedings against them.[731]

The decree is informed by a markedly preventive logic. Such a logic is set on a model that allows the entity not to suffer from any sanctions if it has equipped itself with managerial, organizational and monitoring measures suitable for preventing the crime that has occurred, as well as a dedicated supervisory system.[732] These measures may be considered to be effective if the perpetrator, depending on his/her role in the organizational structure of the entity, needed to circumvent them in order to carry out the criminal conduct, or to violate the management and supervisory obligations incumbent on him/her. In essence, the primary objective of the decree is to incentivize entities to work to prove their extraneousness to the criminal act, for example to

[730] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001.

[731] Article 5 states that "1. The entity is liable for crimes committed in its interest or to its advantage: a) by persons who hold positions of representation, administration or management of the entity or of one of its organizational units with financial and functional autonomy as well as by persons who exercise, including de facto, the management and control of the same; b) by persons subject to the management or supervision of one of the persons referred to in subparagraph a). Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [Articolo 25-*undecies* e Articolo 5].

[732] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [Articoli 6 e 7]. *See* also Paola Balducci, *L'Ente Imputato: Profili di Efficienza e di Garanzia nel Processo De Societate* (Torino: Giappichelli Editore, 2013) 139.

prove that the act is attributable solely to a deviation of the natural person from the rules dictated by the entity itself.[733]

The preventive perspective, however, is interwoven with a restorative one. These two perspectives respond, as a matter fact, to the same need. That being the need to incentivize proactive behaviors on behalf of the entity by offering a series of gradual reward benefits, depending on the timing and quality of the undertaken initiatives. If the entity has adopted and implemented all the prevention mechanisms provided for in Articles 6 and 7 of the Decree, it should not find itself in the position of "having to make amends." Instead, if the entity has failed to adopt such mechanisms, or has done so but the implemented prevention system has proven not to function properly or to be inadequate, the entity is granted a wide array of opportunities to make amends.[734]

Practice shows that the entity finds itself more often in the position of having to access *ex-post* remedial measures, rather than being able to take advantage of the exempting efficacy of its prevention system. This happens both because the entity is oftentimes not equipped with any prevention system and because prevention systems are hardly considered adequate and effective by the judge of the case. Therefore, the decree seems to have functioned more as an incentive to an *ex-post* form of reparation

---

[733] Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 179-80.

[734] Paola Balducci, *L'Ente Imputato: Profili di Efficienza e di Garanzia nel Processo De Societate* (Torino: Giappichelli Editore, 2013) 14-5. Maurizio Bellacosa, "L'Equità nella Giustizia Penale" in *La Strada Giusta: L'Equità Come Pratica* edited by Samuele Sangalli (Italy: Luiss University Press, 2017) 103-6. Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 180.

rather than as an incentive to an effective *ex-ante* form of prevention. The entity has little confidence in an acquittal outcome because of the validity of its prevention model. Accordingly, the defensive logic adopted by the entity, regardless of if it is in compliance with the provisions set forth by the decree, mostly aims at accessing all the reward benefits offered by the decree to mitigate the sanctioning consequences. Such an approach seems to be further substantiated by a frequent recourse to the institution of plea bargaining. In a nutshell, the entity tends to prefer the access to restorative measures or plea bargaining, which are likely to result in a more foreseeable and precautionary trial outcome.[735]

Content wise, the reparatory measures are embedded in Article 17 of the Legislative Decree. The Article states that "without prejudice to the application of pecuniary sanctions, disqualifying sanctions are not applied when, before the declaration of the opening of the first instance hearing, the following conditions are satisfied:

(a) the entity has fully compensated for the damage and eliminated the harmful or dangerous consequences of the crime or has otherwise effectively taken steps to do so;

b) the entity has eliminated the organizational deficiencies that led to the crime through the adoption and implementation of organizational models suitable to prevent crimes of the kind of the one that occurred;

(c) the entity has made the profit available for confiscation."[736]

---

[735] Giovanni Liberati, "L'Imputazione della Responsabilità degli Enti nei Reati Ambientali," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 68. Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 180.

[736] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [Articoli 17]. Andrea Franco, "Il Reato di Inquinamento Ambientale e la Verifica

The reparatory model embraced by the decree is focused on the consequences of the crime rather than on the forms of cooperation for the discovery and the reconstruction of the basic facts of the case. The reward benefits, although narrowed to mere reductions of sanctions, are nonetheless meaningful in scope. The combined provisions of Article 17 and Article 12 of the Decree – "the pecuniary penalty shall be reduced by half and may not, however, exceed two hundred million lire if: (a) the offender has committed the deed in the predominant interest of him/herself or of third parties and the entity has not gained an advantage or has gained a minimal advantage; b) the pecuniary damage caused is of particular tenuousness; 2. The penalty is reduced by one-third to one-half if, before the declaration of the opening of the first instance hearing: (a) the entity has fully compensated for the damage and eliminated the harmful or dangerous consequences of the crime or has otherwise effectively done so; b) an organizational model suitable for preventing crimes of the kind that have occurred has been adopted and made operational. 3. In the case where both conditions provided for in the letters of the preceding paragraph concur, the penalty is reduced by half to two-thirds. 4. In any case, the fine may not be less than twenty million lire" - [737] allowing the entity to avoid disqualifying sanctions and to obtain a reduction in the fine.[738]

---

dell'Idoneità dei Modelli di Organizzazione e Gestione a Prevenirne la Commissione: Profili Problematici," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 6-7.

[737] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [Articoli 12].

[738] Notably, the provision of Article 452-*bis* of the Criminal Code – "ravvedimento operoso" - can be applied only to natural persons. Legal persons will thus merely enjoy of the reduction of pecuniary penalties enshrined in Article 12 of the Decree 231/2001. Paola Balducci, *L'Ente Imputato: Profili di Efficienza e di Garanzia nel Processo De Societate* (Torino: Giappichelli Editore, 2013) 12. Andrea R. Di Landro, "La Funzione Ripristinatoria nel Diritto Penale Ambientale: La Bonifica ed il Ripristino Ambientale. Uno Studio De Iure Condito e De Iure Codendo," *Itinerari di Diritto Penale* (2020): 57. Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con

Our system thus implies that, in the current legal framework, there is no room in favor of the entity for restorative justice models that are *alternative* to the trial. Rather, a restorative justice model that runs alongside the trial or is embedded in it seems to be a more feasible option. This perspective is substantiated by the wording of the legislators themselves. The Ministerial Report of the Decree maintained that: counteractions of a reintegrative, restorative and reorganizational nature are oriented towards the protection of the interests hindered by the offense. Therefore, the re-elaboration of the social conflict takes place not only through a repressive logic but also by means of enhanced compensatory models of the offense. The objectives of "reparation of the offence" and "enhancement of compensatory models of the offence" are evidence of the possibility of Article 17 being used for restorative justice programs.[739]

Article 17 entails temporal limitations that, albeit narrow, seem not to be incompatible with restorative justice programs. The exemption from disqualifying sanctions is accorded only if the entity pursues considerable efforts to repair the damage during the investigation stage or in the phase prior to the sentencing hearing. The temporal scope of Article 17 thus covers the initial stage of the proceedings.[740] This time limit, however, can be waived. Article 65 of the Decree asserts that the judge, prior to the sentencing hearing, can suspend the proceedings if the entity

---

gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 181.

[739] Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 181-2.

[740] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [Articoli 17].

is seeking to repair the damage in accordance with Article 17 of the abovementioned Decree and has proven to be unable to do so prior to the request of suspension of the proceedings.[741]

As mentioned above, Article 17 of the Decree envisages three restorative measures:

(a) the entity has fully compensated the damage and has eliminated the harmful or dangerous consequences of the crime or has otherwise effectively taken steps to do so;

b) the entity has eliminated the organizational deficiencies that led to the crime through the adoption and implementation of organizational models suitable to prevent crimes of the kind of the one that occurred;

(c) the entity has made the profit available for confiscation."[742]

Among those, letter *a,* which requires full compensation for the damage and the elimination of the harmful or dangerous consequences of the crime or, alternatively, that the entity has at least effectively taken steps to that effect, undoubtedly represents the measure with the greatest potential to establish a contact between the entity and the injured parties affected by the criminal affair. The measures enshrined in letters *b* and *c* refer instead to unilateral activities that the entity can carry out without any interactions with third-parties. The activity labelled in letter *b* is indeed the entity's typical internal activity. It requires a review of the operational and organizational procedures adopted by the entity and the analysis of the behavior of the entity's staff to better

[741] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [Articoli 65]. *See* also Paola Balducci, *L'Ente Imputato: Profili di Efficienza e di Garanzia nel Processo De Societate* (Torino: Giappichelli Editore, 2013) 142.

[742] Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001 [Articoli 17].

grasp what went wrong in the process. The reasons as to why the entity is reluctant to share or negotiate this kind of activities with external parties can in fact be ascertained quite easily.[743]

The measures enshrined in letter *a* force the entity to interact with parties other than their staff and the judges. The conditions set forth by the norm are open-ended formulas that leave ample maneuverable room to the entity as to how they are to be materialized. As far as the elimination of harmful or dangerous consequences is concerned, it is not made explicit what exactly the expected behavior should amount to. The existing case law only partially allows for providing minimum indicators of the required behavior and, above all, cannot be generalized to all types of crimes. Crimes such as bribery and market abuse do not result in tangible events and mainly produce effects of a purely patrimonial nature. These are crimes with respect to which it is difficult to imagine harmful or dangerous consequences that cannot be repaired with the compensation of the damage. Yet, even in this case, if the measure enshrined in letter *a* is projected on the elimination of the sources of danger rather than on the consequences of the crime, actions other than economic reparation e.g., the removal of top managers or of the individuals who materially carried out the criminal conduct, can also come into play. Assuming that the same restorative conduct would have to be implemented in the context of a proceeding initiated to prosecute an environmental offence, the entity would be required to behave in a different and more far-reaching manner. It is precisely with reference to environmental crimes that the objectives of recomposing the social conflict and compensating

[743] Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 182.

for the offence – indicated by the legislators as the objective of Article 17 – come into effect and can take a full-fledged form.[744]

The hypothesis that the entity will interact and negotiate with the victims of the offence finds support in the wording of the Supreme Court. The court, although referring to the modalities of compensation for the damage referred to in letter a, is quite clear in referring to a dialogical and interactive path. The court refers to (for the purpose of fulfilling letter *a* of Article 17 of the Decree) to a "communicative conduct with the injured party," who must be able to consider whether to adhere to the offer or put forward serious and objective reasons for rejecting it. In essence, the acceptance by the injured party is the only tangible proof that the damage has been effectively and fully compensated. In cases where the entity decides on the determination of damages unilaterally without allowing the injured party to interject themselves on the matter or without having at least contacted them, the initiative is considered ineffective. In order to be able to carry out a "constructive dialogue" with all claimants, the court adds that the entity must undertake reasonable efforts "to identify the persons offended and harmed by the crime, regardless of whether it is a civil party in the lawsuit."[745]

The principle that can be inferred from the aforementioned judgment is that the entity's restorative initiatives cannot be unilateral. Neither can they remain circumscribed within the scope of internal deliberations or a dialogue with the sole

[744] Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 183.

