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## Probation in Italy: Legal culture and justice models

OÑATI SOCIO-LEGAL SERIES VOLUME 12, ISSUE 6 (2022), 1442–1462: LEGAL CULTURE AND EMPIRICAL RESEARCH

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL/0000-0000-0000-1301](https://doi.org/10.35295/osls.iisl/0000-0000-0000-1301)

RECEIVED 29 OCTOBER 2021, ACCEPTED 20 JANUARY 2022, FIRST-ONLINE PUBLISHED 30 MARCH 2022, VERSION OF RECORD PUBLISHED 1 DECEMBER 2022

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### Abstract

Quite recently, Italian Law 67/2014 extended the *messa alla prova* scheme to adult defendants, albeit not exactly with the same features as for juvenile ones. There are indeed some important differences: first about the types of offences and about Community Service Work, and also about the use of restorative justice practices. This paper suggests some questions, using the concept of legal culture: 1. the involvement of the various players, because they have varying degrees of power, resources and tools; 2. the probation scheme and its purposes, because it could be useful to re-habilitate, or to restore, or something else; 3. the use of restorative justice, which appears less than widely used, and the engagement of the victims of the crimes admitted to *messa alla prova* programmes. Legal culture is crucial for *messa alla prova*, as it benefits from the convergent approach of different views and professions.

### Key words

Probation; restorative justice; *messa alla prova*

### Resumen

Recientemente, la ley italiana 67/2014 extendió el esquema de *messa alla prova* a todos los acusados adultos, si bien no exactamente con las mismas características que para los acusados menores. De hecho, hay algunas diferencias importantes: primero, en relación con los tipos de delito y el trabajo comunitario, y también en relación con el uso de prácticas de justicia restaurativa. Este artículo sugiere algunos temas utilizando el concepto de cultura jurídica: 1, la implicación de varias partes, porque tienen distintos grados de poder, recursos y herramientas; 2. la libertad condicional y sus objetivos, porque podría ser útil para rehabilitar, para restaurar, o para algún otro fin; 3. el uso de

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la justicia restaurativa, que parece ser poco utilizada, y la implicación de las víctimas de los crímenes admitidos en el programa de messa alla prova. La cultura jurídica es esencial para la messa alla prova, porque se beneficia del enfoque convergente de distintas visiones y profesiones.

### **Palabras clave**

Libertad probatoria; justicia restaurativa; messa alla prova

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## 1. Introduction

This paper aims to discuss some topics about the probation system in Italy. More specifically, it focuses on the measure called *messa alla prova* (Italian acronym: MAP), a typical kind of probation, introduced for young defendants in 1988 and more recently (in 2014) for adults.

Over the last twenty-five years, probation systems have been more and more widely applied: in the USA only, between 1980 and 2012, people involved in the probation system increased from 1 to around 4 million (Pagano 2016). Also in Italy, the trend is growing, especially after the introduction of law no. 67/2014, allowing the use of probation before judgment (PBJ) for adult defendants (Ministero della Giustizia 2022a).

Italian Law 67/2014 introduced and extended *messa alla prova* also to adult defendants, albeit not exactly with the same features as for juvenile ones. Indeed, some important differences can be easily noticed; first about the types of offences and about Community Service, as well as about the use of restorative justice practices. Italian Law 67/2014 provides for Courts to operate with social workers. It also requires the involvement of different judicial institutions, as well as coordination of resources, both public and private (Bonini 2018).

The object of this paper is to highlight the differences and the similarities, using the key of legal culture (Friedman 1978, Pocar 2002, Ferrari 2004, Nelken 2004, 2014) and to suggest some questions that may be useful to compare the juvenile and the adult regimes, especially about: 1. The different involvement of the various players, because they have varying degrees of power and of resources and tools in the *messa alla prova* application. 2. The criminal model and its divergent purposes, because it could be useful to restore, to re-educate, or for some other purpose, such as reduction of prison overcrowding (Ciappi and Coluccia 1998, Reggio 2010, Mannozi and Lodigiani 2015, Monzani and Di Muzio 2018). 3. The engagement of the victims of the offenders admitted to *messa alla prova* programmes and, more in general, the use of restorative justice, which appears less than widely used.

To pass from *law in books to law in action* (Pound 1910), we adopt the concept of legal culture used by Nelken:

legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do. (Nelken 2014)

The socio-legal *scenario* we are speaking of represents a clear case of interaction (or conflict) between internal and external legal culture (Friedman 1978) and it can certainly be described using the *key of legal culture*, because different cultures and professions (legal and social ones) are involved in the implementation and application of *messa alla prova*, for both adults and minors (Cottino 2016).

## 2. The probation model

Before trying to reach these goals, it is useful to outline a few essential elements of the probation model. Probation is a criminal justice model aimed at enhancing responsibility towards the community and also at avoiding the negative effect of imprisonment. Some international recommendations have described probation as a set of measures that keep offenders out of prison and away from its negative effects, in order to promote their responsibility-taking and rehabilitation. We can briefly mention some of them: primarily, Recommendation CM/Rec (2010)1 of the Committee of Ministers to Member States on the Council of Europe Probation Rules, according to which “the aim of probation is to contribute to a fair criminal justice process, as well as to public safety by preventing and reducing the occurrence of offences; and considering that probation agencies are among the key agencies of justice and that their work has an impact on the reduction of the prison population.”

