

## “Probation”: History and Report on Experience from the Italian Constitutional Court

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### Abstract:

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The Probation is an alternative procedure to define the criminal trial for underage defendants and adults according to d.P.R. n.448/88 and law n.67/2014, respectively. The Probation is reserved to any defendants who first commit a crime with low entity. Moreover, this procedure involves suspension of sentence, resulting in reduction of working by courts and in lower risk to sentence for the accused. Few years after the implementation of Probation, a comment about its impact on social and legal field is advisable, especially in the light of recent criticisms issued by sentences of Constitutional Court.

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**Keywords:** Probation - Social impact - Constitutional Court.

### 1. The probation as practice to suspend criminal trial: genesis and impact on underage defendants

The institute of the “Probation” dates back to the fascism and precisely to the era characterized by introduction of the juvenile jurisdiction as well as all of rules that regulate the criminal proceedings against juvenile defendants. Although the aim was highly innovative, these sentences obviously reflected the ideologies and values of the time. Therefore, the primary requirement was the prevention of the deviance of the minor that was considered a disease to be cured “through the imposition of punishment”<sup>2</sup>.

The Constitutional Charter overturns the frame of reference and the minor is considered as a “subject” however to be protected in any condition with specific guarantees and autonomous rights<sup>3</sup>. The mentioned normative apparatus, based on the conception of the child who crimes as “little criminal man” to be punished more mildly, enters into a systemic collision with the new founding principles. The subsequent trade union activity of constitutionality offered by the Council is so penetrating that it constitutes a powerful impulse for the reform dictated by the Juvenile Criminal Trial Code (d.P.R. 22 September 1988 n. 448) emanated in execution of the delegation of which to the l. 16 February 1987 n. 81. Among the initiatives and institutions to be delegated it is useful to point out the exclusion of the exercise of civil action in juvenile criminal proceedings, the non-respect of the public disclosure of juvenile criminal hearings and the possibility, by the judge, to suspend the process to provide a positive evaluation of the minor’s personality<sup>4</sup>.

The juvenile trial has profoundly transformed the criterion of assessing the procedural position of the defendants. In fact, it is based on the need to activate a path of empowerment and recovery of the child, using all the tools made available to the judge, through the new legislative program.

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<sup>2</sup> On the point, cf. F. PALOMBA, *Il sistema del processo penale minorile*, Milano, 2002, p. 6 ss.; E. FASSONE, *Probation e affidamento in prova*, in *Enciclopedia del diritto*, vol. XXXV, Milano, 1986, pp.784 ff. ; F. MERLINI, G. SCARDACCIONE, M. T. SPAGNOLETTI, *Sospensione del giudizio e messa alla prova: riflessioni sui primi due anni di applicazione*, in *Esperienze di giustizia minorile*, 1996.

<sup>3</sup>See, FACCIOLI F., *I soggetti deboli. I giovani e le donne nel processo penale*, Milano, 1990, p.54 ss.

<sup>4</sup> Cf., l. 16 February 1987, n. 81 (Legislative delegation to the Government of the Republic for the enactment of the new code of criminal procedure), specifically, l. art. 3 lett. e): «*The duty of the judge to fully assess the personality of the child from the psychological, social and environmental point of view, also for the purpose of evaluating the results of the support interventions arranged; the judge’s right to suspend the trial for a specified period of time in such cases; suspension in this case of the course of limitation*».

For example, the judgment of 'No need to proceed due to irrelevance of the fact' and the suspension of the trial with probation as institutions aimed both at avoiding the traumatizing effects by criminal trial and ensuring a new path of rehabilitation of the minor<sup>5</sup>. The normative dictate of which to' art. 28 of Decree No. 488/88, which governs the institution in question<sup>6</sup>, clearly highlights the guarantee of the institution of probation which constitutes a new way of interpreting and treating the crime and its author, in accordance with the progressive erosion of the concept of affliction and retribution of the penalty and the simultaneous expansion of the idea of prison as a '*extrema ratio*'.<sup>7</sup>

At first reading, the strongly guaranteeing scope of the mentioned institute has been clear since as the positive outcome of the "testing" determines a real cause of extinction of crime. It is a procedural outcome that, by logic and necessity, follows the duty of the judge to fully evaluate the personality of the child in parallel to evaluate positive results by support programs with the right to suspend the trial for that purpose<sup>8</sup>.

A prerequisite of the suspension is to be found in the defendant's consent - on which it is necessary to proceed with the assessment of the personality and the acquisition of elements about the conditions and personal, family, social and environmental resources of the minor. Moreover, there is also no doubt that the judge, beyond the content of the statements made by the defendant, must have sufficient evidence not to consider the charge unfounded. The need for a preliminary confession is related to the psychological profiles of the accused to avoid that the probation could be considered for the defendant an escape system. Furthermore, it would not be possible to use the evidence whenever the conditions for the adoption of a decision on dismissal are met or there are grounds for not being punishable, or where the judicial pardon is applicable, or in the event that the accused is acquitted for "irrelevance of the fact"<sup>9</sup>.

The assessment of the above conditions is entrusted to the judge who has a wide discretion regarding the existence of the necessary degree of maturity of the minor, with the power to grant the measure, considering it legitimate and appropriate in relation to other procedural formulas, such as judicial forgiveness and acquittal for irrelevance of the fact,<sup>10</sup> considering as already happened and sufficient awareness by the child in relation to the crime<sup>11</sup>. The assessment of the judge must have as object not the abstract possibility that the maturation in the minor occurs,<sup>12</sup> but a probabilistic assessment on the formation of the subject and on the evolution of the personality towards socially adequate models.<sup>13</sup>

So, the judge will be able to exclude the testing for these reasons: 1) if the deviance appears intrinsically rooted in the minor; 2) in the hypothesis in which the environmental context in which he lives, is so degraded as not to allow his penitence; 3) if the circumstances of the offence and the person of the accused reveal, in any event, the

<sup>5</sup>Article 27 of the d.P.R. No. 448 of 22/09/1988, introduces in the criminal law an exception to the principle of mandatory prosecution, consisting in the power of the judge to pronounce a judgment of no need to proceed for irrelevance of the fact if they result in the tenuousness of the fact and the occasionality of the conduct and if the further course of the proceedings affects the educational needs of the child.

<sup>6</sup>The rule reads as follows: "The judge, after hearing the parties, may order that the trial be suspended by order when it considers that it is necessary to assess the personality of the minor at the end of the trial ordered pursuant to paragraph 2. The trial shall be suspended for a period not exceeding three years when proceeding for offences for which the life imprisonment or imprisonment of not less than 12 years; in other cases, for a period not exceeding one year».