[745] Corte di Cassazione, sezione II, sentenza 8 gennaio 2014, n. 326. In materia di responsabilità degli enti (legge 231/2001), la condotta della società che metta a bilancio una somma determinata unilateralmente, senza alcuna possibile interferenza da parte degli enti territoriali danneggiati dal reato, non garantisce l'efficacia del risarcimento che è una delle tre condizioni essenziali per la revoca delle misure interdittive.

judiciary. If the principle inferred from the wording of the Supreme Court applies to the measure of compensation for damages, it must also apply when the entity finds itself, as it happens in the case of environmental crimes, in the condition of also having to eliminate the harmful or dangerous consequences stemming from the crime (which extend far beyond the economic damage caused to a private individual or to the state). The opening of a negotiating table with the parties affected by the offence and with all the relevant stakeholders seems to be the only viable path to effectively comply with the restorative measures referred to in letter *a* of Article 17 and thus obtain the benefits granted by the Legislative Decree.[746]

The negotiating phase will inevitably aim at achieving an agreement between the entity and those affected by the offence. Yet, both the identification of the parties affected by the offence and the evidence that the harmful consequences of the damage have been eliminated lie on the correct reconstruction of the basic facts of the case. Given the unique features of environmental crimes and the wide array of interests on which such crimes impinge upon, the determination as to how to repair the damage caused by the offence needs to be necessarily preceded by the full appreciation of what happened during the offence and what precise consequences the people and the environment suffered from it. Such a process, if left to the discretion of the entity and the relevant stakeholders, can turn out to be more complex than expected. Accordingly, the support of the mediators and the features of restorative programs might help to carry out proper and constructive interactions among the parties involved in the process. If the negotiation phase results in a positive outcome, the

[746] Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 184.

judge, in assessing the offender's conduct, will rely on the utter reparation of the harmful consequences stemming from the misbehavior. If the negotiation phase results in a negative outcome instead, the fact that the entity has acceded to a restorative program is tangible proof that the entity has usefully attempted to eliminate the harmful consequences resulting from their misconducts and to compensate the damage caused to the victims.[747]

C. Restorative Justice Suitability to Domestic Environmental Crimes: Mediation in Environmental Disputes

According to Massimo Donini, "the repaired crime expresses a 'performance-based' restorative justice, where active conduct that aims at a typical outcome within the dynamics of the offence, and not only of the relationship with the victim, is decisive. The other form of reparation is instead 'interpersonal' - also remaining external to the type of offence - where the presence of a victim, even a substitute victim, is necessary, and the figure of a mediator is equally indispensable, although in these circumstances a defense attorney is not required."[748] In other words, it seems to be useful to distinguish between criminal mediation and conflict management programs on the one hand, and restorative conduct of the offense on the other. Criminal mediation in essence does not even involve "typical" conducts focused on the elimination of a typical aspect of the offense of the protected good in the technical sense. Rather, it paves the way towards reconstructing

[747] Stefania Giavazzi, "Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 184-5.

[748] Massimo Donini, "Le Due Anime della Riparazione Come Alternativa alla Pena-Castigo: Riparazione Prestazionale vs. Riparazione Interpersonale." *Giuffrè Editore* (2022): 2027.

the relationship among the parties and eliminating the conflict between the offender and the victim. On the contrary, the sanctioning benefit for the reparation of the offence depends upon the result of an individual's action, whereas an author/victim encounter does not necessarily fit into this logic. In fact, mediation and its outcome are not fully assimilable to the category of restorative "conduct" of the offense. Yet, the two forms of reparation are generally gathered together under the comprehensive umbrella of reparation conceived of "as a set of responses to the committed crime aimed at the re-composition of the relationship between the perpetrator and the victim, as well as the reconstitution of the interests impinged upon by the crime, through actions subsequent to the act consummated which are intended to reinforce the recognition of values, the restoration of the sphere of material interests and that of the relations between the relevant stakeholders. The profound difference between reparation as a "pathway" of relations between the perpetrator and the victim, and reparation of harm and offense as an objective "performance or result," does not preclude both of these reparative dimensions from falling under the chapter of reparation in the broad sense.[749] The above examined mechanisms of "ravvedimento operoso" ex. Art. 452-*decies* of the Criminal Code, the extinguishing procedure of Article 318-*bis* of the D.lgs n. 152/2006, and the reparatory measures of Article 17 of the D.lgs n. 231/2001, express a "performance-based" restorative justice in environmental matters, where active conduct that aims at a typical outcome within the dynamics of the offence, and not only of the relationship with the victim, is decisive. It remains to be seen, however, whether restorative justice in the form of "interpersonal" mediation, i.e., reparation as a "pathway" of

[749] Massimo Donini, "Le Due Anime della Riparazione Come Alternativa alla Pena-Castigo: Riparazione Prestazionale vs. Riparazione Interpersonale." *Giuffrè Editore* (2022): 2039-2041.

relations between the perpetrator and the victim, can also succeed in environmental offending scenarios.

There is a well-established awareness among environmental law scholars that the traditional model of criminal sanction enforcement has proven (over the past decades) not to be capable of achieving results worthy of positive evaluation.[750] Over the past fifteen years there has been a proliferation of foreign studies on the use of criminal mediation and, more generally, restorative justice programs for the purpose of managing the consequences of environmental crimes. Such programs have witnessed the active involvement of victims, offenders and the affected communities by means of finding shared solutions to repair the offences that had been caused and preventing further offenses from reoccurring.[751] Therefore, it is not a matter of proposing a new model of the management of environmental crimes that is merely theoretical and dropped from above. Rather, it is an attempt to concretely take note of the needs and the experiments emerging elsewhere and that have arisen from below (bottom-up process).[752]

Environmental pollution, environmental disasters, resource exploitation, trafficking and illegal disposal of waste, danger and damage to animal life and health, destruction and alteration of ecosystems: these highlight that the 'environmental issue' confronts facts of particular complexity which give rise to atypical conflicts and peculiar forms of 'victimization'. The adoption of restorative justice programs in this area thus demands

[750] Francesco D'Alessandro, "La Tutela dell'Ambiente e L'Ineffettività della Tradizionale Risposta Sanzionatoria Penale: Quali Prospettive per il Futuro?" In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 125.

[751] For further details see Chapter 1.

[752] Diletta Stenardi, "Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l'Ambiente. Spunti di Riflessione dall'Estero," In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 158.

ad hoc declinations, having all the more to ensure and preserve the essential and salient characteristics that connote this instrument. The restorative justice model in criminal environmental matters thus promotes the use of the entire spectrum of restorative programs: from the victim-offender mediation to conferences and circles. The principles that inform such programs are identical. What changes is the number of subjects involved in the program and the consequent type of "relational" work conducted by the mediators (and the parties) during the meeting and the restorative encounters. Such encounters must take due account of the web of relationships (past, present, and future) that bind together the participants in a network that can harness the conflict or, on the contrary, offer adequate support for restorative and reparative activities.[753]

Mediation has the pursuit of a conciliatory agreement as its primary objective that would allow for the settlement (with potential enduring effects) of a dispute through the achievement of a solution that all the parties consider to be fair and satisfactory.[754] The achievement of such a solution helps prevent further conflicts from reoccurring through appropriate strategies and the implementation of agreements. By its very nature

[753] Claudia Mazzucato, "La giustizia riparativa in ambito penale ambientale. Confini e rischi, percorsi e potenzialità," In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 142-3 and 150.

[754] Reaching an agreement is certainly an important goal. Yet, even when this is not possible, there may be other goals to be achieved. Practice has shown that there are conflicts in which other important goals are possible. Mediation makes it possible to open up broken channels of communication, prompt the parties to create negotiating proposals that had not even been hypothesized before, reach partial agreements, or eliminate at least some of the problematic issues that have been raised. In environmental matters (rather than a final resolution of the problem), it could be more realistic to aim for the construction of a method of coexistence that will allow the relationship between the parties to continue in future and that will make a contribution to the creation of a community between parties who share the same territory. Giudice, Nicola et al. "Linee Guida Operative in Materia di Mediazione dei Conflitti Ambientali Ricadenti nella Giurisdizione Civile e in Quella Amministrativa." *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 38-9.

environmental conflicts refer to a specific place and thus environmental mediation can be considered as a place-based form of intervention (i.e., as an opportunity to promote social capital, civicism, and care for the common goods).[755] It is believed that going through mediation after the case has just begun saves more in terms of both time and cost. In addition, the relationship between the people involved in the process tends to deteriorate over time, resulting in difficulties in rebuilding a fruitful dialogue.[756] This is why the commencement of a restorative justice program in a very early stage of the proceedings may be highly beneficial.[757]

Special attention must be paid to the correct identification of the parties involved in the environmental conflict. The involvement of all the relevant stakeholders reduces information asymmetries (the primary cause of conflict) and results in the empowerment of all parties on the issues that the mediation is intended to address, thereby increasing its effectiveness. To this extent, it is believed that mediation should engage with the representatives of all the interests involved - including counter interested parties. Therefore, it is believed that the guiding criterion of the mediation process is that of inclusion, so that all voices can effectively participate in the confrontation activities,

[755] Nicola Giudice, et al. "Linee Guida Operative in Materia di Mediazione dei Conflitti Ambientali Ricadenti nella Giurisdizione Civile e in Quella Amministrativa," *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 38-9.

[756] Camera Arbitrale di Milano, "Linee Guida per la Mediazione Ambientale Demandata dal Giudice," In *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 55.

[757] Mediation is much less costly than civil litigation for many reasons as mediators are specialized in the field and so is aware of the intricacies of the dispute, preparation for mediation is far easier and simpler than for arbitration or litigation, attorneys are not necessary but may participate at the request of a party. Jyoti Bharat Rangari, "Mediation in Environmental Disputes," *Journal on Contemporary Issues of Law* 3 (2017): 6.

especially by avoiding the exclusion of the most hostile parties.[758] Mediation provides the opportunity for parties to work together and reach a settlement rather than rendering an unfriendly end to the relations.[759] As for environmental crimes, oftentimes regarded as "victimless" crimes, it is relevant to point out that they are in reality "crimes characterized by mass victimization, in the sense that, directly or indirectly, they offend large, and not infrequently vast, circles of persons."[760] For like offenses, restorative justice has set up special programs (e.g., community circles, victim-impact statements, conferencing etc.) which provide for the involvement of the community, possibly through a "representative," thereby giving voice to the interests (otherwise inexpressible in criminal proceedings) and claims that the criminal proceedings would entrust to the impersonal instances of the state (or other public bodies) or some exponential subject of diffuse interests.[761] The greatest difficulty in the field of environmental protection is thus the identification of the victims and their representatives, especially when genuine environmental crimes are involved. The environment is inherently a common good. This leads to the following questions: With whom should the mediation encounter be held? With environmental associations or with territorial authorities?[762]

---

[758] Camera Arbitrale di Milano, "Linee Guida per la Mediazione Ambientale Demandata dal Giudice," In *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 54.

[759] Jyoti Bharat Rangari, "Mediation in Environmental Disputes," *Journal on Contemporary Issues of Law* 3 (2017): 6.

[760] Grazia Mannozzi, e Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 19. Claudia Mazzucato, "Appunti per una Teoria 'Dignitosa' del Diritto Penale a Partire dalla Restorative Justice," *Libellula Edizioni* (2010): 145.

[761] Claudia Mazzucato, "Appunti per una Teoria 'Dignitosa' del Diritto Penale a Partire dalla Restorative Justice," *Libellula Edizioni* (2010): 145.

[762] Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 85.

Most of the criminally relevant conducts of pollution fall within the scope of business activities. This phenomenon raises the issue of delegation functions. The delegation of functions refers to the conditions under which the top subject of the private or public legal person (in particular the sole director or, in his/her absence, the managing partners of partnerships; the director endowed with special powers in environmental matters or, in his absence, the board of directors or its chairman in the case of corporations) can effectively delegate certain powers to other subjects, and consequently free themselves from the criminal liability linked to the exercise of such powers. In environmental criminal law, the delegation of functions is accepted under the following conditions:

- the effective attribution to the delegate of all decision-making and spending powers necessary for the protection of the environment;
- the identification of an experienced and competent person, who ensures on-site presence according to the needs of the production realm;
- the written form and certain date of the document containing the sufficiently precise identification of the powers that the delegator gives to the delegate, and written acceptance by the latter.

