

# Restorative Justice in the Penal Reform in France: New Rights for the Victims and Perpetrators of Criminal Offenses<sup>1</sup>

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Reinvented in the mid-1970s in the Anglophone countries (Zehr 1990, 2012), restorative justice progressively developed on the old continent from the following decade, in a more or less pronounced manner. Despite scientifically proven promises (Cario 2010), it strangely took time to become established in France, in the severe times of crisis that the country's penal justice system was (whatever some may say) experiencing. Eagerly awaited by professionals in the sector (Cario 2007; Inavem 2014), law no. 2014-896 of August 15, 2014, on the individualization of sentences and on increasing the effectiveness of penal sanctions, which developed based on the work by the consensus conference on the prevention of recidivism (Tulkens 2013; Cario 2013a, 2013b), provided new rights for the victims and perpetrators of penal offenses (Cario 2013a, 2013b). Thanks to the new article 10-1 of France's Code of Criminal Procedure (*Code de procédure pénale*, hereafter referenced as C.pr.pén), participation in a restorative measure can be proposed to the victims and perpetrators of crimes, "in any criminal procedure and at all stages of the procedure." This creation is symbolically strong, due to the insertion of this article under subtitle II, "Restorative Justice," within the preliminary title of Book 1 of the Code of Criminal Procedure.

Restorative justice directly addresses the victims and perpetrators of offenses and their significant others. It aims to give them an active role in reducing the personal, family, cultural, and wider social repercussions of the crime. Over the course of more than 40 years, the restorative justice measures have become increasingly diverse (Cario and Mbanzoulou 2010). They meet strict protocols that are designed and validated by methodically rigorous evaluations (Shapland, Robinson, and Sorsby 2011; Latimer, Dowden, and Muise 2011; Cario 2013a, 2013b; Strang et al. 2013). In this way, they guarantee respect and safety for all the participants.<sup>2</sup> Implemented as part of a dynamic process, they require the voluntary commitment of all those who believe themselves to be affected by the criminal conflict. The aim is to negotiate the best solutions for each party concerned, together, via active participation, in the presence

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<sup>2</sup> IFJR, Code de déontologie de l'IFJR pour la mise en œuvre de mesures de Justice restaurative en matière pénale, July 2014 (IFJR deontological code). [justiceresaurative.org/actualites\\_2014-07-22.html](http://justiceresaurative.org/actualites_2014-07-22.html).

and under the supervision of a “third-party justice,” potentially with the assistance of a “psychological and/or social third party.” By giving the stakeholders responsibility, the process attempts to restore all of them to a wider social harmony (Cario 2007).<sup>3</sup>

The law of August 15, 2014 was a major step forward in the domain of the restorative justice in France, helping to consolidate a new model of criminal justice (Cario 2007). Nevertheless, although the text of article 10-1 C.pr.pén. appears relatively satisfactory in setting the conditions for recourse to a restorative justice measure (1), the concrete methods of application have yet to be defined, particularly based on the conclusions of experiments over recent years (Cario 2012) (2), and on the new rights now accorded to victims (3).

## 1 - The Conditions for Recourse to a Restorative Justice Measure

Conveniently, the wording of article 10-1 C.pr.pén. specifies the objectives of proposing a restorative justice measure (A) and lays down the prerequisites (B).

### A. The Objectives of Recourse to a Restorative Justice Measure

The second paragraph of article 10-1 C.pr.pén. offers “*the victim of a crime as well as its perpetrator [the possibility] of participating actively in the resolution of the difficulties resulting from the crime, and particularly in repairing all kinds of harm resulting from the offense.*” By bringing both the victim and the perpetrator into the front line, restorative justice measures differ from the trend that regrettably affects the conditions of recourse to mediation in criminal matters, which demand only the victim’s agreement (Mbanzoulou 2012). The principle of each party participating actively in resolving the repercussions of the crime reinforces their role as the primary actors in the restorative meeting: in defining the practical methods of the meeting (preparatory phase); in the choice of themes tackled and the content and characteristics of the exchanges (meeting phase); in the nature and practical modalities of meeting their reciprocal commitments (conclusion of the restorative agreement); and in defining follow-up for each party’s commitments (closure phase).