<sup>7</sup>G. DI GENNARO, *Aspetti teorici e pratici del probation*, in *Quaderni di criminologia clinica*, 1990, 9, p. 323.

<sup>8</sup>F. PALOMBA, *Il sistema del processo penale*, *op. cit.*, p.7.

<sup>9</sup>Confirms the assumption, also in the judgment Cass. sez. I, 23 March 1990, in Cass. pen. 1990, 71; sez. IV, 9 July 2014, n.30559, *ibid.*, 2014, 3150 ss.; on this point, also Sect. I, 14 January 2005, n. 2907, *ibidem*, 2006, 9, 2897; sez. IV, 21 September 2007, n.38540, in Arch. giur. circol. e sinistri, 2008, 4, 305 e sez. I, 5 June 2000, n. 7385, in Arch. nuova proc. pen., 2000, 524 ss.

<sup>10</sup>Wanting to compare the two institutes, that of the cd. "judicial forgiveness", while sharing the scope and the final result of the extinction of the crime (but for lack of recidivism and not for positive outcome of the test), provides for its application of requirements much stricter than the "testing": it is necessary, in fact, that the child has not been sentenced to a custodial sentence for a crime and is required, moreover, the judge to formulate a positive judgment on the fact that the child will not commit new crimes.

<sup>11</sup>For an examination of the institute of the testing of juvenile defendants: N. TRIGGIANI, *La messa alla prova dell'imputato minore tra passato, presente e futuro. L'esperienza del Tribunale di Taranto* - Proceedings of the Conference, April 27, 2010, Bari, 2011, pp.1-160.

<sup>12</sup>Cass. Sez. I, 8 July 1999, n. 10962, in Cass. pen. 2000, 3117.

<sup>13</sup>Cass. Sez. II, 27 March 1998, n. 3213, in Giust. pen. 2000, III, 169.

extraneousness of the conduct deviating from the lifestyle of the child, to the point of not deeming appropriate the submission to the measure.

## 2. The extension of probation to adult defendants: the regulatory framework

The extension of probation to adult defendants is realized following the approval of l. 28 April 2014 n. 67 and provided, in Chapter II (art. 3 to 8), for supplies concerning the suspension of proceedings with testing, provisions not delegated to the Government and therefore applicable from 17 May 2014. The enactment of the present law has made several changes to the penal code, through new provisions of a substantive nature contained in art. 168 - *bis*, *ter* and *quater* c.p. and amendments to the criminal procedure code, with the provisions contained in art. 464 - *bis*, *ter*, *quater*, *quingies*, *sexies*, *septies*, *octies* and *novies* and in art. 657 c.p.p., (relating to the calculation of the probation period in the execution of the sentence), as well as the implementing, coordination and transitional rules of the same code (art 141-bis and b).

The institution, whose genesis reveals affinity with the homologous institution already consolidated in the context of the juvenile criminal trial, also associates in itself some characteristics of the probation to the social service and, in particular, public utility work, including any restorative and conciliatory requirements, even as conditions for granting the benefit to the provision of public utility work.<sup>14</sup>

Among the primary objectives of the institute, it is clear that a prompt definition of criminal proceedings that have as object crimes of lesser social alarm<sup>15</sup> leads to extinction of the crime, thus meeting the requirements of defining the same processes in reasonably short times<sup>16</sup>. In addition, the examination of paragraphs 2 and 3 of art. 168 *bis* of the Criminal Code reveals the new nature of the test, as an institution aimed at eliminating the harmful or dangerous consequences that arise from the crime and to ensure, where possible, the restoration of related damage.<sup>17</sup> As in the case of the application of the probation procedure for minor defendants, there are certain limits expressly indicated by law, including that relating to the seriousness of the crime and the consequential penalty published or that of the non-applicability of the benefit in cases where the same has already been granted; as regards subjective limits, admission to the benefits of the institution may not be granted in all cases where the applicant has been declared a professional delinquent, habitual or by tendency.

<sup>14</sup>For an examination of the institute under consideration, cf. G. AMATO, *L'impegno e servizi sociali e lavori di pubblica utilità*, in *Guida al diritto*, 2014, fasc. 17, p. 87 sqq.

<sup>15</sup>R. PICCIRILLO-P. SILVESTRI, Report no. III/07/2014, Office of the Supreme Court, Rome, 2014, where it is emphasized how the institute realizes A state renunciation to punitive power conditional on the success of a period of controlled and assisted trial, reconnecting with the Anglo-Saxon tradition of probation. More precisely, the one introduced by l. n.67/2014 is a judicial probation in the investigation phase, similar to the model adopted in the juvenile proceedings (art. 28 of the d.P.R. n. 448 of 1988 and art. 27 of the relative implementing rules, approved with d.lgs. n. 272 of 1989), in which the test precedes the delivery of a sentence of condemnation» and the differences that the institute has with respect to those existing in our legal system are highlighted.

<sup>16</sup>This is the well-known C.E.D.U. Sec. II, 8 January 2013 (Appeals no. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10 - Torreggiani and others c. Italy) with which the Court of Strasbourg has pronounced sentence of condemnation of Italy, ascertaining in the concrete case the violation of art. 3 ECHR and, at the same time, highlighted 1) the existence of structural problems, 2) the systemic nature of the violations of art. 3 ECHR 3) the obligation to put in place essential measures and actions to remedy it (within one year), calling on the State to make the widest possible use of alternative measures to detention and to direct criminal policy towards a reduction in the use of detention. For a timely and systematic examination of the profiles underlying the pronouncement in question, please refer to V. MANES, *Taricco, finale di partita*, in *Primato del diritto dell'Unione europea e controlimiti alla prova della "saga Taricco"*, Milano, Giuffrè, 2018, pp. 407 – 419; Id. *La Corte muove e, in tre mosse, dà scacco a "Taricco". Note minime all'ordinanza della Corte Costituzionale n. 24 del 2017*, in *dirittopenalecontemporaneo.it*, 2017, 13 febbraio 2017, pp. 1 – 14.