Under these conditions, the crime committed within the scope of the production activity (e.g., uncontrolled storage of waste, discharge into water over threshold values, etc.) will be imputed to the delegate and not to the delegator. Accordingly, the delegate would be most suited to participate in the restorative encounter. The delegator, nevertheless, retains "high vigilance" duties, in the sense that he/she must verify that the delegate has actually taken charge of the delegation.[763] Furthermore, he/she must ensure that

[763] Carlo Melzi D'Eril and Alessandro Nascimbeni, "L'Obbligo di Vigilanza in Capo al Soggetto Delegante nell'Ambito della Delega di Funzioni in Materia Ambientale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 63-4.

the delegate has seriously performed his/her preventive powers-duties. The delegator does not divest him/herself of criminal responsibility for environmental matters. Rather, he/she delegates the exercise of the powers that underlie it to other parties, over whom he/she must nevertheless exercise oversight tasks, either personally or through monitoring systems delegated to other parties. If the abovementioned conditions are satisfied, the requirement of "soggetto apicale" enshrined in Article 6 of the D.lgs 231/2001 will be fulfilled. Accordingly, the burden of proof shall lie with the entity. The legal person will have to prove to have exercised the supervisory functions necessary to prevent like offences from occurring and that the perpetrator has carried out the act in violation of such organizational and supervisory measures.[764]

Another factor of complexity is the public nature of the subject to which the legal system has attributed the power to take the decisions that most affect the environment. The public administration (PA), in fact, is not only a necessary party to the actual or potential conflict (and to the eventual conciliation procedure designed to settle it) but, even before that, the PA is the subject to which the legal system attributes the exercise of administrative powers in the interest of the entire community of which the administration itself is an exponential subject. In other words, the administration has the power-duty of balancing the various opposing interests at stake. This power draws its

[764] Paola Balducci, *L'Ente Imputato: Profili di Efficienza e di Garanzia nel Processo De Societate* (Torino: Giappichelli Editore, 2013) 16. Niccolò Baldelli, "La Delega in Materia Ambientale al Vaglio del Criterio d'Imputazione Oggettiva Ex Art. 5 D.lgs. 231/01. Riflessioni A Margine di un Orientamento del Tribunale di Milano," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2022): 80-1. Carlo Ruga Riva, *Diritto Penale dell'Ambiente* (Torino: Giappichelli Editore, 2021), 80-4. Luca Ramacci, *Diritto Penale dell'Ambiente* (Italy: CEDAM, 2009), 46-7. Carlo Melzi D'Eril and Alessandro Nascimbeni, "L'Obbligo di Vigilanza in Capo al Soggetto Delegante nell'Ambito della Delega di Funzioni in Materia Ambientale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2020): 63-4.

legitimacy from the capacity to achieve a balanced synthesis among the interests involved. When compared to the homologous choice of the private individual, the motivations that can lead the administration to the decision to undertake a path of mediation are different. Moreover, the absence of a norm – among the provisions in force - that grants the administration the possibility of establishing a mediation procedure cannot be underestimated. In other words, in the absence of a legitimizing norm, the subsistence of this faculty and the convenience of its exercise - by reason of the public interest to be satisfied - will have to be ascertained and sufficiently motivated on a case-by-case basis (i.e., depending on the characteristics of the conflict, the interests at stake and the additional opportunities that recourse to mediation could potentially offer to the resolution of the conflict). If, therefore, the absence of a legitimizing norm does not seem to constitute an insurmountable obstacle for the purpose of recognizing the subsisting faculty of the administration to institute the mediation procedure, there exists at least one critical profile that tends to negatively influence the choice of concretely undergoing the mediation procedure as well as the achievement of a final agreement at the outcome of the established procedure. This critical factor stems from the necessary presence within the conflict of a party, the public administration, whose action cannot entirely disregard established practices and procedures. In addition, neither does it indulge in a kind of self-exemption from the legal and, before that, political responsibilities that rest on the administration and those individuals acting in its name and on its behalf. For a mediation procedure to be properly established, the parties involved must give their consent, that is, the genuine manifestation of their willingness to undertake the conciliatory procedure in order to verify the possibility of reaching a shared agreement. The administration, however, is not always genuinely interested in the early settlement of an environmental dispute. Due to the asymmetrical nature of the power relations with the

private party, the public administration may be unwilling to cooperate. The administration that does not engage in a mediation procedure, however, consciously accepts the growth of the "external costs" of its action, i.e., the costs that the public incurs whenever the administration disregards the involvement of the interests of the recipients of that action. By feeling excluded, these parties are driven to adopt strategies of resistance and opposition. To this extent, the deeper meaning of mediation can be grasped as a tool used to resolve environmental disputes. This becomes an instrument of inclusion of the actors involved and affected by administrative decisions with environmental impacts and of *ex post* legitimization of the exercise of political-administrative powers. Therefore, in the moment the authority consents to the mediation procedure, it merely regains a function that already belonged to it, i.e., the capacity of synthesizing and balancing the different interests of the community affected by the contested provision. The consent of the administration plays a key role at the moment of the establishment of the mediation procedure but also during the encounter as well as after its conclusion. With regard to the first aspect (i.e., the course of the proceedings) the effectiveness of the administration's contribution is often hampered by the need to delimit in advance the margins within which the public official is entitled to express the will of the represented authority. Closely related to such a controversial issue, and relevant to the stipulation of the final agreement, is the problem of the liability of the public official who commits the administration by adhering to the potential agreement. In this regard, as it is well known, the legal system contains a series of disincentives of a normative nature. The choice to enter into a mediation agreement, where properly argued by the administration and adopted on the basis of a favorable opinion of the legal counsel or an act of assent issued in advance by the Court of auditors, excludes the configurability of gross negligence, even where the choice turns out to be

erroneous. Recent case law seems to have sensed the need for the administration to comply with the dictate of the new discipline introduced by the legislative decree n. 28/2010 on the use of mediation in civil and commercial matters. Accordingly, the Tribunal of Rome (section III, order 10 March 2016) asserted that "notwithstanding the fact that the public administration is inclined not to participate in mediation encounters, the engagement in the mediation process is mandatory pursuant to the law. Therefore, the refusal of the public administration to participate is unjustifiable."[765]

Lastly, the proper execution of the decisions made will represent tangible proof of the mediation encounter's effectiveness. In other words, while it is important what the parties sign as an agreement at the end of the mediation process, it will mainly be the subsequent behavior that will tell whether such an agreement has been effectively honored. Therefore, it would be appropriate for the mediation agreement to provide for shared ways of controlling and monitoring the undertaken commitments, as well as methods of resolving disputes that may arise during the enforcement phase. In this regard, it might be useful to indicate in the signed document a series of follow up meetings that, in addition to having a function of monitoring the decisions that have been taken, might keep the relationship between the parties alive.[766]

---

[765] Michele Giovannini, "La Mediazione delle Controversie Ambientali," In *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 201-213.Decreto Legislativo 4 marzo 2010, n. 28. Attuazione dell'articolo 60 della legge 18 giugno 2009, n.69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali.

[766] Nicola Giudice, et al. "Linee Guida Operative in Materia di Mediazione dei Conflitti Ambientali Ricadenti nella Giurisdizione Civile e in Quella Amministrativa," in *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 47.

In light of the abovementioned statements, it can be argued that mediation has the potential to deal with environmental offending scenarios. Yet, the complex issues surrounding the deployment of this 'out-of-court' mechanism in the field of environmental protection warrant further reflection.

Concluding Remarks

The reform introduced by Law n. 68/2015 - "Disposizioni in materia di delitti contro l'ambiente" - has been twofold. On the one hand, the law has codified the so called "eco-crimes" within the Italian Criminal Code and the environmental offences which give rise to the administrative corporate liability of the entity pursuant to Article25-*undecies* of the D.lgs 231/2001, thereby tightening the criminal response to activities that hamper the environment. On the other hand, the reform introduced reward mechanisms, such as the "ravvedimento operoso" pursuant to Article 452-*decies* of the Criminal Code and the extinguishing procedure of Article 318-*bis* of the D.lgs 152/2006, which seem to be inspired by a different rationale. Such mechanisms respond to a restorative function and pursue the objective of protecting the environment *in extremis*, thereby advancing restoration over retribution.[767] The "ravvedimento operoso" of Article 452-*decies* of the Italian Criminal Code, the extinguishing procedure of Article 318-*bis* of the D.lgs 152/2006 and the reparatory measures of Article 17 of the D.lgs 231/2001 are proof of the willingness to apply the concept of reparation – conceived of as "the actions that eliminate the effects of the crime through restitution, active conduct of neutralization of dangerous or offensive situations, performance in favor of victims or the community, special forms of active withdrawal, procedural cooperation, reparations,

[767] Fabiana Pomes, "Procedura Estintiva delle Contravvenzioni Ambientali e Funzione Ripristinatoria del Diritto Penale," *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 61 and 74.

activities regulated by pardons, amnesties, pardons, oblations etc. – in environmental offending scenarios. Yet, reparation has a secondary meaning i.e., that of "interpersonal" restorative justice. Reparation in the form of "interpersonal" restorative justice consists of behaviors of criminal mediation and of reconciliation with the victim which aim at easing the tensions stemming from the offence with the help of a trained and impartial third party.[768] If the implementation of the "performance-based" restorative justice in environmental matters can be conceived of as being fully part of the Italian criminal system, the "interpersonal" form of restorative justice in environmental offending scenarios has yet to find stable room within our domestic criminal system.

[768] Massimo Donini, "Le Due Anime della Riparazione Come Alternativa alla Pena-Castigo: Riparazione Prestazionale vs. Riparazione Interpersonale." *Giuffrè Editore* (2022): 2027-8.

V. CONCLUSIONS: FUTURE PROSPECTS ON ENVIRONMENTAL RESTORATIVE JUSTICE IN THE ITALIAN CRIMINAL SYSTEM

Clearly at this threatening point in time, anthropogenic actions place considerable pressures on the environment and its ecological stability.[769] As a result of the raise in awareness and information, the tolerance threshold of our society for actions that affect the environment tends to be lower than in the past.[770] Quite a significant number of countries have embraced the notion of environmental crime in their criminal and prosecutorial systems.[771] Environmental crimes encompass activities such as polluting, damaging the fauna and the flora, illegally trading natural resources, transporting toxic materials, and hampering the cultural heritage of Aborigines. [772] Environmental offences affect a wide spectrum of human and nonhuman victims, whose needs and voices tend to be disregarded by traditional criminal prosecution.[773] The traditional responses to crime narrowly focus on punishing the offender rather than holding them accountable

[769] Brunilda Pali, and Ivo Aertsen, "Inhabiting a Vulnerable and Wounded Earth: Restoring Response-Ability," *International Journal of Restorative Justice* 4, Issue 1 (2021): 4.

[770] Ethan H. Jessup, "Environmental Crimes and Corporate Liability: The Evolution of the Prosecution of Green Crimes by Corporate Entities," *New England Law Review* 33, no. 3 (1999): 723.

[771] Rob White, "Prosecution and Sentencing in Relation to Environmental Crime: Recent Socio-legal Developments," *Climate Law Soc Change* 53 (2010): 366.

[772] European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021.[3]. Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1460.

[773] Hadeel Al-Alosi and Mark Hamilton, "The Potential of Restorative Justice in Promoting Environmental Offenders' Acceptance of Responsibility." *UNSW Law Journal* 44 (2021): 487-8.

to environmental victims in any meaningful way.[774] The present contribution arose out of the need to identify a judicial mechanism capable of providing a more adequate response to environmental offences. To this end, the present dissertation concretely explored the practicability of restorative justice in the environmental criminal sphere and the ways through which restorative justice could be implemented in environmental matters.