Mainly focused on “*the resolution of the difficulties resulting from the offense,*” the restorative justice aims to regulate conflicts, appease the people involved, and take into account the repercussions of the crime on all parties (perpetrators, victims, significant others, and the communities to which they belong). The restorative “process” used thus appears as essential as the actual “result” of the meeting, which may never come about. It is important here to point out that reciprocal forgiveness is in no way an objective of restorative justice, that the spiritual values it promotes logically contribute to the respect of fundamental human rights and the general principles of criminal law, and that the process used has no therapeutic aim.

Based on the belief that the people involved are capable of participating in the resolution of their own affairs, restorative measures above all aim to encourage respectful dialogue (Rossi 2012; Umbreit and Peterson-Armour 2011), with the objective of

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<sup>3</sup> IFJR. [justicerestaurative.org/justice\\_restaurative.html](http://justicerestaurative.org/justice_restaurative.html).

identifying and expressing what all parties have suffered, promoting mutual understanding of what happened (why?), and seeking possible solutions to remedy the damage (how?) (Zehr 2012). It is relevant, in this respect, to emphasize that “*the resolution*” of these “*difficulties resulting from the offense*” leads “*in particular*” to the reparation of “*all types*” of harm. This is not limited to bodily and/or property damage: the approach must be global. It is not only monetary, contrary to the assertions of many criminal lawyers, who constantly confuse the direct consequences of the criminal act with its impacts on the future of those involved (Peltier 2014). The diversity and range of the repercussions, rather than the intrinsic seriousness of the facts, are taken into account when deciding on a suitable measure of restorative justice.

The penal reform also displays a real **convergence between the objectives of restorative justice and those of the penal process**. Previously, the functions of the sentence were confusingly included in article 132-24 C.pén., along with the ways of personalizing sentences. Now defined in article 130-1 of C.pén., the function of a sentence is “*to sanction the perpetrator of the crime; to favor their ‘amendment, integration, or reintegration,’ . . . in order to ensure that society is protected, [to] prevent new crimes being committed, and restore social equilibrium, while respecting the interests of the victim.*” These are the functions assigned to restorative measures: giving responsibility to all parties to assist reintegration into the social space; global reparation for each of the protagonists, their significant others, and/or the communities to which they belong; and preventing new crimes from being committed in order to help restore social harmony. The Law of August 15, 2014, applicable from October 1, 2014, makes the restorative process and the penal process complementary. Its effectiveness (through the available means) and its efficacy (symbolic, instrumental, and pedagogical) (Cario 2008) are inscribed in the prerequisites of the penal reform.

### *B. The Prerequisites for Recourse to a Restorative Justice Measure*

Among the deontological<sup>4</sup> principles in article 10-1 C.pr.pén., we can identify a first set of **guarantees regarding conditions for recourse to a restorative justice measure**. There is a formal requirement that all the involved must recognize the facts. However, this should not be understood as a confession but as an absence of denial. In all ways, it conforms to the specifications of the international texts: the Council of Europe Recommendation (1999), the UN Economic and Social Council Resolution (2002, 2005), and the European Directive (2012, compulsorily applicable on November 16, 2015).<sup>5</sup> It is a question of avoiding any secondary victimization of the parties, and setting the terms for the restorative dialogue on common foundations. The generalization of the caesura of criminal proceedings, allowing the competent judge to rapidly declare

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<sup>4</sup> See, in particular, the IFJR deontological code: [justicerestaurative.org/actualites\\_2014-07-22.html](http://justicerestaurative.org/actualites_2014-07-22.html).

<sup>5</sup> Recommendation no. R(99)19 of Committee of Ministers of the Council of Europe Member States on mediation in penal matters; United Nations Economic And Social Council resolution on the basic principles of restorative justice (April 2002), recalled in extenso at the eleventh United Nations Congress, Bangkok, April 2005; European Parliament and Council Directive of October 25, 2012, establishing minimum standards on the rights, support, and protection of victims of crime: [http://ec.europa.eu/justice/criminal/victims/index\\_en.htm](http://ec.europa.eu/justice/criminal/victims/index_en.htm).

the guilt or innocence of the person charged—something long demanded by criminal lawyers—would have made it possible to overcome all objections regarding the respect of the presumption of innocence (however, see the modalities of recourse to criminal mediation before proceedings). Nevertheless, an essential breach was opened when it came to judgment for minors (article 24-5 onwards, Ord. 1945) and later for adults (article 132-70-1 onwards, C.pén.).