<sup>17</sup>L. BARTOLI, *Il trattamento nella sospensione del procedimento con messa alla prova*, in *Cass. pen.*, 2015, p.1755 ss.; M. COLAMUSSI, *La messa alla prova*, Padova, 2010; F. FIORENTIN, *Preclusioni e soglie di pena riducono la diffusione. (L. 28 aprile 2014 n. 67)*, in *Guida al diritto*, 2014, fasc. 21, p. 68 ss.; Id., *Rivoluzione copernicana per la giustizia riparativa, ibidem*, 2014, fasc.21, p.63 ss.; BARTOLI, R., *La sospensione del procedimento con messa alla prova: una goccia deflattiva nel mare del sovraffollamento? (Legge 28 aprile 2014, n. 67)*, in *Diritto penale e processo*, 2014, p. 659 ss. On this point, see also R. DE VITO, *La scommessa della messa alla prova dell'adulto*, in *Questione giustizia*, n.6, 2013, pp.9 ss.; it is also useful to recall the examination of F. VIGANÒ, *Sulla proposta legislativa in tema di sospensione del procedimento con messa alla prova*, in *Rivista italiana di diritto e procedura penale*, 2013, pp.1300 ss.

Profiles of differentiation emerge first in relation to the judgment of eligibility of the benefit that does not happen automatically, but as a result of a wide and accurate assessment of the suitability of the treatment program presented, the seriousness of the crime, the ability to commit crime of the accused and the likely prognosis of abstention from committing further crimes<sup>18</sup>. There are, then, differences of a purely procedural nature with regard to the timing of the relevant request that can be made before the judge of the preliminary hearing and the judge of the hearing, with the deadline set for the submissions of the parties (Art. 421 and 422 c.p.p.). The request, moreover, can be lodged before the judge for preliminary investigations also in the course of the investigation, being able the public prosecutor, even before the prosecution, to inform the interested party, if the conditions are met, who has the right to ask to be admitted to the test pursuant to art. 168 *bis* c.p.<sup>19</sup>

In relation to the treatment program, unlike the Institute for the Benefit of Minors, No. 67/2014 has also imposed compensation requirements, making the granting of the benefit conditional on the provision of public utility work, which is substantiated by unpaid benefits to the community, possibly weighted on the specific professional skills and working skills of the accused - which may be provided by the State or local authorities, as well as by health establishments, social, health and voluntary institutions. These requirements must be set out in the processing program which is drawn up in agreement with the External Criminal Execution Office of the Department of the Penitentiary Administration of the Ministry of Justice (U.e.p.e.), which assumes a fundamental role in the application phase of the institute, preparing, elaborating and implementing the treatment program and informing the judge on the progress of the test with final report, decisive for the judge, for a complete evaluation of the positive or negative test result.

### 3. The institute of Probation reviewed according to constitutional principles

The new conformation of the entire legal system to the Constitutional Charter also required a necessary activity of adaptation and systematic exegetical reviewing by the Council which offered a new interpretation of the guarantor of the procedural institutions intended for juvenile offenders, contributing to the reshaping of the entire juvenile jurisdiction and to the enactment of the corpus of regulations contained in d.P.R. n.448/1988. This is a radical interpretative innovation aimed at recognising the full effectiveness of the protection of the rights of the child; It has made it possible to lay the foundations for the establishment of juvenile justice, characterized by the child's status as a legal entity with special and specific guarantees and autonomous rights<sup>20</sup>. In fact, the constitutional provision contains a series of rules whose content is undoubtedly aimed at the direct or indirect protection of children's rights.

Systematic analysis is based on fundamental principles, on the recognition of the inviolable rights of man, which include the minor as a component of the social formations in which his personality takes place (art. 2), from the principle of equality which expressly prohibits any form of unequal treatment and/or inequality (art.3) which gives primary value and centrality to the person and to the need to protect the dignity and autonomy of the person constitutional principles which, by their form and substance, extend their effects to the minor. The legal framework of constitutional protection appears more detailed in the section dedicated to the family regulated in the Constitutional Charter by art.29 onwards, where the protection of a social training is recognized, just in compliance with the provisions of the aforementioned art.2. The constitutional dictate of which to' art. 29 of the Basic Charter highlights the centrality of the family considered to be the natural 'natural society' which constitutes the core of society; Article 30 Cost. provides that, in the event of parents' incapacity, the law must ensure that their duties are carried out and Art. 31 Cost. which commits the Republic to the protection of children and youth.

<sup>18</sup>In this sense, V. BOVE, *Messa alla prova per gli adulti: una prima lettura della l. 67/2014*, in *penalecontemporaneo.it*, 11 giugno 2014; G. ZACCARO, *La messa alla prova per adulti. Prime considerazioni*, in *Questione giustizia*, 2014.

<sup>19</sup>In this sense, art. 141 *bis* of Legislative Decree no. 28.07.1989 no. 271, introduced by art. 5 (Introduction of Chapter X-*bis* of Title I of the Implementing, Coordinating and Transitional Rules of the Criminal Procedure Code) of L. 28.04.2014 nr. 67 under consideration: art. 141 *bis* (Public Prosecutor's Notice for the application for admission to the trial). "The public prosecutor, even before prosecuting, may inform the person concerned, if the conditions are met, that he or she may request to be admitted to the trial, in accordance with Article 168-bis of the Penal Code, and that the positive result of the test extinguishes the crime».

<sup>20</sup>Among the authors who share this assumption, F. BRICOLA, *Teoria generale del reato*, in *Nuovo Digesto italiano*, XIX,1974, pp. 18 ss.; S. DI NUOVO – G. GRASSO, *Diritto e procedura penale minorile, profili giuridici, psicologici o sociali*, Milano, 2005.

These principles are the basis of the numerous provisions of the law which require every decision to take place "in the best interests of the child", according to the widespread guidance offered by the Constitutional Court<sup>21</sup>. The incipit offered by the constitutional jurisprudence was one of the reasons that led to the provision of a Tribunal for minors, a specialized judicial body which is explicitly recognized as constitutional protection<sup>22</sup>. Similarly, in terms of substantive criminal law and juvenile procedural law, the same constitutional provisions that protect the rights of freedom (art.13), the exercise of the right to judicial protection and defense (art.24), the personality of criminal liability (art.27) and the exercise of the judicial function (Articles 111 to 112) have gradually begun to measure themselves, more and more incessantly, with the provisions that protect children and youth.

Relatively to children and the family, and in all cases where decisions are to be taken on the protection of the rights and the personal condition of the child, the proceedings are excluded from the parties' availability and are left to the instigation of their own motion, regardless of the claims of the same parties, just as the judge is given the power not only to admit evidence, but also to pursue sources of evidence.