The text explains that the

rules guide the establishment and proper functioning of probation agencies. These rules apply also to other organisations in their performance of the tasks covered in these rules, including other state organisations, non-governmental and commercial organisations. These rules need to be read together with Recommendation No. R (92) 16 on the European rules on community sanctions and measures. Furthermore, these rules complete the previous provisions of Recommendation No. R (97) 12 on staff concerned with the implementation of sanctions and measures, Recommendation No. R (99) 19 concerning mediation in penal matters, Recommendation Rec (2000)22 on improving the implementation of the European rules on community sanctions and measures, Recommendation Rec(2003)22 on conditional release (parole), Recommendation Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners, Recommendation Rec(2006)2 on the European Prison Rules, Recommendation Rec(2006)8 on assistance to crime victims and Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, and are to be read together with them. (CM/Rec(2010)1)

The Recommendation gives some definitions, useful to correctly approach the subject-matter of this paper: the definition of probation, of probation agency, of community sanctions and measures, and also of the process called aftercare. The same recommendation explains the basic principles of probation agencies, which “shall aim to reduce reoffending by establishing positive relationships with offenders, respect the human rights of offenders”, and also “the rights and needs of the victims”, where the case. Furthermore, “the interventions of probation agencies shall be carried out without discrimination. In implementing sanctions or measures, the agencies shall seek the offenders’ informed consent”. In any case “probation agencies, their tasks and responsibilities, as well as their relations with the public authorities and other bodies, shall be defined by national law”. Consequently, “probation shall remain the responsibility of the public authorities, even in the case when services are delivered by other agencies or volunteers”. The recommendation also states that “probation agencies shall work in partnership with other public or private organizations and local communities to promote the social inclusion of offenders, and also that co-ordinated and complementary inter-agency and inter-disciplinary work is necessary to meet the often-

complex needs of offenders and to enhance community safety. All activities and interventions undertaken by probation agencies shall conform to the highest national and international ethical and professional standards". A specific value, from the legal culture perspective, is demonstrated by the provision that reads "the competent authorities shall enhance the effectiveness of probation work by encouraging research, which shall be used to guide probation policies and practices"; the same authorities "and the probation agencies shall inform the media and the general public about the work of probation agencies in order to encourage a better understanding of their role and value in society".<sup>1</sup>

Some years before, Recommendation R (92) 16 provided for "community sanctions and measures", as sanctions and measures that keep the offender in the community and involve some restriction of his or her freedom through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. The term designates any penalty imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction, as well as ways of enforcing an imprisonment sentence outside a prison establishment. Although pecuniary penalties/fines do not fall under this definition, any supervisory or controlling activity undertaken to secure their implementation falls within the scope of the rules.

The Rules pursue three main goals, giving evidence that the probation structure can be part of the wider framework of community measures or can be connected to it. It occurred in Italy in 2015, when the new (renewed) Department for Juvenile Justice and Community Measures was set up to implement probation measures for juvenile offenders, as it had long been doing, and also for adults. The three goals are:

a. to establish a set of standards enabling national legislators and the practitioners concerned (decision-making authorities and authorities responsible for implementation) to provide fair and effective application of community sanctions and measures. Said application should ensure a necessary and desirable balance between, on the one hand, the need to protect society (both in terms of legal order and application of norms providing for reparation of the harm caused to victims), and, on the other hand, the essential recognition of the needs of the offender;

b. to give member states basic criteria to ensure that community sanctions and measures are designed and used in full respect for the fundamental human rights of the offenders they are applied to. Similarly, it is important to ensure that the application of these sanctions and measures does not cause any kind of abuse, such as, for example, discrimination against particular social groups. Full consideration needs to be given to the social advantages and disadvantages of, as well as the potential risks resulting from, or likely to result from, such sanctions and measures. Pursuing the aim of achieving an alternative to imprisonment does not in itself justify recourse to any kind of sanction or measure or means of implementation;

c. to propose clear rules of conduct to the staff responsible for the implementation of community sanctions and measures and to all those in the community who are involved in its scope, in order to ensure that said implementation meets any conditions

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<sup>1</sup> The same principles were introduced in the Recommendation R(2000)22, cited above.

and is compliant with any obligations imposed, thereby conferring credibility upon the sanctions or measures.

Nonetheless, this does not mean that implementation is to be thought of in a rigid or formalistic way. Instead, it should be undertaken with constant concern for individualization, that is, the achievement of consistency between the offence and the penal response, as well as with the personality and the capabilities of the offender. Furthermore, the fact that reference can be made to a set of rules which have been established internationally should facilitate exchange of experience, in particular concerning methods of work.<sup>2</sup>

### **3. “Messa alla prova” in Italy**

In this international socio-legal scenario, Italy has different probation tools in force, namely probation after judgement (for convicted offenders) and probation before judgement (for defendants). *Messa alla prova*, the topic of this paper, is exactly a kind of probation before judgement, introduced in Italy in 1988 for minors and in 2014 for adult defendants. In any case, these probation measures require the involvement of the social background. This involvement must not be in terms of resources only, to manage the programmes, but it must also have a relational value (Fassone 1986).