Restorative justice offers original and distinctive programs which are not alternative but *complementary* to the necessary and irreplaceable traditional criminal justice. Restorative justice aims at providing a response to the offence from the perspective of those who have suffered the harmful consequences of the crime. In other words, restorative justice is about bringing justice to the victim rather than punishing the offender. Accordingly, restorative justice does not mean a disavowal of the seriousness of the criminal issue, weakness about prosecuting the violation of the law, renunciation of criminal sanctions or leniency and clemency towards offenders. Rather, restorative justice presupposes the irreplaceability of criminal justice.[775] The essence of restorative justice can be conveyed as follows. It moves from criminal norms, conceived of as precepts for the protection of the community and the individual, in order to try to deal with the crime with tools other than sanctions. Such tools are still structurally afflictive even when oriented towards the re-education of the offender. That is to say, restorative justice entails a mechanism to deal with the offence in such a manner that is, socially constructive, individually noble, more respectful of the needs of the victims and compatible with the entire Constitution and therefore ethically superior to punishment as traditionally

[774] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm,* IUCN Report, 2019 [page 99].

[775] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022) 21-3.

understood. Accordingly, resorting to restorative justice does not imply giving up on the victims' safety or lowering the threshold for prevention. Rather, it means providing the victims with answers that go far beyond the mere imposition of years of prison on the offender. In a nutshell, restorative justice looks through the eyes of the victims rather than through the eyes of the offender, the judge, the lawyer, or the overall community.[776] The offender repays the *malum actionis* not with further evil – penalty – *malum passionis* but with reparation i.e., with a *bonum actionis*. In plain language, evil therefore is not doubled but eluded.[777]

Restorative justice in the field of environmental protection is not a mere utopia. Rather, it stems from tangible experiences developed abroad.[778] The caselaw of Australia, New Zealand and Canada is proof of how the beneficial implications of applying restorative justice programs in environmental matters materialize in *real-world* environmental offending scenarios. These include the recognition of the rights of the victims, the parties' active engagement in the process, the offender's appreciation of the collective impacts of their action, the offender's education and remorse, the offending company's apologies to the victims and the offending company's likely desistance from reoffending, the tailored and innovative outcomes to repair the harm and the internalization of the costs of repairing the harm caused to the environment through elevated compensatory efforts.[779]

---

[776] Grazia Mannozzi, e Giovanni A. Lodigiani, *La Giustizia Riparativa: Formanti, Parole e Metodi* (Torino: Giappichelli Editore, 2017), 372-3.

[777] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022) 64.

[778] Valentina Maglione and Bianca Lucia Mazzei, "Nella Riforma Penale La Sfida Per Riparare il Dolore delle Vittime," available at https://www.ilsole24ore.com/art/nella-riforma-penale-sfida-riparare-dolore-vittime-AEUUR07?refresh_ce=1.

[779] For further details on the Australia, New Zealand and Canada caselaw see above Chapter 1.D.

The Italian legislative framework has all the potential needed to catch up with such noble foreign occurrences. The mechanisms of "ravvedimento operoso" of Article 452-*decies* of the Italian Criminal Code, the extinguishing procedure of Article 318-*bis* of the D.lgs 152/2006 and the reparatory measures of Article 17 of the D.lgs 231/2001, express a "performance-based" restorative justice in environmental matters, where active conduct that aims at a typical outcome within the dynamics of the offence, and not only of the relationship with the victim, is decisive. If the implementation of the "performance-based reparation" in environmental matters can be conceived of as being already fully part of the Italian criminal system, the "interpersonal" form of restorative justice in environmental offending scenarios (i.e., behaviors of criminal mediation and of reconciliation with the victim which aim at easing the tensions stemming from the offence with the help of a trained and impartial third party) has yet to find stable room within our domestic criminal system.[780] It must be emphasized, however, that the underpinning logic of the enabling act n. 134/2021, which sets forth the basic principles for an organic regulation of restorative justice, is leaning towards the interpersonal form of reparation: as if "restorative justice" was essentially that of mediation.[781] This is evidenced by the wording of paragraph *f*, entirely devoted to the formation of mediators. The incidence that the enabling law will have on the "interpersonal" form of restorative justice in the field of environmental protection lies on the wording of the implementing legislative decree, whose official draft was published on August 10, 2022.

[780] For the definition of "performance-based" and "inter-personal" restorative justice *see* Massimo Donini, "Le Due Anime della Riparazione Come Alternativa alla Pena-Castigo: Riparazione Prestazionale vs. Riparazione Interpersonale." *Giuffrè Editore* (2022): 2036.

[781] Massimo Donini, "Le Due Anime della Riparazione Come Alternativa alla Pena-Castigo: Riparazione Prestazionale vs. Riparazione Interpersonale." *Giuffrè Editore* (2022): 2036.

Article 1 paragraph 18 letter *c* of the delegating act referred to the access to restorative programs. The Article strongly recommended the implementing decree to "provide for the possibility of having access to restorative justice programs at any stage and level of the criminal justice proceedings and also during the execution of the sentence, at the initiative of the competent judicial authority, *without any preclusion in relation to the type of crime or its severity,* on the basis of the free and informed consent of the victim and the offender and the positive assessment by the judicial authority of the usefulness of the program in relation to the access criteria defined under subparagraph a)."[782] Interestingly enough, the enabling act opened up restorative justice to the entire criminal universe. The enabling act allocated restorative justice paths to all types of defendants and convicted persons, without any preclusion with regard to the type and gravity of the committed crimes. This was of course an unimpeachable principle on the abstract level but one of complex articulation on operational grounds.[783] In line with the wording of the delegating act, the officially drafted decree, under Article 44, states that the restorative justice programs are accessible *without preclusion in relation to the type of crime or its severity.*[784] The absence of precise guidelines on the types of offences for which restorative justice is best suited might have negative repercussions on the capillary diffusion of restorative justice practices in the field of environmental protection. The explicit labelling of "environmental offences" among the fields of

[782] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.18 lett. c].

[783] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 102-3. Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[784] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonche' In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. 10 Agosto 2022 [articolo 44].

application of restorative justice might have served the purpose of enhancing and making restorative justice in the field of environmental protection a much more widespread practice than it currently is. However, in the absence of such an explicit reference, the concrete application of restorative justice programs to environmental offending scenarios might still be facilitated by other provisions embedded in the official draft of the decree.

Article 45 of the drafted decree, for instance, emphasizes the need for a plurality of stakeholders to participate in restorative programs. More specifically, the article states that "the following may participate in restorative justice programs, with the safeguards set forth in this Decree:(a) the victim of the offence;(b) the person named as the offender; (c) other persons belonging to the community, such as family members of the crime victim and the person named as the offender, support persons reported by the crime victim and the person named as the offender, bodies and associations representing interests harmed by the crime, representatives or delegates of the state, regions, local authorities or other public bodies, public security authorities, social services (d) anyone else with an interest."[785] This provision seems to be opening the potential application of restorative justice to any crime. Thus also, for example, applying it to criminal offenses with "nuanced" or widespread victimization, such as environmental crimes.[786] Environmental offences are indeed considered to have "diffuse victimization" - *vittimizzazione diffusa* - in that they affect a wide range of human and nonhuman

[785] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 45].

[786] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINA 378. 10 Agosto 2022.

victims.[787] Besides the negative effects felt by the environment (ranging from the loss of habitats and ecosystems to the endangerment of species illicitly traded), the impacts of environmental crimes are oftentimes borne by a broad spectrum of human victims.[788] This broader societal dimension includes:[789] individuals whose property, health or life has been impaired, the community by means of the loss of common natural resources, and future generations, in so far as today's environmental crimes can impinge upon the interests of the generations of tomorrow.[790] Following the wording of Article 45 of the drafted decree, such a wide array of victims could participate in the restorative encounter. Yet, they would participate not in the quality i.e., with the status of victims. This is because the drafted decree, under Article 42(c), provides for a rather narrow definition of victim of the offence. "Victim" of the offence is considered the individual *directly* hampered by the offence as well as their family members.[791] Such a definition leaves out other relevant stakeholders, such as the overall community and future generations, whose rights can be severely impinged upon by the offence. Arguably, these stakeholders deserve to participate in the encounter not as mere "participants" but as primary victims of the offence. Therefore, it seems to be safe to suggest expanding the definition of victim embedded in the decree so as to also

---

[787] Veronica Dini, "La Mediazione Penale Ambientale: Scenari Non Troppo Futuribili." *Ambiente & Sviluppo* (2018): 246-7.

[788] Hadeel Al-Alosi and Mark Hamilton, "The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context," *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1461. European Union Action to Fight Environmental Crime, Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE), 2016 [12].

[789] Brunilda Pali, and Ivo Aertsen, "Inhabiting a Vulnerable and Wounded Earth: Restoring Response-Ability," *International Journal of Restorative Justice* 4, Issue 1 (2021): 5.

[790] Aiden Stark, "Environmental Restorative Justice," *Pepperdine Dispute Resolution Law Journal* 16, no. 3 (2016): 436.

[791] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 45ì2(b)].

encompass the victims of crimes regarded as part of the "diffuse victimization."

It should be further noted that the concrete application of restorative justice programs in environmental matters is granted by the procedural institutions that lend themselves to accommodating genuine restorative pathways. It will be the limitations of having access to these institutions that will concretely determine the area of effective use of restorative justice as to the extent of the criminal offences and the seriousness of the fact.[792] The drafted decree, under Article 58, emphasizes the need for the judicial authority "to evaluate the conduct of the program and, also for the purposes of Article 133 of the Criminal Code, any restorative outcome."[793] Article 58 of the drafted decree, by referring to Article 133 of the Criminal Code, introduces an additional criterion to be used for the purpose of determining the content of the sentence i.e., having participated in a restorative justice program, when such a program has resulted in a restorative outcome. When exercising the discretion provided for in Article 133 of the Criminal Code, therefore, the judge should take this further element into account as part of the overall assessment that he/she is called upon to make. The judge obviously will also consider the fulfillment of behavioral obligations, or their lack of fulfillment due to reasons not attributable to the defendant.[794] The carrying out of restorative programs, in accordance with Article 1 of the officially drafted

[792] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 102-3.

[793] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 58].

[794] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa PAGINE 403. 10 Agosto 2022.

decree, might serve also as a mitigating factor of the offence. More precisely, the drafted decree proposes to modify Article 62 of the Criminal Code (which deals with "common attenuating circumstances") so as to label, under number 6, the mitigating factor of having participated in a restorative encounter with the victims of the offence which was concluded with a favorable outcome.[795] The relevance accorded by the decree to restorative programs, limited to the scope of application of Article 62 and 133 of the Criminal Code, seems to be too narrow to carry out the "Copernican" revolution that restorative justice aims at achieving in the field of environmental protection. It does not take much acumen to foresee that a much more impactful venue for restorative exercise in the field of environmental protection might have been the institution of the suspension of trial with probation.[796] This mechanism, in the wording of paragraph 22 letter *a* of the delegating act n. 134/2021, should have been allowed for those individuals accused of crimes punishable by less than *six* years' imprisonment (such as the "environmental polluting" offence contained in Article 452-*bis* of the Italian Criminal Code) and for those crimes that did seem to be suitable to restorative programs.[797] The drafted decree, however, seems to not to have utterly followed the wording of the delegating act by leaving the maximum penalty envisaged for the application of the institute of *probation* unaltered (i.e., four years of imprisonment).[798] Thereby, this precludes the application of this

[795] Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022 [Articolo 1].

[796] Pasquale Lattari, *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta* (Milano: Key Editore SRL, 2022), 102-3. Marco Bouchard and Fabio Fiorentin, "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

[797] LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021 [Articolo 1, co.22 lett. a].