The constitutional framework has been and continues to be of fundamental importance for the construction of the juvenile criminal justice system and, together with constitutional jurisprudence, has been a constant stimulus for the legislator's intervention in the complex and infinite process of implementing constitutional precepts. The Judge of the laws, in fact, has always expressed reservations towards the indistinct application of prison sentences against the minor offender, stating that the punitive claim must be reversed in the face of the need for the social recovery of the child and that the use of the prison institution must always be considered as a *extrema ratio*<sup>23</sup>. As expressly acknowledged by the Constitutional Court in its Decision No. 125 of 1995, this probation plays a decisive role in the context of juvenile criminal proceedings, for its close adherence to the essential purpose of recovery of the child through its re-education and social reintegration, including through the mitigation of the measure of offensive process<sup>24</sup>. As noted above, the aims underlying the extension of the Institute to the defendants of legal age, based on restorative and re-socializing purposes, diverge to a large extent, along with clear intentions of deflation and reduction of detention.

Based on these findings, it has been need verify the compatibility of the new institute with the fundamental principles of the current penal system (always of constitutional origin), such as the principle of the presumption of innocence (art. 27, co. 2, cost.)the protection of the adversarial party and the right of defense (Arts. 24 co. 2, and 111, co. 2 and 5, cost)<sup>25</sup>. It has been pointed out that, in order not to incur a violation of the presumption of innocence, it is not possible to consider the persons to whom the suspension is granted with the probation. In parallel, it must be excluded that expressions such as «responsibility of the accused for the crime<sup>26</sup> ascribed to him» or the «ascertainment

<sup>21</sup>For all see, Corte Cost. 6 aprile 1965 n. 25; 29 January 1981, n. 16.

<sup>22</sup>A. VACCARO, *Il processo minorile: garanzie per i diritti dei minori e degli adulti*, Presentation at the 22nd Conference of the Italian Association of Magistrates for Minors and the Family, "Genitori, figli e giustizia: autonomia della famiglia e pubblico interesse", Parma, 13 e 15 novembre 2003, in [minorrefamiglia.org](http://minorrefamiglia.org).

<sup>23</sup>These are the decisions of the Court Cost. n., 11 April 1978 n.46, 5 April 1995 n. 125 and 9 April 1997 n. 109. In particular, with the judgment n.125/1995 the Court faced the question of constitutional legitimacy of art. 28 co. 4 del d.P.R. 448/1988 «in the part in which it excludes that it is possible to order the suspension of the trial and put to the test in the case the accused has requested a shortened judgment following an immediate order ordered at the request of the public prosecutor». The Judges of the Council stated that "The rule, in its objective meaning, prevents, therefore, the judge to take the measure of suspension of the trial and probation if the minor defendant formulates -- for what is concerned here -- request for summary judgment: comes, that is, sanctioned an automatic foreclosure of the institution in question in the event that the child chooses to access the said special rite». On the basis of these assumptions, the Court continues: 'the rule appears to be vitiated by unreasonableness, since it is not clear why the child, who has been admitted to the summary judgment, must then be denied to ask for evidence, with the consequent possible benefit of the declarative judgment of the extinction of the crime. Moreover, there is certainly no sort of structural, ontological incompatibility between the institution in question and the shortened rite, which is carried out in accordance with the rules laid down for the preliminary hearing. In addition, the alleged foreclosure also contrasts with the articles. The second paragraph of Article 31 and Article 24 of the Constitution, in so far as it prevents the entry of a particularly significant measure... under the aspect of re-education and having substantial rewards».

<sup>24</sup>It is Court Cost. 16 March 1992 n.125; 22 May 1987 n.206, and 15 July 1983 n.222.

<sup>25</sup>M. MONTAGNA, *Sospensione del procedimento con messa alla prova e attivazione del rito*, in *Le nuove norme sulla giustizia penale. Liberazione anticipata, stupefacenti, traduzione degli atti, irreperibili, messa alla prova, deleghe in tema di pene detentive non carcerarie e di riforma del sistema sanzionatorio*, by C. CONTI – A. MARANDOLA – G. VARRASO, Padova, 2014, pp. 370 ss.

<sup>26</sup>C. CESARI, *La sospensione del processo con messa alla prova: sulla falsariga dell'esperienza minorile, nasce il probation processuale per gli imputati adulti*, in *Legislazione penale*, 2014, pp. 515 ss.

of the criminal responsibility of the accused, can be considered elements compatible with the institution in question»<sup>27</sup>.

Comparatively to the declaratory of extinction of the crime" provided for by art. 464 - *septies* co. 1 c.p., as a consequence of the positive outcome of the test, it is highlighted that it does not always presuppose an investigation of the crime, as evidenced in doctrine<sup>28</sup> and in some rulings by constitutional jurisprudence<sup>29</sup>. Moreover, the absence of correlation with the assessment of criminal liability is also found in the characteristics of the treatment program that cannot be assimilated to a sanctioning measure, either because of the importance given to the re-socializing activities envisaged in it, or because it must be shared in detail by the applicant who «does not tend to suffer the process or to defend itself from the process but, on the contrary, uses its potential, in view of a favorable and less painful exit from the judicial circuit»<sup>30</sup>. In this context, it has been postulated that the doubts about a possible conflict between the present procedural institution and the above-mentioned principle of presumption of innocence can be considered to have been overcome.

With regard, then, to the contrast with the principles of the protection of the adversarial party (art. 111 Cost) and the right of defense (art. 24 Cost.) it should be noted, first, that the order of the judge to suspend the trial and admission to the trial, is in full compliance with the principle of the adversarial between the parties, since rendered «...after hearing the parties and the offended person...», as required by art. 464-*quater*, co. 1, c.p.p. On the other hand, some doubts of constitutional legitimacy have been hypothesized in the statutes of art. 464-*quinquies*, co. 3, c.p.p. which states that «during the suspension of the proceedings with trial, the judge, after hearing the accused and the public prosecutor, may modify by order the original prescriptions».

#### 4. The Probation and judgements of the Italian Constitutional Court

The gradual affirmation of the test also in the processes to load of the defendants coming of age has determined the natural arising of problematic applicative of the institute and, The Constitutional Court has recently been asked to decide on a number of questions of constitutional legitimacy, primarily relating to the interpretation of the transitional regime. Of particular importance, then, the reading offered by the Constitutional Court with the judgment of 21 July 2016, n. 201 that determined the constitutional illegitimacy of art. 460, co. 1, lett. e) c.p.p., for contrast with art. 24 Costs., «in the part in which it does not provide that the penal decree of conviction contains the notice of the faculty of the accused to ask through the opposition for the suspension of the procedure with probation»<sup>31</sup>.