Juvenile probation was introduced in 1988 (Articles 28 and 29 of Italian Presidential Decree 448/88), is applicable to any type of crime, even particularly serious ones and those causing significant social alarm, and can have maximum duration of three years. Trial suspension is ordered during the preliminary hearing or during the trial and the measure provides for the minor to be tested on the basis of an educational project prepared by the juvenile social services (USSM). The probation measure can have the most disparate contents; it can consist in prescriptions to do or not to do, mainly concerning education or work, but also sports, social activities or voluntary work. Furthermore, the judge may issue prescriptions aimed at repairing the consequences of the crime and promoting the reconciliation of the minor with the victim (Article 28, paragraph 2, Article 29 of Italian Presidential Decree 448/88). The probation favourable outcome generates the extinction of the offence, pronounced with a non-prosecution ruling; on the contrary, a negative outcome triggers resumption of the trial from where it was interrupted.

The existence of evidence is assessed at the verification hearing, set specifically by the judge; this is a preliminary or trial hearing, depending on the phase in which the trial was suspended and takes place in full compliance with the adversarial and defence principles, in the presence of all the parties concerned: public prosecutor, accused, parents or those exercising parental authority, defence counsel, juvenile services, offended party. The evolution in the minor’s personality is evaluated in terms of growth, thus basing the decision on the likeness that the minor will mature thanks to the measure.

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<sup>2</sup> As this paper discusses also juvenile justice, it is important to bear in mind also the European Rules for juvenile offenders subject to sanctions or measures, laid down in Recommendation CM/Rec(2008)11 of the Committee of Ministers to Member States on the European Rules for juvenile offenders subject to sanctions or measures.

Probation before judgement for adults was introduced in 2014 with law no. 67,<sup>3</sup> to manage a problematic situation in the penitentiary sector (prisons in Italy are overcrowded) for defendants accused of crimes punished with short prison sentences. It consists in suspending the trial and in placing the defendant under the social service supervision. Social workers prepare and define, in agreement with the defence counsel and the Court, a treatment programme. The programme provides for mandatory unpaid community service: work to be done for healthcare or social charities or for public institutions. It shall last no less than 10 days, also not consecutive, and for no more than 8 hours a day (Bartoli 2020). Under Article 2, para. 4 of Italian Ministerial Decree 88/2015, the activities shall be in: the health and socio-health sector; civil protection (aid to the population in the event of disasters); environmental heritage (fire prevention, protection of woodland and forest heritage, maritime property, protection of flora and fauna with regard to protected areas, animal protection); cultural and archival heritage (including reception at libraries, museums, art galleries); buildings and public services (hospitals, nursing homes, state property and public assets, gardens, villas and parks – with the exception of those of the armed forces and police); the accused's specific skills and will to engage in vocational training. In order to reduce the risk of recidivism, the programme may provide for obligations regarding residence, freedom of movement and the prohibition from going to and spending time at certain premises (Triggiani 2014).

The measure also provides for the accused to carry out restorative activities, aimed at eliminating the harmful or dangerous consequences of the crime, at compensating the damage caused and, *if possible*, activities of mediation with the victim or victims of the crime. As we can easily notice, the main feature of any probation measure is *proof*, which is really the core of the whole programme. The treatment programme is necessary to be admitted by the court to trial suspension and is prepared by the social workers on staff at UEPE (Pieroni and Rollino 2018).

The treatment programme is prepared by the UEPE, social work units at the Ministry of Justice, responsible for the local area, after a formal application is filed by the defendant. It is prepared on the basis of the defendant's specific characteristics.

The measure may be granted by the judge for crimes punished with prison sentences of up to four years. The measure may be applied no more than once (or possibly twice, for offences perpetrated before the first suspension). Application to habitual, professional and trend-based offenders is ruled out; this is an important difference versus the juvenile scheme, where the measure is always permitted and is applicable several times (not once only). The spirit informing the juvenile measure is the *favor minoris*, i.e., the justice system must do everything possible to educate the minor and to prevent the labelling consequences of the offence (Goffman 1963/1983).

In the adult system, the trial may not be suspended for a period of over two years, if the prosecuted crime is punished with a prison sentence of more than one year and for

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<sup>3</sup> Italian Law no. 67 of 28 April 2014 amended: The Italian Criminal Code, providing for the measure at Articles 168-*bis*, 168-*ter* e 168-*quarter*; the Italian Code of Criminal Procedure, introducing Article 464-*bis et seq.* which govern preliminary investigation and structuring of the proceeding and trial, as well as Article 567-*bis* setting out the methods to assess the probation period; the implementation, coordination and transitional rules of the Code of Criminal Procedure; the Consolidated Act on the legislation and regulations concerning criminal records.



prosecuted crimes punished with a pecuniary penalty only. The positive outcome of the proof generates the extinction of the crime, exactly as in the juvenile field. At the same time, if the defendant makes serious and repeated infringements of the treatment programme, or if the defendant refuses to perform community service work or perpetrates, during the probationary period, a new intentional crime or a crime of the same nature of the one he or she is being prosecuted for, the judge shall order the revocation of the measure and the resumption of the trial.