[798] Pursuant to Article 168-bis of the Criminal Code, the suspension of trial with probation is allowed, unlike in the juvenile penal system, only for offenses

mechanism to the majority of environmental offences, such as the abovementioned crime of "environmental polluting" contained in Article 452-*bis* of the Italian Criminal Code. Even if the implementation of the provision originally enshrined in Article 1 paragraph 22 letter *a* of the delegating act might not have covered all cases of crimes perpetrated against the environment, it could have represented a small step towards a more effective creeping of restorative justice in the protection of the environment through criminal law.

In conclusion, it seems to be safe to say that the delegating act n. 134/2021 – as implemented by the officially drafted decree of August 10, 2022 – seems to be directing restorative justice to categories of offences other than those perpetrated against the environment. Yet, by enabling the proposed adjustments, the drafted decree would provide for a regulation of restorative justice with a greater potential to deal with environmental offences. Such a comprehensive regulation would render Italy a potential leading country in the field of restorative justice and environmental protection, thereby enhancing the chances of turning unfavorable contexts into potential favourable opportunities.

punishable with a fine or with a conviction sentence not exceeding the duration of four years. Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22 [Article 168bis].

BIBLIOGRAPHY

JOURNAL ARTICLES

Al-Alosi, Hadeel and Mark Hamilton. “The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context.” *University of New South Wales Law Journal* 42*,* no. 4 (November 2019): 1460-1488.

Al-Alosi, Hadeel and Mark Hamilton. “The Potential of Restorative Justice in Promoting Environmental Offenders’ Acceptance of Responsibility.” *UNSW Law Journal* 44 (2021): 487-512.

Alvino, Francesco. “Il Controllo Giudiziale Dell’azione Penale: Appunti A Margine Della Riforma Cartabia.” *Sistema Penale* 3 (2022): 27-39.

Amato, Davide. “Quali Spazi per la Restorative Justice nell’Ordinamento Giuridico Italiano?” In *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 1-294.

Ashton Sally and Sarah Etherington. “Chief Executive, Office of Environment and Heritage v Clarence Valley Council Case Note.” *Australasian Legal Scholarship Library* (2018): 86-91.

Babcock, Hope M. "A Brook with Legal Rights: The Rights of Nature in Court." *Ecology Law Quarterly* 43, no. 1 (2016): 1-52.

Baldelli, Niccolò. “La Delega in Materia Ambientale al Vaglio del Criterio d’Imputazione Oggettiva Ex Art. 5 D.lgs. 231/01. Riflessioni A Margine di un Orientamento del Tribunale di Milano.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2022): 78-100.

Battarino, Giuseppe. “Funzione General-Preventiva del Diritto Penale dell’Ambiente. ‘Informazione Ambientale Integrata.” *Rivista Trimestrale di Diritto Penale Dell’Ambiente* (2021): 66-78.

Bellacosa, Maurizio. “L’Equità nella Giustizia Penale.” In *La Strada Giusta: L’Equità Come Pratica* edited by Samuele Sangalli, 99-120. Italy: Luiss University Press, 2017.

Benozzo, Matteo and Francesco Bruno. “La Bonifica dei Siti Contaminati nel Nuovo Codice dell’Ambiente.” *Legislazione Ambientale* (2003): 1-8.

Bergoglio, Francis. “Encyclical Letter ‘Laudato Si’ on Care for Our Common Home.” *Libreria Editrice Vaticana* (2015): 1-246.

Bertolini, Benedetta. “Pensare le Alternative al Processo: La Diversione.” *Sapienza Legal Papers* (2012): 29-36.

Betaille, Julien. “Rights of Nature: Why It Might Not Save the Entire World.” *Journal for European Environmental & Planning Law* 16, no. 1 (March 2019): 35-64.

Bharat Rangari, Jyoti. “Mediation in Environmental Disputes.” *Journal on Contemporary Issues of Law* 3 (2017): 1-16.

Bleby, Alice. “Rights of Nature as a Response to the Anthropocene.” *University of Western Australia Law Review* 48, no. 1 (November 2020): 33-67.

Bolitho, Jane. “Putting Justice Needs First: A Case Study of Best Practice In Restorative Justice.” *International Journal of Transitional Justice* (2015): 256-281.

Bonfissuto, Giuseppina. “L-Eco-Delitto di ‘Omessa Bonifica’ e Le Sue Prime Applicazioni Nelle Aule di Giustizia. Brevi Note a Margine di GUP, Trib. Di Fermo 21/01/21.” *Rivista Trimestrale di Diritto Penale Dell’Ambiente* (2021): 28-47.

Borghini, Andrea and Cristina Gavalotti. “L’applicazione della Giustizia Riparativa nel Penitenziario Italiano. Tra Prospettive di Sviluppo e Resistenze Culturali.” *Il Mulino* (2020): 583-603.

Boyd, Carrie C. “Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work.” *William & Mary Environmental Law and Policy Review* 32*,* no. 2 (Winter 2008): 483-512.

Bratspies, Rebecca. “Renewable Rikers: A Plan for Restorative Environmental Justice.” *Loyola Law Review* 66*,* no. 2 (Summer 2020): 371-400.

Bruch, Carl, Imad Antoine Ibrahim, and Rachel Lerner. “Greenish, but With More Dimensions: A Framework for Identifying Binding Instruments of International Environmental Law.” *The Georgetown Environmental Law Review* 32 (2020): 485-514.

Cadamuro, Elena. “L’Irrilevanza Penale del Fatto nel Prisma della Giustizia Riparativa.” *Padova University Press* (2022): 1-203.

Calfurrapa, Ramon Beltran. “Victim, Reparation and Criminal Proceedings: A Projection from the Expressive Theories of Punishment.” *Revista Brasileira de Direito Processual Penal* 5 (2019): 145-190.

Camera Arbitrale di Milano. “Linee Guida per la Mediazione Ambientale Demandata dal Giudice.” In *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 1-294.

Camera Arbitrale di Milano. “Quale Futuro Per La Gestione dei Conflitti Ambientali?” *Open Space Technology* (2018): 5-18.

Caparrós, Alejandro. “Bargaining and International Environmental Agreements.” *Environmental and Resource Economics* 65 (2016): 5-31.

Castiglioni, Sara, and Antonella Salvan. “L’esperienza di Giustizia Riparativa. Una Ricerca Condotta presso l’Ufficio di Esecuzione Penale Esterna di Verona e Vicenza.” *Il Mulino* (2012): 327-341.

Chan, Janet, Jane Bolitho, and Jenny Bargen. “Restorative Justice as an Innovative Response to Violence.” *The Federation Press* (2015): 230-247.

Colantoni, Lorenzo and Margherita Bianchi. “Fighting Environmental Crime in Europe: Preliminary Report.” *Istituto Affari Internazionali,* 2020.

Colon-Rios, Joel. "The Rights of Nature and the New Latin American Constitutionalism." *New Zealand Journal of Public International Law* 13 (June 2015): 107-114.

Cooney, John F. "Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach." *Journal of Criminal Law and Criminology* 96, no. 2 (2006): 435-464.

Cottu, Enrico. "La Prescrizione dei Reati Ambientali: Efficacia, Coerenza, Ragionevolezza?" *Diritto Penale Contemporaneo* (2018): 272-292.

Cunneen, Chris. "La Giustizia Riparativa al Vaglio della Criminologia Critica." *Il Mulino* (2009): 41-58.

D'Alessandro, Francesco. "La Tutela dell'Ambiente e L'Ineffettività della Tradizionale Risposta Sanzionatoria Penale: Quali Prospettive per il Futuro?" In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 1-294.

Di Paolo, Gabriella. "La Giustizia Riparativa Nel Procedimento Penale Minorile." *Diritto Penale Contemporaneo* (2019): 1-11.

Di Landro, Andrea R. "La Funzione Ripristinatoria nel Diritto Penale Ambientale: La Bonifica ed il Ripristino Ambientale. Uno Studio De Iure Condito e De Iure Codendo." *Itinerari di Diritto Penale* (2020): 1- 139.

Di Landro, Andrea R. “I Problemi Relativi al Delitto di Omessa Bonifica-Ripristino. In Particolare, Quali Responsabilità per L’Autore del Danno Ambientale e Quali per Gli Altri Soggetti?” *Rivista Trimestrale di Diritto Penale dell’Economia* 31 (2018): 355-368.

Di Landro, Andrea R. “Il Requisito dell’Alterazione dell’Equilibrio di un Ecosistema al Crocevia tra i Delitti di Inquinamento e Disastro Ambientale.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2019): 93-99.

Dini, Veronica. “La Mediazione Penale Ambientale: Scenari Non Troppo Futuribili.” *Ambiente & Sviluppo* (2018): 246-249.

Doak, Jonathan. “The Victim and the Criminal Trial: A Survey of Recent Trends in Regional and International Tribunals.” *Legal Studies* 23 (2003): 1-33.

Donini, Massimo. “Compliance, Negozialità e Riparazione dell’Offesa nei Reati Economici. Il Delitto Riparatorio Oltre la Restorative Justice.” *Giuffrè Editore* (2018): 579-606.

Donini, Massimo. “Le Due Anime della Riparazione Come Alternativa alla Pena-Castigo: Riparazione Prestazionale vs. Riparazione Interpersonale.” *Giuffrè Editore* (2022): 2027- 2042.

Dorsey, Joseph W. “Restorative Environmental Justice: Assessing Brownfield Initiatives, Revitalization, and Community Economic Development in St. Petersburg, Florida.” *Environmental Justice* 2, no 2 (2009): 69-78.

Dova, Massimiliano. "Vi è Spazio per una Pena Prescrittiva – Reintegratoria in Materia Ambientale?" *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2021): 18-28.

Dupuy, Pierre-Marie. "Soft Law and the International Law of the Environment." *Michigan Journal of International Law,* 12, Issue 2 (1990): 420-435.

Fajardo, Teresa. "Back to the Future: The Rio Declaration on Environment and Development and Its Principles in Their 25th Anniversary with Spanish Perspective." *Spanish Yearbook of International Law* 21 (2017): 119-146.

Fimiani, Pasquale. "Gli Aspetti Problematici nel Sistema di Estinzione dei Reati Ambientali del Titolo VI-*bis* del T.U.A." *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 22-37.

Fornasari, Gabriele, and Elena Mattevi. "Giustizia Riparativa: Responsabilità, Partecipazione, Riparazione." *Università degli Studi di Trento* (2019): 1-268.

Forsyth, Miranda, Deborah Cleland, Felicity Tepper, Deborah Hollingworth, Milena Soares, Alistair Nairn, and Cathy Wilkinson. "A future agenda for environmental restorative justice?". *The International Journal of Restorative Justice,* 4, Issue 1 (2021): 17-40.

Franco, Andrea. "Il Reato di Inquinamento Ambientale e la Verifica dell'Idoneità dei Modelli di Organizzazione e Gestione a Prevenirne la Commissione: Profili Problematici." *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 1-25.

Franzin, Dario. “La Procedura Estintiva delle Contravvenzioni Ambientali al Vaglio della Corte Costituzionale: Limiti e Ragionevolezza della Deroga del Principio della Retroattività della *Lex Mitior.*” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2020): 91-100.

Galantini, Novella. “Giusto Processo e Garanzia Costituzionale del Contraddittorio nella Formazione della Prova.” *Diritto Penale Contemporaneo* (2010): 1-13.

Gatta, Gian Luigi. “La Riforma Della Giustizia Penale: Contesto, Obiettivi, E Linee Di Fondo Della Legge Cartabia.” *Sistema Penale* (2021): 1-30.