In support of the decision, the Court, taking up the reasoned part of the aforementioned decision of 2015, has highlighted that the institution represents a new special procedure, alternative to the trial, in relation to which in co. 2 of art.464 *bis* c.p.p Since as in the proceedings by decree, the request of Probation must be submitted with the act of opposition and unlike what happens for the other special procedures, l'art. 460, co. 1 c.p.p. does not provide the warning to the accused who has the right to ask the probation during the opposition phase, in order to allow him to determine correctly in his defensive choices.

In this sense, the lack of provision would result in a clear violation of the right to defense, being able to determine an irreparable prejudice. Of particular importance is the judgment n.231 of 2018 made by the Constitutional Court whose outcome determined the declaration of constitutional illegitimacy of art. 24 and 25 of the Single Text on criminal records (d.P.R. 14.11.2002, n.313), in so far as they provided that the 'general' certificate and

<sup>27</sup>G. TABASCO, *La sospensione del procedimento con messa alla prova degli imputati adulti*, in *Archivio penale*, n. 1, 2015, pp. 15 ss.

<sup>28</sup>As he states, with regard to the extinction of the crime due to amnesty, F. CORDERO, *Contributo allo studio dell'amnistia nel processo*, Milano, 1957, pp.40 sqq. «there has been a legal event having substantial effect, the effect of which would have been to extinguish the punitive duty if the latter had actually arisen; the judgment, in short, is not carried out on a situation of which the existence has been ascertained in the only possible way, and that is through the process, but on the hypothesis that that data exists».

<sup>29</sup>The reference is to the Court judgment, 14 January 2015 n. 49, according to which, with specific regard to the hypothesis of the «ruling that ascertains the prescription...deciding whether the assessment (of liability) there was, or not, is a matter of fact» without necessarily being implicated by the corresponding declaration of extinction of the crime.

<sup>30</sup>A. SCALFATI, *La debole convergenza di scopi nella deflazione promossa dalla legge n. 67/2014*, in *La deflazione giudiziaria. Messa alla prova degli adulti e proscioglimento per tenuità del fatto*, N. TRIGGIANI, (a cura di), Torino, 2014, pp. 9 ss.

<sup>31</sup>It is useful to take the cue from the timely examination carried out by A. SCALFATI, *Decreto di citazione pretorile e mancato avviso circa le scelte alternative al dibattimento*, in *Giur. cost.*, 1995, pp.4233 ss.

the 'penal' certificate should be accompanied by of the records requested by the interested party were given the inscriptions of the order of suspension of the proceedings with the trial (art. 464-*quarter* c.p.p.) and of the judgment with which the judge, in case of a positive outcome of the trial, declared the extinction of the crime (Art. 464-*septies* c.p.p.)<sup>32</sup>.

Even in the more recent interventions of the Constitutional Court, the institute of probation has continued to be the object of interest. It is the case to recall<sup>33</sup> the judgment no. 68 of 2019 with which the Constitutional Court declared unfounded questions of constitutional legitimacy of art. 29, d.P.R. 22 September 1988, n. 448 (Approval of the provisions on criminal proceedings against juvenile defendants) and art. 657-*bis* c.p.p., raised by the Court of Cassation, with reference to art. 3, 27 and 31 Costs., in so far as those provisions do not provide that, in the event of a negative result of the trial of a minor defendant, the judge determines the penalty to be executed taking into account the consistency and duration of the limitations suffered and the behavior of the minor during the period of submission to testing. On the occasion, the Court of First Instance, pointing out, first, a discrepancy between the discipline of the testing of juvenile defendants and that of the homologous institute provided for adults with regard to the determination of the penalty in case of negative outcome of the test, stressed the inconsistency of the existing rules with regard to the constitutional parameters for penalties, which are generally based on the principles of proportionality and individualization (Articles 3 and 27 of the EC Treaty) and, in particular, on juvenile offenders, the principle of the primary educational interest of the minor (as can be deduced from art. 31 Cost.: v. judgment n. 222 of 1983, cit. nt. 21). On the basis of the remittance order, the need to grant the judge a discretionary power to determine the residual penalty to be atoned for; regulatory integration operation possible through a pronouncement of an additive nature by the Constitutional Court

The refusal formulated starts from the necessary and clear distinction between the testing for adults and that for minors, constituting the first, a real «sanctioning treatment», even if anticipated with respect to the ascertainment of the responsibility of the accused and functional to the achievement of the re-socialization of the subject (as already noted in the pronouncement n.91 of 2018), the other, instead, aimed at stimulating an educational path of the minor, prodromal to an evolution of his personality. For these reasons, the Court found that the supposed violations of the principles of proportionality and individualization of the penalty (art. 3 and 27 Cost.) and, while considering the superior needs of protection of the minor's personality underlying art. 31 Cost., the lack of foresight 'in case of failure of the putting to the test of subject minor of a mechanism of decomposition of a part of the sentence eventually inflicted in result of the trial has not been considered in clear violation of the constitutional precepts.

The intervention of the Court was also solicited with reference to art. 464-*bis*, co. 2, and 521, co. 1, c.p.p. for the alleged violation of Arts. 3 and 24, co. 2, Cost. ; the questions of constitutional legitimacy raised and decided by judgment no. 131 of 2019 concern that part of the above-mentioned rule which does not provide for the possibility of ordering the suspension of the procedure with probation if, following the judgment, the fact of crime is, at the request of the same defendant, otherwise qualified by the judge so as to fall within one of those covered by co. 1 of art. 168-*bis* c.p.p.<sup>34</sup>. On the basis of the remittance order, the circumstance according to which the contested provisions preclude the judge from admitting the accused to the suspension of the trial with the probation in the event that the relative request of the same accused has been rejected, by reason of the incompatibility of the benefit with the limits of penalty provided by the offending law, incompatibility then failed as a result of the different classification of the fact made by the court pursuant to art. 521, co. 1, c.p., following the summary judgment.

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<sup>32</sup>The consistency of such a regulatory framework with certain fundamental principles of our legal system had been questioned by several parties: four ordinances with which - proposing the violation of Articles 3 and 27, co. III, Const. - as many questions of constitutional legitimacy had been raised. This, however, had not left the legislator indifferent, who last October intervened on the matter with the stated aim of "overcoming the proposed doubts of unconstitutionality". With Legislative Decree 2 October 2018, n. 122 - which made significant changes in the fabric of the t.u.c.g. (single text on the criminal record) - it was in fact provided that the certificate of the criminal record requested by the interested party must not include the registrations relating to the measures that order the suspension of the procedure with testing and the sentences that, in case of outcome positive, declare the crime extinct. However, in order to "grant a reasonable time frame for the design and implementation of the technical adjustments" required by the reform, the legislator has foreseen that the provisions of the aforementioned decree will become effective from October 2019. Precisely for this reason, the subsequent change was irrelevant with respect to the questions of constitutional legitimacy already submitted to the scrutiny of the judge of the laws, which - except for one, considered irrelevant - were declared founded. In short: the legislator has centered both the diagnosis and the therapy, but has made a mistake in the timing, thus making the help of the judge of the laws necessary.