It may be worth noticing that, in 2020 (October 15), the people supervised by the UEPE with their *messa alla prova* underway were 13,000; 23,000 people were being investigated for probation, on a total of 164,000 people supervised by the UEPE in the reference year (2020, as at 15 October); they were by far mostly males (89%) and Italian (81%); 38% of the offences occurred in 2020 (Ministero della Giustizia 2022b).

The CNCA Report (2018) warns about the risks:

The extension of this measure to adults is a positive fact, even if, in this passage, the risk of a quantitative and not qualitative expansion appears, as for sentences of up to four years it is not due to far-sighted policies, but to short-term policies that only intend to temporarily reduce overcrowding in prisons. Waiting for new prisons and not for experimenting with new forms of restorative justice. (CNCA 2018, p. 112)<sup>4</sup>

In any case, it is clear that both probation measures require the involvement of the social background and the involvement must not be in terms of resources only, to manage the programmes, but it must also have a relational value (Fassone 1986).

#### **4. Juvenile “*messa alla prova*” in Italy**

As said above, *messa alla prova* for juvenile defendants was introduced in Italy in 1988 (Art. 28 of Italian Presidential Decree 448/1988). Under this measure, Juvenile Courts may suspend the trial, in order to observe the personality of the minor defendant. Observation is oriented to grade penal liability, introduce administrative or civil penalties and every other necessary intervention to support the minor and her/his family and to activate his or her social environment. No limits are fixed by law as regards the kind of offenders and offences: juvenile *messa alla prova* is applicable to all offenders (also for repeat offenders) and all offences (really all: also murders). It may be applied more than once, and not only by a court of first instance, but also during plea taking. The trial can be suspended by the judge for a variable period, ranging between one year and three years, depending on the seriousness of the offence. During the probationary period, the minor defendant agrees to comply with a programme, consisting of various activities (education, work, voluntary work and also – the law says: *if possible* – restorative practices).

As regards restorative practices, the law allows the judge to supplement the proof programme with some activities aimed at remedying the consequences of the offence and at promoting reconciliation between the defendant and the victim. This is a very big topic of analysis and we have a lot of literature dedicated to the relationships between *messa alla prova* and restorative justice. The debate has recently intensified, when *messa*

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<sup>4</sup> Coordinamento Nazionale Delle Comunità Di Accoglienza, (CNCA) 2018. Statistical data on application are available on the Italian Justice Ministry web site: see Ministero della Giustizia 2022b.

alla prova was extended to adult defendants in Italy, and it became clearer that the implementation of restorative justice is one of the main opportunities but, at the same time, one of the biggest problems that we have (Scivoletto 2017).

When the probatory period ends, the same judge that admitted the minor to the measure will evaluate the proof in order to decide whether to rule for the extinction of the crime, depending on the evolution in the offender's personality. In any case, we must keep in mind that the main objective of juvenile criminal trial is not to punish but educate young defendants. The law also envisages a negative outcome, when no change has occurred in the young offender's personality and behaviour: in this case, the trial will restart from where it was suspended (Article 29 of Italian Presidential Decree 448/88).

Messa alla prova for young defendants is applicable to all kinds of crimes and all minors are eligible (the law does not provide for any limits, in terms of type of offence, criminal record or number of times).<sup>5</sup> Its purpose is to promote educational and supporting strategies for minors, with the help – if possible – of their families and their networks of relationships and background; the aim is to strengthen and enhance the defendants' personal skills and resources in order for them to re-engage in society. As socio-legal studies show, being found guilty in trial often reinforces a negative image of him/herself (the "deviant label") (Goffman 1963/1983, Moyersoen 2018); on the contrary, the pursued ideological purpose is to prevent any conditions that would make the juvenile defendant perceive him/herself as a criminal (De Leo 1981). Messa alla prova has two other objectives: to contribute to keeping the juvenile criminal justice system focused on its key-concept, i.e., the "child's best interest" and to help the minor to take responsibility for past actions and to use the experience to move forward (Vezzadini 2017).

This is why messa alla prova is – at least in theory – a clear example of a measure that brings together different fields of knowledge, skills and methods of action. Legal culture, as "one way of describing relatively stable patterns of legally oriented social behaviours and attitudes" (Nelken 2014), is still crucial for messa alla prova, as it benefits from the convergent approach of different views and professions.

Data resulting from socio-legal research programmes, over the thirty years the measure has been applied for, give evidence that this tool has a lot of pros, but also some cons. As concerns pros, we can easily notice that the system had long been waiting for it. The measure allows the minor and his/her family and life context to be involved. We can say that messa alla prova is able to combine education and punishment, the main objectives of the juvenile criminal justice (Pavarini 1991).

Messa alla prova does certainly have a lot of pros: first of all, it ensures that the young offender be made more accountable, in order to increase his/her responsibility-taking, but, at the same time, it has also some limits. The quantitative data resulting from several socio-legal research works, conducted over the 30 years of its application, give evidence that the outcomes of juvenile probation in Italy are mainly positive: approximately 98% of the trials suspended to admit the defendants to this kind of probation had a positive outcome and ended with the extinction of the crime; we know how important this goal is in order to prevent any labelling effect (Becker 1963/1987, Palomba 1989).

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<sup>5</sup> On the contrary, messa alla prova for adults applies only once and only to defendants accused of crimes that are punished with no more than 4 years in prison.