The measure “*can only intervene after the victim and the author of the crime have received full information about it.*” This condition indicated the importance of preparing the participants and not hurrying them. The process and the guarantees offered must be explained to the participants, as well as the possible outcomes, the benefits that the process might bring them, and what they cannot expect from it. This information must be “full” and formulated in a didactic and pedagogical way, by specially trained people.

The measure “*can only intervene after the victim and the author of the crime . . . have given their express consent to participate.*” Essential to the correct implementation of the restorative justice measure, this condition guarantees the active involvement of all participants in the restorative meeting. It marks the legitimacy of each participant’s place. This consent must be expressed throughout the proceedings of the measure, and it can be revoked at any moment. From a methodological point of view, it is crucial not to limit seeking participant consent to the principle of participation alone. It must also apply to the choice of measure, as well as all the practical methods for its proceedings.

Article 10-1 C.pr.pén. provides a second set of **guarantees regarding the implementation of the restorative justice measure** “*by an independent third party with the correct training.*” Such training cannot be improvised. To gain solid and relevant disciplinary knowledge, professionals and volunteers must complete their basic training by acquiring knowledge of listening and interview techniques, group facilitation techniques, and the specificity of the implementation and follow-up protocols for restorative measures. The French Institute for Restorative Justice (IFJR), in partnership with the French National Institute for Victim Support and Mediation (L’Institut national d’aide aux victimes et de médiation: INAVEM) has begun offering such training, for most of the eligible measures. Unfortunately, training cannot be provided at university owing to the theoretical, pedagogical, and praxeological knowledge necessarily required. However, currently, anyone wishing to work in these wider criminology professions still faces the outdated resistance of the “intradisciplinary” sectors that supposedly study the complex criminal phenomenon. The facilitator<sup>6</sup> of the meeting, also in charge of preparing the participants, is responsible for ensuring that the proceedings run smoothly. Such preparation, which is often lengthy, is always guided by the principle of not (re) victimizing the potential participants, and not aggravating the situation of the detained persons. The facilitator makes sure the proceedings are safe and that everyone gets a fair chance to speak, so that all participants can express themselves and be heard, with respect and dignity. With up-to-date knowledge of restorative justice and criminological issues affecting victims and perpetrators, the facilitator must also be familiar with the specific techniques for implementing the chosen measure. They must be unbiased towards the

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<sup>6</sup> It is important to understand that the term is neutral, especially since the implementation of the restorative measures scrupulously favors a parity reflected in the gender composition of humankind.

participants, showing impartiality and considerate neutrality. The measure itself is also independent of both the judiciary institution and the legal authorities.

The restorative justice measure is placed “*under the supervision of the judiciary authority, or, at their request, of the penitentiary authorities.*” The judiciary authority, sole guarantor of the respect of individual freedoms, is in fact best equipped to provide this supervision. It involves ensuring that fundamental human rights are respected, as well as the general principles of criminal law and the rights and interests of the participants throughout the restorative process. It can be manifested in different ways. These are primarily: the formal progress of the process; a deontological failing on the part of the facilitator adversely affecting a participant; homologation (or even integration into the underlying decision) of the agreement protocol; or the contents of the agreement.

However, control over the implementation of the restorative process comes up against the obstacle of the confidentiality principle. Strictly applied, this principle allows no restrictions, unless “*the parties have agreed otherwise, and except in cases where there is a higher interest relating to the necessity of preventing or sanctioning crimes*” committed, in the process of being committed, or about to be committed, and which endanger persons.<sup>7</sup> The information divulged must concern only “*the proceedings of the measure*” and not the contents of the exchanges. It must only be addressed to the public prosecutor. This principle of confidentiality is essential for the optimum effectiveness of the restorative meeting and dialogue. It applies to the coordinators and facilitators of the measure, as well as the participants themselves. Its corollary is the ban on using participation in a restorative justice measure within a subsequent penal procedure, including if the restorative meeting fails.