Giavazzi, Stefania. “Le Misure Riparatorie nel D.LGS 231/2001: Spazi e Limiti per un Percorso di Giustizia Riparativa con gli Enti in Materia Ambientale” *In La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 179-185.

Giovannini, Michele. “La Mediazione delle Controversie Ambientali.” In *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 1-294.

Giudice, Nicola et al. “Linee Guida Operative in Materia di Mediazione dei Conflitti Ambientali Ricadenti nella Giurisdizione Civile e in Quella Amministrativa.” In *La Mediazione dei Conflitti Ambientali. Linee Guida Operative e Testimonianze degli Esperti. Camera Arbitrale di Milano* (2016): 170-179.

Giuffrida, Maria Pia. “Giustizia Riparativa e Mediazione Penale. Un Percorso Sperimentale fra Trattamento e Responsabilizzazione del Condannato.” *Il Mulino* (2013): 491-507.

Glazewski, Jan and Emma Witbooi. "Environmental Law." *Annual Survey of South African Law* 2003 (2003): 458-481.

Gullo, Antonio. “Delazione e Obblighi di Penalizzazione di Fonti UE.” *Diritto Penale Contemporaneo* (2016): 1-26.

Hall, Matthew. “Victims of Environmental Crime: Routes for Recognition, Restitution and Redress”. In Spapens, Toine, Rob White and Marieke Kluin, *Environmental Crime, and its Victims: Perspectives within Green Criminology* (Routledge, 2014), 103-118.

Hamilton, Mark. “Restorative Justice Intervention in an Aboriginal Cultural Heritage Protection Context: Conspicuous Absences?” *European Property Law Journal* 31 (2014): 352-367.

Hamilton, Mark. “Restorative Justice Intervention in an Environmental Law Context: Garrett v Williams, Prosecutions Under the Resource Management Act 1991 (NZ), and Beyond.” *European Property Law Journal* 25 (2008): 263-271.

Hamilton, Mark. “Restorative Justice Activity Orders: Furthering Restorative Justice Interventions in an Environmental and Planning Law Context?” *European Property Law Journal* 32 (2015): 548-561.

Hamilton, Mark, and Tom Howard. “Restorative Justice in the Aftermath of Environmental Offending: Theory and Practice.” *National Judicial College of Australia* (2020): 1-15.

Harry BELL, Alexander. “L’Inquinamento Ambientale al Vaglio della Cassazione. Quel che è Stato Detto e Quel (Tanto) Che Resta da Dire Sui Confini Applicativi dell’Articolo 452-*bis* del Codice penale.” *Rivista Trimestrale di Diritto Penale dell’Economia* (2022): 15- 36.

Hermann, Donald H. J. "Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice." *Seattle Journal for Social Justice* 16, no. 1 (Summer 2017): 71-104.

Himmelhoch, Sarah D. “Environmental Crimes: Recent Efforts to Develop a Role for Traditional Criminal Law in the Environmental Protection Effort.” *Northern School of Law of Lewis and Clark College* (1992): 1-32.

Illuminati, Giulio. “Modello Processuale Accusatorio e Sovraccarico del Sistema Giudiziario.” *Revista Brasileira de Direito Processual Penal* (2018): 533-558.

Jarrell, Melissa L., and Joshua Ozymy. “Real Crime, real victims: environmental crime victims and the Crime Victims’ Rights Act (CVRA)”. *Crime, Law and Social Change: An Interdisciplinary Journal* 58, no. 4 (2012): 373-389.

Jessup, Ethan H. “Environmental Crimes and Corporate Liability: The Evolution of the Prosecution of Green Crimes by Corporate Entities.” *New England Law Review* 33, no. 3 (1999): 721-742.

Kim, Rakhyun E., and Klaus Bosselmann. “International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements.” *Transnational Environmental Law* 2 (2013): 285-309.

Larinni, Claudia. “obblighi europei di incriminazione e responsabilità colposa.” *Rivista Penale* (2020): 1-22.

Lazarus, Richard J. “The Reality of Environmental Law in the Prosecution of Environmental Crimes: A Reply to the Department of Justice.” *Georgetown Law Journal* 83, no. 7 (1995): 2539-2546.

Liberati, Giovanni. “L’Imputazione della Responsabilità degli Enti nei Reati Ambientali.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2020): 56-70.

Lobascio, Domenico, Maria Angela Noia, Eustachio Vincenzo Petralla, and Rosa Urso. “Percorsi di Giustizia Riparativa a Bari.” *Il Mulino* (2009): 35-43.

Losengo, Roberto et al. “La Legge sugli Ecoreati 5 Anni Dopo: un Primo Bilancio.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2020): 111-149.

Lucifora, Annalisa. “Spunti di Comparazione e Nuove Prospettive di Armonizzazione del Diritto Penale dell’Ambiente: Scelte di Politica Criminale e Tecniche di Tipizzazione.” *Rivista Trimestrale di Diritto Penale dell’Economia* 32 (2019): 190-241.

Lukitsch Hicks, Bethany. "Treaty Congestion in International Environmental Law: The Need for Greater International

Coordination." *University of Richmond Law Review* 32, no. 5 (January 1999): 1643-1674.

Manacorda, Stefano. "L'Efficacia Espansiva del Diritto Comunitario sul Diritto Penale." *Il Foro Italiano* 118 (1995): 55-72.

Mannozzi, Grazia. "Problemi e Prospettive della Giustizia Riparativa alla Luce della 'Dichiarazione di Vienna'" *Dottrina e Ricerche* (2001): 1-28.

Mannozzi, Grazia. "Victim-offender Mediation in Areas Characterized by High Levels of Organized Crime." *European Journal of Criminology* (2013): 187-205.

Mannozzi, Grazia. "Mediating Conflicts in the Medical Sector: General Considerations From the Italian Perspective." *Global Juris* 15 (2015): 291-327.

Mannozzi, Grazia. "Giustizia Riparativa." *Giuffrè Editore* (2017): 465-486.

Mannozzi, Grazia. "The Emergence of the Idea of a 'Restorative City' and its Links to Restorative Justice." *International Journal of Restorative Justice* 2 (2019): 288-292.

Mannozzi, Grazia, Viola Molteni, and Francesco Civiello. "La Messa alla Prova per Adulti: Riscontri Applicativi." *Sistema Penale* (2021): 1-31.

Marchetti, Filippo. "Nuovi Incentivi Premiali Nella Disciplina Del Giudizio Abbreviato E Del Rito Monitorio: Riflessioni In

Vista Dell'esercizio Della Delega." *Sistema Penale* 2 (2022): 65-81.

Marshall, Tony F. "The Evolution of Restorative Justice in Britain." *European Journal of Criminal Policy and Research* 4 (1996): 21-43.

Martufi, Adriano. "La 'Diversione' Ambientale tra Esigenze Deflattive e Nuove Tensioni Sistemiche: Alcune Annotazioni in Merito alla Speciale Proposta Estintiva Prevista per le Contravvenzioni del D.lgs. 3 Aprile 2006, n. 152." *Diritto Penale Contemporaneo* (2018): 293-304.

Mattevi, Elena. "Giustizia Riparativa ed il Sistema del Giudice di Pace." *Università degli Studi di Trento* (2012): 1- 396.

Mazzanti, Edoardo. "La Protezione Penale dell'Ambiente come Diritto Umano. Inquadramento e Rilievi Critici." *La Legislazione Penale* (2019): 1-17.

Mazzucato, Claudia. "La giustizia riparativa in ambito penale ambientale. Confini e rischi, percor- si e potenzialità." In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 1-294.

Mazzucato, Claudia. "Appunti per una Teoria 'Dignitosa' del Diritto Penale a Partire dalla Restorative Justice." *Libellula Edizioni* (2010): 99-165.

McDonald, John. "Restorative Justice Process in Case Law." *Alternative Law Journal* 33 (2008): 41-44.

McKenzie, Allison. “Rights of Nature: The Evolution of Personhood Rights.” *Joule: Duquesne Energy & Environmental Law Journal* 9 (2020-2021): 27-36.

Melchionda, Alessandro. “La Procedura di Sanatoria dei Reati Ambientali: Limiti Legali e Correzioni Interpretative in *Malam Partem*.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2021): 1- 17.

Melzi D’Eril Carlo and Alessandro Nascimbeni. “L’Obbligo di Vigilanza in Capo al Soggetto Delegante nell’Ambito della Delega di Funzioni in Materia Ambientale.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2020): 56-69.

Micheletti, Dario. “Il Reato di Contaminazione Ambientale. Interpretazioni a Confronto sull’Articolo 51*bis* d.lgs. n. 22/1997.” *Rivista Trimestrale Diritto Penale dell’Economia* (2004): 107-164.

Motupalli, Chaitanya. "International Justice, Environmental Law, and Restorative Justice." *Washington Journal of Environmental Law and Policy* 8, no. 2 (July 2018): 333-361.

Motzfeld Kravic, Andreas. “An Analysis of Stagnation in Multilateral Law-Making- and Why The Law of the Sea Has Transcended The Stagnation Trend.” *Leiden Journal of International Law* 34 (2021): 935-956.

Pain, Nicola. "Encouraging Restorative Justice in Environmental Crime." *Newcastle Law Review* 13 (2018): 29-52.

Pain, Nicola, Rachel Pepper, Millicent McCreath, and John Zorzetto. “Restorative Justice for Environmental Crime: An

Antipodean Experience." *Australian Environment Review* (2016): 1-20.

Palazzo, Francesco and Roberto Bartoli. "La Mediazione Penale nel Diritto Italiano e Internazionale." *Firenze University Press* (2011): 3-118.

Pali, Brunilda, and Ivo Aertsen. "Inhabiting a Vulnerable and Wounded Earth: Restoring Response-Ability." *International Journal of Restorative Justice* 4, Issue 1 (2021): 3-16.

Palmer, Geoffrey. "New Ways to Make International Environmental Law." *The American Journal of International Law* 86 (1992): 259-283.

Paone, Vincenzo. "Dopo Tre Anni dall'Entrata in Vigore della L. n. 68/2015, Persistono Criticità in Tema di Estinzione delle Contravvenzioni Ambientali." *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2019): 1-21.

Pathal, Puneet. "International Environmental Crime: A Growing Concern of International Environmental Governance." *US-China Law Review* 13, no. 5 (May 2016): 382-398.

Poggi D'Angelo, Marina. "La Procedura Estintiva Ambientale: L'Idea dell'Inoffensività/Non Punibilità in Ottica Riparatoria e Deflattiva." *Rivista Trimestrale di Diritto Penale dell'Ambiente* (2022): 37-60.

Pollock, Mark S. "Local Prosecution of Environmental Crime." *Lewis & Clark Law School* 22, no. 4 (1992): 1405-1420.

Pomes, Fabiana. “Omessa Bonifica dei Siti Inquinati Ex Art. 257 TU Ambiente e Predisposizione del Progetto di Bonifica: La Cassazione Torna Sul Tema.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2019): 1-18.

Pomes, Fabiana. “Procedura Estintiva delle Contravvenzioni Ambientali e Funzione Ripristinatoria del Diritto Penale.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2019): 60-74.

Porfido, Stefano. “The Use of Restorative Justice for Environmental Crimes in the European Union’s Legal Framework.” *Queen Mary Law Journal* (2021): 106-132.

Preston, Brian. “The Use of Restorative Justice for Environmental Crime.” *Criminal Law Journal* 136 (2011): 1-25.

Rajamani, Lavanya. “Legal instruments and obligations in the international climate change regime: nature, type, spread, functions, and interplay.” In *Innovation and Experimentation in the International Climate Change Regime,* edited by Lavanya Rajamani (The Hague: Brill, 2020): 94-174.