At the same time, exactly in the legal culture sense, we have to analyze the contents of the proofs and, even before that, we must take a look at the selection criteria used by the Courts to decide the defendants to be admitted to and those to be denied this measure.

Statistical data give evidence that a large part of suspended trials ends with the extinction of the crime, but not that many trials are suspended. In Italy, the minors admitted to the *messa alla prova* in 2006 accounted for 10% of the total defendant minors and, in 2017, for 18%. Almost all the minors admitted to *messa alla prova* are Italian.<sup>6</sup>

In this, we find a big research question. What are the reasons that Juvenile Judges consider when they decide to suspend trial? The Law allows all trials to be suspended (in theory); but, in practice, we know that only 20% is suspended. As clearly emerged from the monitoring of national data, it is obvious that, since the first Italian studies on this topic (Scivoletto 1999, Santagata 2005), the choice to suspend trial has always been reserved to highly selected cases, not only quantitatively but also qualitatively. Juvenile courts decide to grant “probation” in a very small number of cases, although the measure offers the big goal of criminal liability extinction. Albeit effective, it does not seem to be quite as efficient: in fact, its application requires the use of considerable resources (in terms of human and social capital). The success of the measure, as the goal to be achieved, depends – in the internal legal culture of Judges and Social workers – on the correct involvement of the minor’s whole network: the family, the school, and the other relevant agencies in the minor’s life (Nelken 2006), as per the well-known “Italian style” in juvenile justice (Lemert 1981, Scalia 2005).

In considering these data, we also know that no follow-up national data are yet available, although it should be an important research variable. So, research programmes are needed to introduce some indicators about the definition of success/failure of the *messa alla prova* programmes; they will be useful to investigate the criteria used by the courts for example to select the measure, to make the final decision (if positive, the crime is extinguished; if negative, the trial is resumed).

If researchers were equipped with this set of indicators, they would be able to evaluate the effective success percentage: not only the judicial success as the positive end of the trial success percentage; they also would be able to assess whether *messa alla prova* is only a big cost to provide benefit to few privileged and lucky minors, or it might be re-qualified as an important tool useful to test new criminal policies and new forms of punishment (Scivoletto 1999, 2005), in which the social work scope prevails over the criminal one.

After thirty years of application, empirical data report that but few foreign minor defendants are admitted to *messa alla prova*. This evidence is evaluated and explained in the literature not as a signal of opposition, but as a signal of lack of power: Juvenile Courts prefer to grant the measure only to young people that have a good family and social network. A strong network is a useful tool to make the programme strong and its outcome successful. Social workers (USSM) need to consider whether the social and family background can help and support the young defendant in changing his/her way

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<sup>6</sup> Dipartimento per la Giustizia Minorile e di Comunità, Sezione statistica; see Ministero della Giustizia 2022b.

of life. So, the family and the social environment are considered – also by judges, not only by social workers – as a necessary tool to create good *messa alla prova* programmes.

At the same time, although the measure has been applied for so long, we know that *messa alla prova* programmes do not yet comprise mediation or restorative practices as well. The reason is strictly related not only to the difficulties in spreading the culture of restorative justice as such, but also to the kind of crimes and, first of all, to the victims' will (this is especially true for mediation, which is in no case compulsory).<sup>7</sup>

Once again, the usefulness of the legal culture perspective in our research is clear; it is a perfect key of investigation about the topic of probation, both if we analyze judiciary dossiers and interview judges, social workers, lawyers or other professionals involved in this socio-legal field.

## 5. Some results from a research programme about *messa alla prova* for adults

### 5.1. Note on methodology

This paragraph reports some results obtained by a quali-quantitative research programme, focusing on *messa alla prova* for adults,<sup>8</sup> conducted in the Emilia Romagna Region between 2016 and 2021, in collaboration with the Justice Ministry Social Work Units (Italian acronym: UEPE) of Bologna and Reggio Emilia and the Voluntary Services Centers (CSV Emilia), i.e., the centers that coordinate local volunteer organizations.

The first part of the research programme was dedicated to collect quantitative data about the application of the *messa alla prova* measure in the Emilia Romagna Region, shortly after the introduction of Law 67/2014 (2016–2018). The collected quantitative data were: number of offenders, types of offences, duration and content of the proof programmes and were based on UEPE records (192 records of the Bologna and Reggio Emilia UEPE).

On the other hand, qualitative data were collected between 2018 and 2021 and were obtained interviewing (a) 13 social workers about managing probation for adults (UEPE Officers on staff at the Reggio Emilia UEPE Office); interviewing (b) 16 defendants, on their experience after the end of probationary period, managed by the same UEPE professionals, and (c) collecting also the opinion of 7 defence counsels<sup>9</sup> about the *messa alla prova* tool and the possibilities of introducing restorative justice practices in the *messa alla prova* programmes for adults (see Scivoletto *et al.* 2020). In addition, the opinion of all social workers on staff at the UEPE Offices of the Emilia Romagna region was collected administering them an online survey.

The aim of the dual approach of the research was to compare the first application and the current application in terms of implementation of law (bureaucracy, communication between institutions, work practices) and in terms of spread of the legal culture in the same territory.

<sup>7</sup> Statistical data on application are available on the Justice Ministry web site, cited above.