<sup>33</sup> Cf., Court cost. 20 febbraio 2019 n. 68.

<sup>34</sup> Court cost. 3 April 2019 n. 131.

On the point, however, the *Consulta* noted that, if the appellate judge can admit the defendant to the suspension of the trial with probation, such possibility must be granted to the same court of first instance where the change of indictment was applied.

In that regard, the right of defense is not infringed, since the suspension of the trial by the Court of First Instance constitutes a genuine alternative rite<sup>35</sup> and constitutes one of the most significant expressions of the right of defense.<sup>36</sup> The Constitutional Court, with the judgment n.82 of 2019, then declared the constitutional illegitimacy of art. 517 c.p., for contrast with art. 3 and 24 co. 2 Costs., in the part in which it does not provide the right of the accused to ask the judge of the hearing the application of the penalty, pursuant to art. 444 c.p.p., with regard to the concurrent crime that emerged during the trial and that is object of new contestation».<sup>37</sup>

It has emerged in some argumentative passages, the necessity of a greater adaptation of the Code in favor of a more advanced protection of the right of defense, the result of a long journey marked by numerous landings on the relationship between the new disputes and the alternative rites. The Constitutional Court has reached the conclusion that the possibility of requesting the alternative rites is strongly related to the right of defense and, in particular, the right to choose the most congenial procedural model to the exercise of that right. The fate of those rules which still make the request for an alternative rite inadmissible after the new contestation, all subject to a declaration of constitutional illegitimacy, appears, therefore, already marked.

Following the arrival of the Court, there are no reasons to justify a restriction of the right of access of the accused to an alternative rite after the modification of the charge pursuant to art. 516 c.p.p. or the additional contestation made pursuant to art. 517 c.p.p. and this in the light of both the centrality to the right of defense in relation to the indictment modified during the trial (determining the contribution of the judgment n. 333 of 2009), and of the overcoming of the distinction between new contests “physiological” and “pathological” in addition to overcoming the criterion of procedural economy and litigation deflation to exclude the grafting of an alternative sequence rewards them after the new claims emerged from the judgment n. 141 of 2018<sup>38</sup>.

The Court states, in the reasoned party’s conclusions, that in the light of the principles expressed in the above-mentioned judgment no. 206 of 2017, including the extension of the possibility to apply for a plea after the dispute over the physiological. of the different fact, the acceptance of the question now appeared to be a 'due act'. Finally, according to the Court, "'different facts', 'linked crime', which have emerged for the first time in the case, complement procedural occurrences which, in terms of access to alternative rites, represent entirely similar situations. The pronouncement seems innovative - in the persistent silence of the legislator - emphasizing the need to give effectiveness to the right of the accused to opt for an alternative rite after each new litigation.

In the case of the judgment no. 131 of 2019, the Constitutional Court rejected the questions of constitutional legitimacy of art. 464-*bis*, co. 2, and 521 co. 1, c.p.p., raised with reference to Arts. 3 and 24, co. 2, Cost. whereas it is not possible to order a stay of proceedings under the probation procedure; otherwise qualified by the judge so as to fall within one of those referred to in the first paragraph of art. 168-*bis*<sup>39</sup>.

Among the reasons put forward in support of the above-mentioned complaint, the referring court found that the contested provisions precluded the court from admitting the defendant to the suspension of the trial with the probation in the event that the relevant claim of same defendant, by reason of the incompatibility of the benefit with the limits of penalty provided by the offending law, incompatibility then failed as a result of the different classification of the fact made by the court pursuant to art. 521, co. 1, c.p., following the summary judgment. The Court pointed out, however, that that exegetical reading of the contested provisions was not the only plausible one, since the case law of legality had, first of all, repeatedly held that, in the event of a request for suspension of the trial under review, the judge is required to verify the correctness of the legal classification attributed to the fact by the accusation and, if necessary, to modify it, if he considers it incorrect, drawing the consequences from the point of view of the recurrence of the benefit in question<sup>40</sup>.

<sup>35</sup> Cf., Court cost. 21 February 2018 n. 91, and 8 June 2005 n. 240.

<sup>36</sup> In this sense, the decisions of 21 March 2018 n.141; 22nd October 2012 n.237, 13th May 2004 n.148.

<sup>37</sup> See Constitutional Court February 20, 2019 n. 82.

<sup>38</sup> From sentences of 22 October 2012 n. 237; 1° December 2014 n. 273; 5 July 2017 n. 206, and 21 March 2018 n.141.

<sup>39</sup> Corte cost. 3 April 2019 n. 131.

<sup>40</sup> Cass. Section IV, judgments 8 May 2018, n. 36752 and 20 October 2015, n. 4527.



Likewise, the Supreme Court has held that the celebration of the judgment of first instance in the form of the abbreviated rite does not preclude the defendant from objecting, in the appeal, the unjustified rejection, by the judge of first care, the request for suspension with testing<sup>41</sup>. The Court then proceeded with the analytical reconstruction of the case-law on legality, stating that there had been no other rulings on the existence of that exclusion, on the basis of the c.d. alternatively between the benefit of the test and the shortened rite; in the sense that, when the accused has obtained the rejection of the request for suspension of the trial with probation, opting subsequently for the shortened judgment, he could no longer propose the same first request, according to the old *brocardo*: *“Electa una via, non datur recursus ad alteram”*<sup>42</sup>. On the point, other orientation had replied that the application for a shortened judgment following the rejection of the main application for the suspension of the trial with the test after the requalification of the disputed fact must necessarily be understood as having been submitted with reserve; It is a reservation that gives the right of appeal against refusal of the benefit already requested in the main which, as such, is not intended as implicitly waived at the time of the request of the shortened rite<sup>43</sup>. Following the exegetical view more protective developed by the Supreme Court, the appellate judge lodged with the appeal against a sentence rendered in the abbreviated judgment could admit the accused to the suspension of the trial with probation, if it finds that the court of first instance’s rejection of that request is unfounded; therefore, the same power could be granted to the same court of first instance, in the cases in which it considers illogical in its previous refusal, following the legal redevelopment of the disputed fact (faculty granted by art. 521, co. 1, c.p.p.).