## **2 - The Methods for Recourse to a Restorative Justice Measure**

### **Conditions for Recourse to a Restorative Justice Measure**

Restorative justice measures appear widely relevant and applicable (A). However, the law says little about how such measures should be proposed. Consequently, there is nothing to prevent an individual taking the initiative in proposing one—quite the opposite. In line with the conditions explained above, the current experiments in France are working toward a potential operational model adapted to each type of measure (B).

#### *A. The Applicability of Recourse to a Restorative Justice Measure*

The first paragraph of article 10-1 C.pr.pén. makes the restorative justice measures widely applicable: “*In any criminal procedure and at all stages of the procedure, including the execution of the sentence.*” This wording leaves all participants significant room for maneuver (Sayous 2012)<sup>8</sup>. A restorative justice measure can be proposed during the investigation, the preliminary inquiry, the judgment hearing, or the execution of

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<sup>7</sup> IFJR, Code de déontologie de l'IFJR, art. 10. (IFJR Deontological code).

<sup>8</sup> Nevertheless, it raises questions about applicability concerning procedures that are controlled outside of the Code of Criminal Procedure. The current reform of the Ordonnance of February 2, 1945, should expressly refer to this, particularly regarding restorative conferences.

sentences, or even later. The restorative process, penal process, and jurisdictions for the enforcement of sentences can therefore work together and complement one another, with a possibility of links between them. Although it is the responsibility of the judicial authority to propose a restorative justice measure, nothing prevents the socio-judiciary participants (in the widest sense), the protagonists, and their significant others making such a request to the competent magistrate.

Such a system provides great flexibility and reduces the risk of exploitation of the restorative justice and of all those involved (Wright 2011). The reference in the text to “*restorative justice measures*” allows for all possibilities: no particular restorative justice measure is mentioned, so all are eligible, with reasoned judgment from trained practitioners, to decide which is best adapted to the situation in question, working with the participants themselves. The most common measures, applied alone or in combination, are penal mediation, restorative mediation (after proceedings), criminal reparation for minors, restorative conferences, restorative circles, victims offenders encounters, circles of support, and accountability.<sup>9</sup>

### *B. The Practical Modalities for Proposing a Restorative Justice Measure*

The process of proposing and implementing a restorative justice measure must be based on **directing people toward a dedicated restorative justice service**, or a service for promoting restorative justice measures. The introduction of detainee–victim meetings in 2010 and 2014 at Poissy Penitentiary reminds us that the preliminary orientation phase is essential for people who may be interested in participating in a restorative meeting of any kind (Cario 2012). It is also the organization currently retained and tested within the restorative justice measure trials in the new Regional Service for Restorative Justice (SRJR: Service Régional de Justice Restaurative) provided by the Association for Applied Criminal Policy and Social Reintegration (APCARS: l'Association de Politique Criminelle Appliquée et de Réinsertion Sociale: [www.apcars.fr](http://www.apcars.fr)) for Ile-de-France, with scientific support from the IFJR (Sayous 2014).

The design of a restorative justice program, whether or not it takes place within a dedicated restorative justice service, must consequently be based on a strong foundation of partnership. Restorative justice must therefore have a network of organisms to guide and direct potential participants. Within the APCARS's project, SRJR referents have been identified among external partners, as well as within its own victim support, judiciary control, accommodation, and social reintegration services. Their mission is to facilitate and improve the effectiveness of orientation toward the SRJR (Sayous 2014).

Partners who might potentially provide such guidance and direction generally belong to the judiciary sector (judicial authority, penitentiary administration, integration and probation services, national police, and gendarmerie) or the parajudiciary sector (victim support associations, judiciary control associations, accommodation, and social reintegration centers), the health and social services, and even victim associations. Working directly with the victims, the perpetrators of penal infractions and/or those

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<sup>9</sup> See the summary table at the end of this study, showing the integration of restorative measures throughout the penal process.

responsible for dealing with them (the “referents”) invite the persons in question to commit to the process, in order to benefit in their individual journey. These referents are trained to explain the appropriate restorative justice measure, in a didactic way, thus offering the person in question the freedom to consent to be directed toward the local SRJR, in full knowledge of the facts.