Resta, Eligio. “Teorie della Giustizia Riparativa.” *Convegno sul Tema ‘Quali Prospettive per la Mediazione? Riflessioni Teoriche ed Esperienze Operative’* (2001): 179-186.

Riondino, Michele. “Giustizia Riparativa e Mediazione Minorile.” *Pontificia Università Lateranense* (2009): 1-18.

Riondino, Michele. “The Paradigm of Restorative Justice: Manifestations of Mercy in the Penal Law of the Church.” *Revista de Investigación de la Catedra Internacional Conjunta Inocencio III* (2020): 83-98.

Ripa, Ginevra. “Disastro Ambientale e Pubblica Incolumità: la Corte di Cassazione Circoscrive il Campo di Applicazione della Fattispecie.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2018): 1-9.

Rosas, Allan. "Issues of State Liability for Transboundary Environmental Damage." *Nordic Journal of International Law* 60, no. 1 (1991): 29-48.

Rotolo, Giuseppe. “Occasioni di Dialogo fra le Parti alla Luce della Riforma del Diritto Penale dell’Ambiente.” In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 1-294.

Ruga Riva, Carlo. “La Fattispecie di Inquinamento Ambientale: Uno Sguardo Comparatistico.” *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2018): 1-25.

Rugani, Andrea. “Osservazioni in Tema di ‘Impedimento del Controllo.’ *Rivista Trimestrale di Diritto Penale dell’Ambiente* (2022): 61-79.

Russo, Giovanna. “Il Contributo della Giustizia Riparativa all’Efficienza della Giurisdizione.” *Salvis Juribus* (2020): 1-7.

Sand, Peter H., and Jeffrey McGee. “Lessons Learnt From Two Decades of International Environmental Agreements: Law.” *International Environmental Agreements* 22 (2022): 263-278.

Satta, Andrea. “Gli Obblighi Comunitari di Tutela Penale Ambientale alla Luce della Direttiva 2008/99/CE e del Trattato di Lisbona.” *Rivista Penale* 12 (2010): 1-8.

Scardaccione, Gilda. “Nuovi Modelli di Giustizia: Giustizia Riparativa e Mediazione Penale.” *Rassegna Penale e Criminologica* (1997): 9-28.

Siracusa, Licia. “Il Transito del Diritto Penale di Fonte Europea dalla ‘Vecchia’ alla ‘Nuova’ Unione Post-Lisbona.” *Rivista Trimestrale di Diritto Penale dell’Economia* 4 (2010): 779-841.

Siracusa, Licia. “L’Attuazione della Direttiva Europea sulla Tutela dell’Ambiente Tramite il Diritto Penale.” *Diritto Penale Contemporaneo* (2011): 1-22.

Siracusa, Licia. “I Delitti di Inquinamento Ambientale e di Disastro Ambientale in una Recente Proposta di Riforma del Legislatore Italiano.” *Rivista Trimestrale di Diritto Penale dell’Economia* 28 (2015): 207-241.

Skjærseth, Jon Birger, Jørgen Wettestad, and Olav Schram Stokke. “Soft Law, Hard Law, and Effective Implementation of International Environmental Norms.” *Global Environmental Politics* (2006): 104-120.

Smith, Tara. “Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law.” *Ashgate Publishers* (2012): 1-19.

Sobrero, Rossella. “La Mediazione dei Conflitti Ambientali: Il Ruolo della Comunicazione.” In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 1-294.

Stanislao, Sessa. “La giustizia riparativa nell’ordinamento penale italiano.” *Rivista giuridica registrata presso il Tribunale di Milano* (2016): 2-19.

Stark, Aiden. "Environmental Restorative Justice." *Pepperdine Dispute Resolution Law Journal* 16, no. 3 (2016): 435-462.

Stenardi, Diletta. “Ricorso alla Mediazione Penale e ad Altri Programmi di Giustizia Riparativa nella Gestione dei Reati Contro l’Ambiente. Spunti di Riflessione dall’Estero.” In *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* (2016): 1-294.

Stilt, Kristen. "Rights of Nature, Rights of Animals." Harvard Law Review Forum 134, no. 5 (March 2021): 276-285.

Sugrue, Vanessa. “What Happens When Values Are Put to Work? A Reflection in One Outcome from a Restorative Justice Conference in the Criminal Division of the District Court: Environment Warranted Judge Jurisdiction.” *Resource Management Journal* (2015): 19-22.

Szasz, Paul C. “Restructuring the International Organizational Framework.” *United Nations University Press* (1992): 340-384.

Testuzza, Maria Sole. “Rimediare al Male con il Bene. La Giustizia e il Perdono della Vittima nell’Età della Controriforma: tra *Restitutio, Satisfactio, Satispassio,* e *Potestas in Se Ipsum.*” *Revista de Investigación de la Catedra Internacional Conjunta Inocencio III* (2017): 266-295.

Varraso, Gianluca. “La Legge ‘Cartabia’ E L’apporto Dei Procedimenti Speciali Al Recupero Dell’efficienza Processuale.” *Sistema Penale* 2 (2022): 29-49.

Venturoli, Marco. “La Tutela delle Vittime nelle Fonti Europee.” *Diritto Penale Contemporaneo* (2012): 86-113.

Vezzadini, Susanna. “What About Restorative Justice Practices in Italy after the EU Directive 29/2012?” A Long Story of Cultural Difficulties and Misunderstanding.” *Criminal Justice Issues - Journal of Criminal Justice, criminology, and Security Studies* (2018): 429-437.

Vicoli, Daniele. “La Mediazione in Fase Esecutiva nel Sistema Italiano: il Quadro Normativo e le Dinamiche Applicative.” Revista Brasileira de Direito Porcessual Penal 7 (2021): 2285-2310.

Victor, David G. “The Use and Effectiveness of Nonbinding Instruments in the Management of Complex International Environmental Problems.” *American Society of International Law* 91 (1997): 241-250.

Weiss, Edith Brown. “The Evolution of International Environmental Law.” *Japanese Yearbook of International Law* 54 (2011): 1-27.

Weiss, Edith Brown. “International Environmental Law: Contemporary Issues and the Emergence of a New World Order.” *Georgetown Law Journal* 81, no. 3 (March 1993): 675-710.

White, Rob. “Indigenous Communities, Environmental Protection and Restorative Justice.” *Australian Indigenous Law Review* 18*,* no. 2 (2014/2015): 43-55.

White, Rob. “Prosecution and Sentencing in Relation to Environmental Crime: Recent Socio-legal Developments.” *Climate Law Soc Change* 53 (2010): 365-381.

White, Rob. “Reparative justice, environmental crime, and penalties for the powerful.” *Crime Law Soc Change* 67 (2017): 117-132.

Wijdekop, Femke. *Restorative Justice Responses to Environmental Harm.* IUCN Report, 2019.

Wirth, David A. “The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa.” *Georgia Law Review* 29, no.3 (1995): 599-654.

Wright, Martin. “In che Modo la Giustizia Riparativa è Riparativa?” *Convegno sul Tema ‘Quali Prospettive per la Mediazione? Riflessioni Teoriche ed Esperienze Operative’* (2001): 153-177.

Zamith Boin Aguair, Carla, Joao Salm, and Katia Herminia Martins Lazarano Roncada. “Restorative Justice and Environment.” Associação dos Juízes Federais do Brasil – AJUFE (2020): 1-108.

ONLINE ARTICLES

Armour, Marilyn. "Restorative Justice: Some Facts and History," available at https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history.

Bouchard, Marco, and Fabio Fiorentin. "Sulla Giustizia Riparativa," available at https://www.questionegiustizia.it/articolo/sulla-giustizia-riparativa.

Bouchard, Marco. "Breve Storia (e Filosofia) di Giustizia Riparativa," available at https://www.questionegiustizia.it/rivista/articolo/breve-storia_e-filosofia_della-giustizia-riparativa_237.php.

Bouchard, Marco. "È Possibile Spezzare la Catena del Male Senza Attingere alle Risorse del Perdono?" available at file:///Users/margheritamarotta/Desktop/Giustizia%20riparativa.html.

British Columbia, "Restorative Justice," available at https://www2.gov.bc.ca/gov/search?id=2E4C7D6BCAA4470AAAD2DCADF662E6A0&tab=1&q=restorative+justice+environment.

Capasso, Filomena. "Una Nuova Forma di Politica Criminale. La Giustizia Riparativa nella Riforma Cartabia," available at https://www.unicost.eu/una-nuova-forma-di-politica-criminale-la-giustizia-riparativa-nella-riforma-cartabia/.

Cera, Giulia. "Tutela Penale Dell'ambiente: Nuove Imposizioni In Arrivo Dall' U.E," available at

https://www.filodiritto.com/tutela-penale-dellambiente-nuove-imposizioni-arrivo-dallue.

Market Wire. "Teck Metals Reaches Agreement at Community Justice Forum," available at https://www.globenewswire.com/fr/news-release/2011/05/11/1350314/0/en/Teck-Metals-Reaches-Agreement-at-Community-Justice-Forum.html.

Maglione, Valentina, and Bianca Lucia Mazzei. "Nella Riforma Penale La Sfida Per Riparare il Dolore delle Vittime," available at https://www.ilsole24ore.com/art/nella-riforma-penale-sfida-riparare-dolore-vittime-AEUUR07?refresh_ce=1.

Proctor, Jason. "Punishing Polluters: Can Restorative Justice Work?" available at https://www.cbc.ca/news/canada/british-columbia/climate-talks-pollution-restorative-justice-1.3473076.

Pynn, Larry. "Restorative Justice can be More Powerful than Criminal Justice System: B.C. Conservation Officer" available at https://vancouversun.com/news/local-news/restorative-justice-can-be-more-powerful-than-criminal-justice-system-b-c-conservation-officer.

Vaira, Laura. "Costruire Legami per Nuove Forme di Sicurezza Sociale," available at file:///Users/margheritamarotta/Desktop/Giustizia%20riparativa.html.

OFFICIAL PUBLICATIONS

Biffi, E. & B. (eds.). *Environmental justice: restoring the future.* Leuven, Belgium: European Forum for Restorative Justice, 2019.

British Columbia. *Quarterly Environmental Enforcement Summary* (2nd Quarter 2011: April 1 – June 30).

European Forum for Restorative Justice Comments on the EU Directive 2008/99/EC of *the European Parliament and of the Council of 19 November 2018* on Improving Environmental Protection through Criminal Law, 3 May 2021.

European Forum for Restorative Justice. *Thematic Brief on Restorative Environmental Justice*. Leuven, Belgium, 2017.

European Forum for Restorative Justice. *Effectiveness of Restorative Justice Practices: an overview of empirical research on restorative justice practices in Europe*, 2017.

European Union Action to Fight Environmental Crime. Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE), 2016.

INTERPOL, "Criminal exploitation of world's natural resources affects our everyday lives, from the foot we eat to the air we breathe", available at https://www.interpol.int/Crimes/Environmental-crime.

INTERPOL, "INTERPOL marks a decade in tackling serious organized environmental crimes", available at https://www.interpol.int/News-and-Events/News/2020/INTERPOL-marks-a-decade-of-tackling-serious-organized-environmental-crime.

Legambiente, "Ecomafia 2021. Tutti i Numeri sulle Illegalità Ambientali in Italia," available at

https://www.legambiente.it/comunicati-stampa/ecomafia-2021-tutti-i-numeri-sulle-illegalita-ambientali-in-italia/.

LEXAMBIENTE. Numero 1/2021. *Rivista Trimestrale del Diritto Penale dell'Ambiente* (2021): 1-84.

LEXAMBIENTE. Numero 1/2022. *Rivista Trimestrale del Diritto Penale dell'Ambiente* (2022): 1-173.

Ministry of Justice (NZ), *Restorative Justice: Best Practices in New Zealand* (Report, 2014) 12-26.