Beyond the obvious reasons of procedural economy, such an exegetical reading would not find any obstacle in the literal wording of the contested provisions, ensuring a hermeneutic result compatible with the constitutional parameters invoked by the national court. How much, finally, to the invoked parameter of which referred to in art. 24 Const., in accordance with the original framework of the institution in question as a real alternative rite<sup>44</sup> that is one of the most effective ways of exercising the right of defense<sup>45</sup>, the Court has resorted to the declaration of constitutional illegitimacy with reference to several provisions of the Rite Code in so far as they did not allow the request for an alternative rite following a new challenge, thus preserve the exercise of one’s right of defense regarding the choice of the rite<sup>46</sup>.

The Court therefore stated that the prejudice to the right of defense and to the principle of equality does not appear to be unequivocally originated by the provisions criticized by the relevant body, if interpreted in such a way as to allow, in particular, to the judge to admit the accused to the alternative rite that he had at his time requested within the terms of the law and to guarantee him the sanctioning benefits associated with that rite. The fact that emerges from the frequent interventions of the Constitutional Court is the undoubted complexity that has characterized the graft of the institution under consideration in the procedural system, so it is not surprising that even in recent months, new questions of constitutional legitimacy have arisen. It is the case of the judgment of 11 February 2020, n. 14, with which the constitutional illegitimacy of art. 516 c.p.p. in the part in which, following the modification of the original imputation, does not provide the right of the accused to request the trial judge to suspend the proceedings with put to the test, for contrast with art. 3 and 24 second subparagraphs Cost. The declaration of unconstitutionality, with reference to both constitutional parameters, can be considered a natural consequence of the application of principles now consolidated in the jurisprudence of the Court, set out in the above-mentioned judgments (for all nn. 92/2019 and 141/2018) which had in turn declared the illegitimacy of art. 516 and 517 c.p.p. in the part in which they did not foresee the faculty of the accused to be admitted to a special rite to content reward as a result of modifications of the imputation in course of preliminary investigation.

<sup>41</sup> Cass. IV sez., sentence 18 September 2018, n. 44888; Id. III sez., sentence 15 February 2018, n. 29622.

<sup>42</sup>Cass. IV sez. 3 July 2018, n. 42469; VI sez., 28 March 2017, n. 22545; III sez. 19 October 2016 2017, n. 4184.

<sup>43</sup>Cass., n. 44888/2018 e n. 29622/2018.

<sup>44</sup>The new institute has substantial effects, because it gives rise to the extinction of the crime, but is characterized by an intrinsic procedural dimension, as it consists of a new special procedure, alternative to the judgment, during which the judge decides with an order on the request suspension of the trial with trial. On this point, the aforementioned Court cost. n. 240 of 2015 and lastly, no. 91 of 2018.

<sup>45</sup>*Ex plurimis*, Court cost. March 21, 2018 No. 141; October 22, 2012 n. 237 and 13 May 2004 n.148.

<sup>46</sup> On this point, in particular, Court cost. June 22, 1994 n. 265 (in relation to the plea agreement) and 14 December 2009 n. 333 (in relation to the abbreviated rite).

In support of the above decision, partly reasoned, it was argued that such foreclosures constitute a violation of Article 24 Cost., since the choice of alternative rites, represents one of the most qualifying expressions of its right of defense; further profile of unconstitutionality is also manifested in relation to art. 3 Cost., resulting in an unreasonable disparity of treatment in access to special rites.

The need to ensure the effectiveness of the right of defense must justify, as the Court has stated, the progressive extension of the institution to every single hypothesis of new contestation, regardless of the fact that it relates to facts already arising from the investigative acts and therefore the new wording of the imputation may be found *by the defendant*. To judge otherwise would result in the compression of the inviolable right of defense in every state of jurisdiction. The occasion is useful to recall once again the nature (also) of the trial as a special rite alternative to judgment, Premise that allows the Court to rule that the faculty of the defendant to submit the application for admission to trial during the trial determines the consequent declaration of partial illegitimacy of art. 517 c.p.p., dragging, like these principles, the structurally identical hypothesis of modification of the original imputation, pursuant to art. 516 c.p.p.<sup>47</sup>.

For the sake of completeness, it is necessary to include in the now abundant jurisprudence of the Constitutional Court in the matter of suspension of criminal proceedings with testing, the pronouncement n.19 of 2020 concerning the question of constitutional legitimacy of art. 456, paragraph 2, c.p., in relation to art. 3 and 24 Cost., in the part in which it does not provide that the decree of immediate judgment must contain the warning of the ability of the defendant to request the suspension of proceedings with probation.

Among the reasons underlying the complaint, first of all, the unreasonableness of the difference in treatment created by the contested provision between the regime guarantor of the power of the accused to request the summary judgment or the application of the penalty pursuant to art. 444 cod. proc. pen., of which notice must be given under penalty of nullity in the decree of immediate judgment, and the different treatment reserved for the right to request the suspension of the proceedings with testing, pursuant to art. 464-*bis* cod. proc. pen. for which the contested provision did not contain any obligation to give notice.

The absence of the obligation of notice, in the decree of immediate judgment, of the further ability of the defendant to request the suspension of the proceedings with probation, would also result in the violation of the right of defense, because of the risk for the accused to incur in terms of forfeiture arising from the combined provision of articles 464-*bis*, paragraph 2, and 458, paragraph 1, cod. proc. pen. with the consequent irremediable loss of the faculty to request an alternative rite.

The Court, reiterating once again the twofold nature of the institution both substantial (extinction of the crime), both procedural, (generating a special procedure, alternative to judgment)The Court of First Instance referred to the constitutional jurisprudence which framed the request for alternative rites as one of the most significant expressions of the right of defense<sup>48</sup>. It follows that, in the opinion of the Council, when the period within which to ask for alternative rites is anticipated with respect to the trial phase, the lack or insufficiency of the relative warning may result in the irremediable loss of the ability to access them, but the omitted notice of his faculties the compression of the right of defense<sup>49</sup>.

These assumptions applied with reference to the discipline outlined by art. 456, paragraph 2, c.p.p., require the declaration of illegitimacy constitutionally of the rule in the part in which it does not provide that the decree that provides for immediate judgment contains the warning of the ability of the defendant to request the suspension of proceedings test and omission of the notice under consideration, can only supplement a general nullity pursuant to art. 178, paragraph 1, letter c), c.p.p.