**The process used by the restorative justice service** following this orientation next involves making contact with the people in question to offer them the chance to participate in a restorative justice measure. This interview provides the opportunity, if necessary, to re-explain the process and stakes involved in the measure. Once the parties consent, their **preparation** can begin. During this phase (which is the most decisive for the success of the whole process), the facilitator (and his or her cofacilitator in certain measures) invites those involved to explain what they expect and need in terms of the response to the crime committed/suffered. It is also a chance to check their motivations, their capacity to fully commit to the process, and their psychological aptitude to benefit from it. Several individual interviews are generally required. The participants are encouraged to envisage the best end solution to their problem. Similarly, it is during these preliminary individual interviews (which may take place in separate groups, as is the case with victims offenders encounters) that a consensus must be reached about the practical modalities of the future meeting. The participants must be helped to imagine the meeting, prepare for it, and anticipate difficult moments, particularly with regard to expressing each party’s strong emotions. The decision making about the frameworks and practicalities of the meeting (times, room availability, distribution of speaking time) makes everything much more concrete. The participants progressively grasp the process, by beginning to occupy a position as actors in the envisaged meeting.

The **meeting** takes place when the coordinators and/or facilitators of the measure think that the conditions for the physical and psychological safety of the persons involved have been satisfied, with everyone free to leave the restorative process at any point. After a reminder of the objectives of the chosen measure, they invite participants to speak about the circumstances that led to the conflict associated with the criminal act, its repercussions for each of their lives, their related feelings and emotions, and the best ways to remedy the situation. Depending on the measure, a **restorative agreement** may be made, either in writing or more informally, setting out everyone’s commitments with a view to repairing the repercussions of the crime on all involved (if necessary after consulting their respective advisors). Finally, those leading or facilitating the measure are in charge of following up on everyone’s commitments. The **closure** of the meeting, formal or otherwise, allows the participants to mark the end of the restorative process and assess its effects on their respective lives as a whole.

### **3 - The Strengthening of Victim Rights to a Restorative Justice Measure**

The Law of August 15, 2014 gives a remarkable role to the victim of the infraction and/or his or her significant others. As already emphasized, any sentence must respect “the interests of the victim” (article 130-1 C.pén.). Article 10-1 C.pr.pén. created an innovative measure “in any criminal procedure and at all stages of the procedure, including the execution of the sentence,” by offering the protagonists of the crime (both perpetrators and victims) recourse to a restorative justice measure.

When it comes to executing sentences, article 707-IV C.pr.pén. now clearly states the rights of the victim, particularly including the right for harm against them to be repaired, as well as the right to “compensation” using “any other appropriate means,” such as the proposal of a restorative justice measure. Given such a right, the victim can personally go to the competent magistrate, or, more informally, the “referents” of a regional restorative justice service, or of any other service devoted to restorative justice that will assist them in the process. All the same, it is regrettable that such a right to restorative justice is not extended to the perpetrator, as is the case in France’s neighboring countries. Admittedly, the availability of restorative justice measures is currently low. Nevertheless, the recognition of the right to restorative justice for all persons subject to trial would have been the best guarantee of its gradual but inevitable rise, given the promises already delivered during experiments.

Some might be surprised that the respect of victim rights no longer appears in article 707-II C.pr.pén. on the objectives of executing sentences (Herzog-Evans’s contribution on this matter). However, its new wording has become highly pertinent. “The execution regime for custodial sentences or those that restrict freedom aims to prepare for the integration or reintegration of the condemned, so that they can act as a responsible person, respecting the rules and interests of society, and avoid committing more crimes.” Symbolically leaving chapter 1 (general provisions) of the general title on the execution of penal sentences, the principle of taking victims’ interests into account remains present in article 712-16-1, para. 1, C.pr.pén. as a preliminary to any decision to temporarily or definitively free a person with a custodial sentence before the end of this sentence.