Ministry of Justice (NZ), *Restorative Justice: Best Practices in New Zealand* (2004) 1-40.

Ministero della Giustizia, Dipartimento per la Giustizia Minorile. "Linee di Indirizzo del Dipartimento per la Giustizia Minorile e di Comunità in Materia di Giustizia Riparativa e Tutela delle Vittime di Reato." *Tribunale di Monza* (2019): 1-14.

Ministero della Giustizia. "Commissione di Studio sulla Mediazione Penale e La Giustizia Riparativa- Secondo Monitoraggio," available at https://www.giustizia.it/giustizia/it/mg_1_12_1.page?contentId=SPS31334&previsiousPage=mg_1_12_1#.

Ministero della Giustizia. "Tavolo 13 – Giustizia Riparativa, Mediazione, e Tutela delle Vittime del Reato," available at https://www.giustizia.it/giustizia/it/mg_2_19_1_13.page.

Ministero della Giustizia, "Riforma Penale, Ecco I Testi Bollinati," available at https://www.gnewsonline.it/riforma-penale-ecco-i-testi-bollinati/.

Panorama. *Panorama Perspectives: Conversations on Planetary Health*, available at https://www.rockefellerfoundation.org/wp-content/uploads/Planetary-Health-101-Information-and-Resources.pdf.

Sistema Penale. "Riforma della Giustizia Penale: Lo Schema del Decreto Legislativo Approvato dal Consiglio dei Ministri e La Relazione Illustrativa," available at https://www.sistemapenale.it/it/documenti/riforma-processo-penale-testo-schema-decreto- e-relazione-illustrativa.

UNEP-INTERPOL Rapid Response Assessment. *The Rise of Environmental Crime- A growing Threat to Natural Resources Peace, Development and Security,* 2016.

UNEP, 'UN Environment Assembly concludes with 14 resolutions to curb pollution, protect and restore natural worldwide,' available at https://www.unep.org/news-and-stories/press-release/un-environment-assembly-concludes-14-resolutions-curb-pollution.

United Nations Office on Drugs and Crime. *Handbook on Restorative Justice Programmes.* New York: United Nations Publishing, 2006.

United Nations Office on Drugs and Crime. *Handbook on Restorative Justice Programmes.* Vienna: United Nations Publishing, 2020.

LIST OF INSTRUMENTS

United Nations. *Statute of the International Court of Justice,* 18 April 1946.

Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298.

United Nations General Assembly. Resolution adopted by General Assembly 2997 (XXVII). Institutional and financial arrangements for international environmental cooperation. UN Doc. A/RES/27/2997 (1972).

United Nations Conference on the Human Environment, Stockholm Declaration on the Human Environment, UN Doc. A/CONF.48/14, (December 1972).

National Parks and Wildlife Act 1974 No 80 NSW Legislation.

Council of Europe. Committee of Ministers. Recommendation No. R (87) 20 of the Committee of Ministers to Member States on Social Reactions to Juvenile Delinquency (Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers Deputies).

Legge 22 settembre 1988, n. 448. Approvazione delle Disposizioni sul Processo Penale a Carico di Imputati Minorenni. D.P.R. 22-9-1988 N 448.

Codice di Procedura Penale, D.P.R. 22 settembre 1988 no. 477 (aggiornato al 29/04/2022).

United Nations. 1989. "Convention on the Rights of the Child." Treaty Series 1577 (November).

Resource Management Act 1991 No 69 N Legislation.

United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 165.

United Nations Conference on Environment and Development, 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26, (June 1992).

National Organization for Victims Assistance. *Restorative Community Justice: A Call to Action.* Washington, 1995.

Council of Europe. European Convention on the Exercise of Children's Rights. Strasbourg, 25.l.1996.

Fines Act 1996 No 99 NSW Legislation.

New South Wales Consolidated Acts. *Protection of the Environment Operations Act (PEO Act),* 1997.

Council of Europe Committee of Ministers. Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies).

Decreto Legislativo 28 agosto 2000, n. 274. "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 99, n. 468."

Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century. A/CONF.187/4 (2000).

Council of the European Union. Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

Decreto Legislativo 8 giugno 2001, n. 231. Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. G.U. n. 140 del 19 giugno del 2001.

Sentencing Act 2002 No 9 NZ Legislation.

Victims' Rights Act 2002 No 39 NZ Legislation.

United Nations, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. (2002) No. 2002/12. 24 July. In Resolutions and decisions adopted by the Economic and Social Council at its substantive session of 2002 (1-26 July), pp 54-59. United Nations Economic and Social Council, E/2002/INF/2/Add.2.

Decreto Legislative 3 aprile 2006, n.152. Norme in materia ambientale. G.U. n. 88 del 14 aprile 2006.

European Commission for the Efficiency of Justice (CEPEJ). Guidelines for a better implementation of the existing Recommendation concerning mediation in penal matters. CEPEJ (2007) 13. Corte costituzionale, Sentenza 367/2007.

Corte costituzionale, Sentenza 378/2007.

Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. L 328/28.

UNEP Guidelines for the development of national legislation on access to information, public participation, and access to justice in environmental matters. UNEP/GCSS.XI/L.5 (2010).

UNEP Guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment. UNEP /GCSS.XI/L.5 (2010).

Decreto Legislativo 4 marzo 2010, n. 28. Attuazione dell'articolo 60 della legge 18 giugno 2009, n.69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali.

Decreto Legislativo 7 luglio 2011, n. 121. Attuazione della direttiva 2008/99/CE sulla tutela penale dell'ambiente, nonché della direttiva 2009/123/CE che modifica la direttiva 2005/35/CE relativa all'inquinamento provocato dalle navi e all'introduzione di sanzioni per violazioni.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

Corte di Cassazione, sezione II, sentenza 8 gennaio 2014, n. 326. In materia di responsabilità degli enti (legge 231/2001), la condotta della società che metta a bilancio una somma determinata unilateralmente, senza alcuna possibile interferenza

da parte degli enti territoriali danneggiati dal reato, non garantisce l'efficacia del risarcimento che è una delle tre condizioni essenziali per la revoca delle misure interdittive.

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.

Paris Agreement to the United Nations Framework Convention on Climate Change, December 12, 2015, T.I.A.S. No. 16-1104.

Consolidated versions of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

Legge 22 maggio 2015, n.68. Disposizioni in materia di delitti contro l'ambiente. (GU n. 122 del 28-5-2015).

CORTE DI CASSAZIONE PENALE Sez. 3^ 03/11/2016 (ud. 21/09/2016) Sentenza n.46170.

Council of Europe. Recommendation of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters (2018) CM/Rec (2018)8.

Mediazione e Giustizia riparatoria nel sistema penale italiano, X congresso delle Nazioni Unite sulla prevenzione del crimine e il trattamento del reo, Aprile, 2020.

LEGGE 27 settembre 2021, n. 134. Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia

riparativa e disposizioni per la celere definizione dei procedimenti giudiziari, entrata in vigore 19/10/2021.

Codice penale. Aggiornato al D.L. 25 febbraio 2022, n. 13 e alla Legge 9 marzo 2022, n. 22. Codice di Procedura Penale 2022. Aggiornato al Decreto Legislativo 8 Novembre 2021, n 188.

Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonché In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. Relazione Illustrativa. 10 Agosto 2022.

Ministero Della Giustizia. Schema Di Decreto Legislativo Recante Attuazione Della Legge 27 Settembre 2021 N. 134 Recante Delega Al Governo Per L'efficienza Del Processo Penale Nonche' In Materia Di Giustizia Riparativa E Disposizioni Per La Celere Definizione Dei Procedimenti Giudiziari. 10 Agosto 2022.

CASES

Garrett v Williams, Craig Walter, NSWLEC 96 [2007].

Canterbury Regional Council v Interflow (NZ) Limited [2015] NZDC 3323.

Chief Executive, Office of Environment and Heritage v Clarence Valley Council, NSWLEC 205 [2018].

BOOKS

Antolisei, Francesco. *Manuale di Diritto Penale: Parte Speciale II.* Milano: Giuffrè Editore, 2016.

Balducci, Paola. *L'Ente Imputato: Profili di Efficienza e di Garanzia nel Processo De Societate.* Torino: Giappichelli Editore, 2013.

Bernasconi, Costanza. *Il Reato Ambientale: Tipicità, Offensività, Antigiuridicità, Colpevolezza.* Pisa: Edizioni ETS, 2008.

Ciavola, Agata. *Il Contributo della Giustizia Consensuale e Riparativa all'Efficienza dei Modelli di Giurisdizione.* Torino: Giappichelli Editore, 2010.

Cornwell, David J, F W M McElrea, John R Blad, and Robert B Cormier. *Criminal punishment and restorative justice: past, present, and future perspectives.* Winchester, UK: Waterside Press, 2006.

Drielak, Steven C. *Environmental Crime Trials: The Road to Reasonable doubt.* Illinois, USA: Charles C Thomas, 2017.

Dupuy, Pierre-Marie and Jorge E Vinuales. *International Environmental Law.* Cambridge: Cambridge University Press, 2nd ed, 2018.

Eusebi, Luciano. *Una Giustizia Diversa: il Modello Riparativo e La Questione Penale.* Milano: Vita e Pensiero, 2015.

Friedrich, Jurgen. *International Environmental "soft law". The Functions and Limits of Nonbinding Instruments in International*

Environmental Governance and Law. Heidelberg: Springer, 2013.

Hamilton, Mark. *Environmental Crime and Restorative Justice, Justice as Meaningful Involvement.* Cham: Palgrave Macmillan, 2021.

Ingelson, Allan. *Environment in Courtroom.* Calgary, Alberta: University of Calgary Press, 2019.

Kenny, Paula, and Liam Leonard. *The Sustainability of Restorative Justice.* United Kingdom: Emerald Publishing Limited, 2014.

Lattari, Pasquale. *La Giustizia Riparative: Tra Principi Normativi, Legge N. 134 del 2021, ed Esperienza Concreta.* Milano: Key Editore SRL, 2022.

Lynch, Michael J., Michael A. Long, and Paul B. Stretesky. *Green Criminology and Green Theories of Justice.* Cham: Palgrave Macmillan, 2019.

Macrillò, Armando e Paola Balducci. *Esecuzione Penale e Ordinamento Penitenziario.* Milano: Giuffrè Francis Lefebvre, 2020.

Mannozzi, Grazia e Giovanni A. Lodigiani. *La Giustizia Riparativa: Formanti, Parole e Metodi.* Torino: Giappichelli Editore, 2017.

Mannozzi, Grazia. *La Giustizia Senza Spada. Uno Studio Comparato su Giustizia Riparativa e Mediazione Penale.* Milano: Giuffrè Editore, 2005.

Patrizi, Patrizia. *La Giustizia Riparativa: Psicologie e Diritto per il Benessere di Persone e Comunità.* Roma: Carocci Editore, 2020.

Ramacci, Luca. *Diritto Penale dell'Ambiente.* Italy: CEDAM, 2009.

Ruga Riva, Carlo. *Diritto Penale dell'Ambiente.* Torino: Giappichelli Editore, 2021.

Situ-Liu, Yingyi, and David Emmons. *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment.* Thousand Oaks: Sage Publications, 1999.

Tanasescu, Mihnea. *Understanding the Rights of Nature: A Critical Introduction.* Bielefeld: Transcript Verlag, 2022.

Valiante, Mario. *Manuale di Diritto Penale dell'Ambiente.* Milano: Giuffrè Editore, 2009.

Zehr, Howard. *Changing lenses: Restorative Justice for Our Times.* Harrisonburg, VA, and Kitchener, ON: Herald Press, 2015.

Zehr, Howard. *The Little Book of Restorative Justice.* New York: Good Books, 2015.