<sup>8</sup> This paper is on a quali-quantitative research programme, divided into two phases (2016-2018 and 2019-2021). The complete results of the programme can be found in Scivoletto *et al.* 2020.

<sup>9</sup> All the counsels who sit on the executive board of the criminal chamber of the Parma Bar.

### *5.2. The social workers experience: the regional survey results*

As regards the survey, it was addressed to all (58) the social workers on staff at the UEPE of the Region. The professionals who replied were 37.64% of the total; 22 of them (i.e., 59%) had over twenty years of experience in the service. It means the sample had in-depth knowledge of the matter and of its changes over time. It is also a group with good experience of *messa alla prova*: 18 of them had managed more than 50 cases; 13 of them had managed between 30 and 49 cases.

The answers about the *messa alla prova* measure, were in general, positive (although not enthusiastic). It should be noticed that the Italian outcome of the proof is almost always positive, but our interviews highlighted some doubts about its application, in terms of capability of *messa alla prova* to perform all its – ideal and many – functions.

The opinion about the main goal of the measure was investigated: whether it aims at meeting rehabilitation needs (18 out of 32 professionals, i.e., 56%, answered very much so/quite), or needs for reduction of procedures (2 out of 32, i.e., 69%, answered quite/very much so), or restorative needs (the quite/very much so answers were 24 out of 32, i.e., 75%).

Regarding their satisfaction with the collaboration with the other professionals involved in the *messa alla prova* application, very different results emerged. Satisfaction is high as regards the relationships with local social services (31 out of 32 respondents, 97% are very or quite satisfied) and defence counsels (30 out of 32, 94%). Indeed, quite lower satisfaction was surveyed about communication and collaboration with judges: here the quite or very satisfied social workers dropped to 20 out of 32 (62%). This result was therefore the subject of in-depth analysis during the interviews conducted in the qualitative part of the study.

As concerns Community Service (Italian acronym: LPU), laid down as essential by Law no. 67/2014, 33% of interviewees (11 out of 33) believe that it, although legitimate, is insufficient; for 58% (19) it is sufficient and 9% only (3) gave a good opinion of it.

Therefore, Community Service does not characterize the experience, it is not enough to support *messa alla prova*: according to the interviewees, the *messa alla prova* programme should also contain restorative justice activities (30 out of 33, 92%). Someone also stressed the need for more resources in terms of voluntary activities (3 out of 33, 9%).

The general experience of the social workers is however positive: 88% of the social workers taking the survey (28 out of 32). Asked about the effectiveness of *messa alla prova*, the most important element in their answer was: to avoid recidivism (19 out of 32 interviewees, 59%). Asked about the “effectiveness” of the measure, they answered that it lies in the experience of the proof (6 out of 32 interviewees, 19%), the usefulness of introducing restorative programmes or activities (4, 12%) and the extinction of the crime (3, the 9%).

The questionnaire also included one open-ended question, introduced to allow the interviewees to express themselves freely (or their opinions more freely). Some interesting considerations emerged in terms of legal culture. First of all, the need for training activities with judges was stressed. The interviewed professionals reported

great difficulty in the interaction between judges and social workers. Furthermore, the measure of “probation” seems to be useful for the prevention of crimes. Finally, the interviewees believe that a good relationship with defence counsels is essential: they reported that the support of defence counsels to the *messa alla prova* programmes would increase the chances of success.

### *5.3. Strengths and weaknesses of messa alla prova: interviews to social workers and law professionals*

The 13 interviews with social workers on staff in the Reggio Emilia UEPE focused on the organizational dynamics, whereas the interviews with the other professionals focused on community service work and on restorative justice; interviews with privileged witnesses focused on the more general cultural dynamics of the criminal system.

The interviews aimed at investigating organizational matters, needs for training, the relations between social workers (UEPE offices) and law professionals, the public opinion about the culture of mediation and the role of the victims.

As to the opinion about this measure, there is general satisfaction, although some issues were also found.

The opinions gathered with the interviews were to this effect:

Most people are happy they had this experience, as they felt useful and fulfilled; There are those who take it seriously, do not create problems, while others must be kept under control. But I think it is a useful thing: they pay a debt and are also useful to the community. (Int. no. 4)

Some privileged witnesses stressed the value of the proof as an element of novelty compared to the previous system:

I believe it must be confirmed and only freed from bureaucracies and bureaucratic burdens. (Int. no. 6)

From this perspective, community service is an important resource; respondents said that

The core of the MAP is the LPU, which can make sense if the defendant has a collaborative attitude and is willing to get involved and commit. It becomes an opportunity when the defendant really wants to think about it. It is a great advantage for the accused who can avoid the trial, and a possible conviction, if the MAP extinguishes the crime. (Int. no. 2)

As regards legal culture, the majority of opinions focused on the kind of relationships between different professionals in the judiciary field. The interviewees expressed the need for a change of view:

On the part of the trial judges, who, instead of being the judges of the fact, that is, the ones that put the fact-crime on the balance on one side and the years of sentence on the other side until the balance goes even, look at the defendant’s history, at the history of the person. It is a significant change of view, because judges now must have agreements with municipalities and with bodies having a social value and a socially-oriented mission. (Int. no.1)

A privileged witness underlined the difficulty of relationships with the courts:

We are social workers, we are not interested in judging whether you are guilty or not; we listen to you and collect data and information. We are part of the penitentiary system: suddenly, this law requires us to work with the ordinary courts, but we were not used to do it. (Int. no. 5)

Another factor that emerged is the need for training, mostly stressed by privileged witnesses:

We should start with a huge training operation, even at University, on restorative justice; In my opinion, restorative justice can have a very interesting development in the future; however, it is necessary to train, create registers, create services, put in some money. (Int. no. 7)

There is a whole issue that concerns the specialization of professionals; It's high time that we did something (...) this in-training operation: we must start from high school. At university it is already too late (...). (Int. no. 8)

#### *5.4. The defendants' opinion: the results of the semi-structured interviews*

As said above, the true novelty of the research programme was the collection of the defendants' opinions, through semi-structured interviews. Their opinions about the experience they lived through the period of *messa alla prova* are, for the most part, positive. Some of the clearest and most effective answers we got are reported below:

The experience was certainly something positive for me; it is an opportunity to test yourself, so, in this sense, it is certainly useful. Community Service work is also an experience, an opportunity to help people who need it. I don't like the term work because work begins and then finishes, instead I have had an experience of common and mutual growth, as I define it, so it does not end. (Int. no. 7)

I found it very useful because of the contact with the social worker who takes care of it. I forced myself to go there (to do my work), because I was wrong and it is right that I do it. (Int. no. 11)

I was wrong and I paid, helping people who need help, in my community. (Int. no. 8)

It is useful because you think about it (petty crimes) and in the future you will avoid doing stupid things. (Int. no. 13)

Probation is a period of time in which you can think, it is a period that helps you to think. (Int. no. 15)

I consider probation a very useful measure to avoid penalties. (Int. no. 6)

At the beginning, I felt it as an obligation, of course, because I would have never had this experience if it hadn't been mandatory; then, as I got into it, I actually changed my mind, meaning that I started to hold it as useful and interesting, and – see, I'll be honest – I think that I will ask to continue to work as a volunteer, also after my probatory period ends. (Int. no. 12)

An aspect that clearly emerged is the difficult implementation of mediation. Many were not even aware that it existed, they did not know what it was:

No, I have never heard of it. I don't even know what it is. (Int. no. 1)

No never, zero. (Int. no. 2)

Mmmh... no, I have never heard of it, no one has ever told me about it... my lawyer said that the court ordered that I do these hours of community service work. (Int. no. 3)

No, I have not been offered this option... only through my lawyers and the insurance company, we have reached an agreement for compensation in money, nothing else. (Int. no. 16)

Only very few defendants had heard about it before:

We discussed this thing of criminal mediation, but just in general, with everyone, certainly not with me personally. (Int. no.13)

Some of these defendants could not use the criminal mediation instrument, because

I would have liked to experience criminal mediation, but it was not possible because the victim did not want to. (Int. no. 5)

### *5.5. The lawyers' opinion*

The interviews with defence counsels<sup>10</sup> revealed that the *messa alla prova* measure for adults is still little-known as a criminal policy tool, which is mainly proposed by lawyers and almost never asked for by their clients. In general, the opinion of defence counsels regarding *messa alla prova* for adult defendants is positive: all of them spoke of it as a tool that allows the defendant to carry out an activity in a freedom regime, while also allowing control by the Social Service (UEPE). At the same time, the lawyers also stressed the ambiguities of this tool: all the interviewees were well aware of the possibility of its instrumental use, not steered by the will of rehabilitating the offender, but simply to avoid negative effects on the criminal records.

As regards the involvement of the victim, which is necessary to carry out any mediation programme, some resistance emerged: the victim appears to be a more difficult party to deal with than the offender.

A lawyer clearly stated that "it is easier to find ways to make the sentence milder or to modify it, than to satisfy the victim" (lawyer no. 3).

With regard to criminal mediation and restorative justice in general, the positions of lawyers are quite homogeneous: many claim they use it little, and many others do not seem to be in favour of it, as they consider the jurisdiction of juvenile courts or justices of the peace more appropriate for this kind of practice. The lawyers pointed out that there is a lot of confusion between compensatory and restorative practices, that reparation is confused with damage compensation, which in itself is rather a mitigating factor, as well as the condition to apply "probation":

In a case I worked in, mediation had been applied for... however, I don't know whether mediation had a positive outcome, or whether any criminal mediation procedure was carried out. Nonetheless it is to be pointed out that it was proposed for a personal injury offence involving two ladies that had had a fight at work, a criminal conviction verdict had been issued, we were opposing to it petitioning for the offence extinction and it was proposed in that scope, they had also put the lady in contact with an organization, I can't remember which one. (Lawyer no. 6)

All the lawyers' opinions regarding restorative justice defined it as entirely functional to the offender and not to the victim; therefore, its function appears to be aimed at

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<sup>10</sup> Interviews were carried out with all the 7 members of the Criminal Chamber of the Parma Bar in November 2020.



rehabilitation and resocialization, while no restorative function is seen for the victim. This opinion is reflected in the quantitative data concerning the application of MAP for adults, given that restorative actions are almost entirely lacking in the proof programmes (except for the activities envisaged as a condition to be granted the measure):

Sometimes the judge assigns the MAP mechanically, as a bureaucratic procedure, sometimes even lawyers cannot fully understand its meaning, the goal is to finish in a short time and nothing else. (Lawyer no. 1)

## **6. Conclusion: legal culture in action**

To conclude, we can say that the *messa alla prova* measure – both the one for adults and the one for juvenile defendants – is a very valuable opportunity to reflect more in general on both the orientations of the culture of penalty and on the efficiency and effectiveness of criminal law provisions (Foucault 1975/1976, Gallo and Ruggiero 1989, Garland 2001/2004, Mosconi 2010). A key to understand these aspects is certainly – once again – *legal culture*, which suggests us that any issues in the juridical field (Bourdieu 1986) be treated as the arena in which the different players interact (Nelken 2006).