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<sup>47</sup> Principle already introduced from the cited sent. 141 of 2018 (in nt. 57), for the case of contestation of new aggravating circumstances.

<sup>48</sup>The reference is to the judgments of the Court cost. 3 April 2019, 131; 21 February 2018 n. 91; 6 July 2016 n. 201 e n. 7 October 2015 n.240. On the twofold nature of the institute, cf. the judgments Court cost. 13 May 2004 n.148 and 6 July 2016 n. 201 and 22 October 2012 n. 237; in the same sense, 7 July 2004 n.219 and 23 November 1995 n. 497.

<sup>49</sup>Cf. the decisions cited above. From an examination of the jurisprudence of legitimacy, it emerges that the nullity due to the omission of the notice for the testing is already assessed after the additive judgment concerning the penal decree of condemnation. does not present an absolute character, so that it remains cured or in any case not deductible *in the* cases provided for in Articles. 180 and 182 of the ritual code. For all, cf. Cass., Sez. IV, 21 February 2017, n. 21897, in C.E.D Cass., n. 269943 and sez. IV, 14 February 2019, n. 17659, ivi, n. 276085.

## 5. Conclusions and Perspective Futures

The examination of the legislative aspects and the constitutional profiles of the two institutions of the process suspension with the testing of minors and adults, highlights that there are major divergences between them. The differentiation profiles are also found in the field of application and procedure since as the suspension of the trial with testing can be requested for minors after the exercise of criminal proceedings and in the absence of specific requirements whereas for adults the probation could be applied before criminal trial.

Moreover, the probation for underage defendants is based on the defense of the child, in full compliance with the constitutional precepts aimed at the protection of children and youth; the corresponding institution operating in the context of legal proceedings against persons of legal age does not aim to provide direct and specific protection to the accused persons, but rather the pursuit of interests of a primary procedural nature.

As regards the statistical data, there has been a significant and steady increase in the use of adult testing in recent years; the budget can be considered numerically favorable considering the time elapsed since the entry into force of l. n.67/2014, if we consider the numerical gap between the 511 cases in 2014, year in which the Testing Act came into force and the 39,350 cases taken over in 2019<sup>50</sup>. One of the aims pursued by the legislator, as mentioned above, is that of offering an alternative reintegration path to those subject to a trial for crimes of lesser social alarm and that of pursuing a deflationary function of criminal proceedings, in line with other recent reforms of the Code of Rite (think of d.lgs. n.28 of 2015 that introduced the institution of not criminality of the fact for particular tenuousness of damage); the institute has entered into a process of identifying the use of prison as a "extrema ratio", characterized by the search for new initiatives aimed at accompanying the defendant in the social context, without neglecting the need to strengthen the reparative dimension of criminal justice. The institution of the test, in fact, represents the sanction of community", which more than any other introduces the concept of "restorative justice", with a particular attention to the relationship with the victim of the crime<sup>51</sup>.

Among the main criticisms, first of all, that of the uneven use of the measure and the lack of an offer, not uniform, for the performance of public works in the national territory; There is also a procedural lack of uniformity in the question of the time required for admission to the institution<sup>52</sup>. With regard to the initiatives aimed at increasing and facilitating the use of the institution in question, it is necessary to highlight the stipulation of National Conventions and Protocols of Understanding which can be implemented immediately on the territory, initiatives aimed at modernising and bringing the Italian penal and prison system closer to the highest European and international standards. Most of these agreements were signed by the Presidents of the Tribunal, the Council of the Bar, the Criminal Chamber and the Director of the External Criminal Execution Office. In order to enhance the

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<sup>50</sup>According to recent ministerial data, the increase in cases of suspension of proceedings is particularly important, rising from 511 in 2014 to 9,690 in 2015, 19,187 in 2016 and 23,492 in 2017. The increase in the number of measurements carried out from 2015 to 2017 was 142%. The most recent update of the data processed by the Department of Juvenile and Community Justice speaks of 18,214 people in charge for testing (as of January 15, 2020), with a clear male presence: 15,339 men and 2,875 women. While out of a total of 8,331 people condemned to public works, 7,460 are men and 871 women. The conventions promoted by the Department both for the performance of the work of public utility by the defendants I put to the test I. and of the condemned to the works of public utility, As of December 31, 2019, there were 7,255 with a geographical distribution that sees northern Italy lead with 47% of the total, followed by the center (28%) and the south (25%). Restorative justice is a paradigm that involves the victim, the offender and the community in the search for solutions to the effects of conflict generated by crime, in order to promote the repair of damage, reconciliation between the parties and strengthening the sense of collective security. On the theme, M. COLAMUSSI, *Adulti messi alla prova seguendo il parametro della giustizia riparativa*, in *Processo penale e giustizia*, 2012, fasc. 6, p. 127 ss.; *Rivoluzione copernicana per la giustizia riparativa*, in *Guida al diritto*, 2014, fasc. 21, p.63 ss.

<sup>51</sup>According to recent ministerial data, the increase in cases of suspension of proceedings is particularly important, rising from 511 in 2014 to 9,690 in 2015, 19,187 in 2016 and 23,492 in 2017. The increase in the number of measurements carried out from 2015 to 2017 was 142%. The most recent update of the data processed by the Department of Juvenile and Community Justice speaks of 18,214 people in charge for testing (as of January 15, 2020), with a clear male presence: 15,339 men and 2,875 women. While out of a total of 8,331 people condemned to public works, 7,460 are men and 871 women. The conventions promoted by the Department both for the performance of the work of public utility by the defendants I put to the test I. and of the condemned to the works of public utility, As of December 31, 2019, there were 7,255 with a geographical distribution that sees northern Italy lead with 47% of the total, followed by the center (28%) and the south (25%).

<sup>52</sup>For an examination of the critical aspects of the reform, v. A. MARANDOLA, *La messa alla prova dell'imputato adulto: ombre e luci di un nuovo rito speciale per una diversa politica criminale*, in *Diritto penale e processo*, 2014, p.675 ff.

demand for testing from the preliminary investigation stage, in some cases, in addition to these bodies, The Offices of the Public Prosecutors were involved and this in order to deploy to the maximum degree the deflationary effectiveness and to start in a short time the suspect to its repair path.

So, to the comforting numerical data it has been tried to accompany the qualitative data of the measure of the putting to the test, placing however the attention to the prevention of the recidivism and the real strengthening of the social security. Among the objectives, that of elevating the institution of the test with respect to ordinary procedural rites, allowing it to overcome the current residual function and becoming a valid alternative to the process and punishment, increasingly suited to the canons of the European "restorative justice".

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