Indeed, the extension of *messa alla prova* to adults has drawn again attention to the central matter of criminal polices in Italy: not only does it require that offenders be assisted and rehabilitated, but also that safety and affordability be ensured.

Furthermore, *messa alla prova* for adults gives a new and significant opportunity to rethink the most typical contents of the rehabilitation model that, for minors, has been pursued for over thirty years. The analysis of its application also gives the basis for reasoning more in general on the probation model effectiveness, which has considerable unanswered questions, in terms of both social construction and legal culture, as well as in terms of implementation of public policies.

*Messa alla prova* for adults requires the UEPE staff to work with users that are different from those on whom the social service has gained over thirty years' experience (Salvadori and Arata 2014). At the same time, it requires courts deciding on the merits to rule on treatment, which is the very scope of the supervision judicial structure (in Italian: *magistratura di sorveglianza*).

Furthermore, *messa alla prova* of adults requires several judiciary institutions to be involved, first of all the trial courts, besides the use of coordinated resources from the civil service and private social players. Therefore, the measure requires practical organizational solutions to be deployed, aimed at limiting the unevenness of its application, ideally at a national level (an ambitious goal), or at least a regional level.

A precise line of research can be found in organizational logics: internal, inter-institution and external organizational approaches, which can be implemented between the Judiciary, Courts, UEPE, lawyers, civil service and private social players (Piromalli 2007). The topic can be seen in all its importance if we observe the design and development of inter-institution guidelines and protocols, which have set down the operational methods and introduced good practices since the very first months in the measure application.

Lastly, some inconsistency between the two scopes is to be pointed out: in the juvenile scope, *messa alla prova* is useful to the defendant to appropriately build his or her

personality; for adults, it is an advantage given to those that can be expected to refrain from perpetrating other offences: rewarding logic (a positive penalty as a reward).

Among the main points of attention for both measures, some risks are to be pointed out: a. unequal application and benefit between defendants; b. standardization of projects; c. instrumental uses (especially as regards the measure for adults, the risk of standardized application results from the excessive workload of UEPE). Moreover, for adults, attention must be given to community service, which is a binding requirement and a mandatory part of the *messa alla prova* project; conversely, for minors, it is to be pointed out that, after 30 years of implementation, there is still no national follow-up monitoring of outcomes.

Lastly, for both scopes (juvenile and adult offenders), there is the Restorative Justice challenge: it is to be borne in mind that CM/REC 2018(8) reads that: “Restorative justice” refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the “facilitator”).

The *messa alla prova* arrangement – which, from a systematic perspective, belongs to the rehabilitation model – does not seem instrumental to spreading a restorative justice culture in Italy. Rather, we could say that both legislative acts implementing the MAP (1988 and 2014) use restorative justice in order to reduce the prison population, without giving it the status of a true and independent legal paradigm, fit to resolve social conflicts by involving the community or, even more specifically, the victims. Mediation has proved again the most interesting and tight knot: the data we surveyed on the measure for adults show the light and shadow already found in previous studies (Scivoletto 1999, 2017) and the danger of assuming the equivalence of symbolic/widespread compensation (when not a financial one only) and moral compensation to the victim.

This finding is evidence of the need for further and wider reflection on the feasibility and legitimation of criminal mediation in the so-called community justice. In terms of application, the need for systematic actions aimed at “assessing the possibility of a system of community sanctions in accordance with the needs of the local community, which is the expression of joint taking charge of the person by the local civil service structures, involving private organizations, businesses and volunteer associations “ seems to be confirmed, as already found in the works of the so-called *Stati generali della Giustizia* organized by former Justice Minister Orlando; besides the opportunity

to set up infrastructure and organizational arrangements having appropriate size and staffing, which can enhance the tangible control and support action in managing community sanctions”, enabling “to assess the expediency of specific and targeted rehabilitation programmes to be proposed to those sentenced to community sanctions (education to lawfulness, preparation to employment, value of diversity). (Ministero della Giustizia 2016)

Therefore, scientific research will have to continue not only to verify the consistency of the theoretical assumptions and operational arrangements of *messa alla prova*, but also to monitor its outcomes, both in-trial ones (concerning the application methods and judicial outcome of *messa alla prova*), and especially out-of-trial ones (legal follow-up

on reoffenders and psychological-social follow-up on personal development) and to introduce services implementing restorative justice practices, which are still too limited, as they are local and/or occasional.

This evidence asks us, as researchers, to continue to use – again and better – the key-concept of legal culture, remembering its usefulness and its potentialities, given by its three dimensions: fact, approach and value (Nelken 2014).

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