Others will regret the censoring of the highly original provision concerning the “contribution for victim support” (as in foreign juridical systems) by the Constitutional Council. It deprives the victim support sector of resources that are crucial to its successful operation, when the sector today suffers badly from the lack or weakness of lasting means while being faced with growing demands to help crime victims.<sup>10</sup> The modifications to article 728-1,II C.pr.pén. are a step in the right direction. If the monetary values allocated to indemnify civil parties are not claimed, they are paid to the guarantee fund for victims of terrorism and other offenses (*Fonds de garantie des victimes des actes de terrorisme et d’autres infractions*: FGTI). Currently, however, nothing allows this fund to feed the victim support network in return.

A final and significant provision facilitates the implementation of restorative justice during the execution of sentences. In line with the new article 2-1 of the *Loi pénitentiaire* (penitentiary law) of October 24, 2009, the penitentiary authorities can now make agreements with associations (or with other public or private persons) aiming to help convicted persons access rights and common law measures, in order to facilitate their integration or reintegration.

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<sup>10</sup> Nathalie Nieson, Rapport au Premier ministre et à la Ministre de la justice sur le financement des associations d’aide aux victimes et la gouvernance de la politique nationale d’aide aux victimes (“Report to the Prime Minister and the Minister of Justice on Finance for Victim Support Associations and the Governance of National Victim Support Policy”), July 2013; Constitutional Council, Decision no. 2014-696 DC, August 7, 2014, cons. 25 and following.

In conclusion to this summary examination of the law of August 15, 2014, and its relation to restorative justice and the new rights accorded to victims and perpetrators, the penal reform carried out under the impetus of the minister of justice marks a real turning point for the integration of the measures that it promotes in French criminal law. The strong proposals from social partners or the French Platform for Restorative Justice<sup>11</sup> were also determining factors. The introduction “of restorative justice” into the Code of Criminal Procedure by an invaluable amendment finally offers a juridical framework that is conducive to implementing restorative justice practices to benefit those who have suffered from a crime, without any kind of leaning toward privatizing the penal process.

It is indispensable for all those involved in implementing justice measures to have special training. No one can overemphasize the anachronistic removal of section 75 of the French National University Council, “Criminology” (Cario, Villerbu, and Herzog-Evans 2012). This powerful idea, whose time has come, must now be pragmatically manifested in action (Johannès 2014), so that everyone can “integrate” these new rights, which allow the reconquering of individual dignity, represent a powerful desistance factor<sup>12</sup> (Ward and Maruna 2007; Shapland, Robinson, and Sorsby 2011; Farrall et al. 2011; Herzog-Evans 2013), and reveal citizen solidarity.

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<sup>11</sup> French Platform for Restorative Justice: Plateforme Française pour la Justice Restaurative, [justicerestaurative.org/PFJR](http://justicerestaurative.org/PFJR).

<sup>12</sup> The mechanisms and results of which are very close.

## Summary Table Showing the Possibilities for Integrating Restorative Justice Measures at All Stages of the Criminal Procedure

Most of these measures are applicable to both adults and minors

<i>Restorative justice measure</i>	<i>Juridical framework</i>	<i>Textual basis</i>
<b>Before proceedings</b>		
Restorative circle	Case closed	10-1 C.pr.pén.
Penal reparation	Alternative to proceedings	12-1 C.pr.pén. February 2, 1945
Penal mediation	Alternative to proceedings	41-1-5° C.pr.pén.
Restorative conference Family group conference (FGC)	Alternative to proceedings	10-1 C.pr.pén. 12-1 Ord. 1945, <i>awaiting completion</i>
<b>Information</b>		
Penal reparation (minors)		12-1 Ord. February 2, 1945
Restorative mediation		10-1 C.pr.pén.
Family group conference (FGC)		10-1 C.pr.pén. 12-1 Ord. 1945, <i>awaiting completion</i>
Restorative circle	Termination of public prosecution/proceedings dismissed	10-1 C.pr.pén.
<b>Criminal proceedings</b>		
Penal reparation		20-7 Ord. 1945 12-1 Ord. 1945
Restorative mediation		10-1 C.pr.pén.
Family group conference		10-1 C.pr.pén. 20-7 Ord. 1945, <i>awaiting completion</i>
Restorative circle	Discharge or acquittal	10-1 C.pr.pén.
<b>After proceedings, during the sentence execution phase</b>		
Victims/offenders encounters (“anonymous group” or “face to face”)	In prison or in the community	10-1 C.pr.pén.
<b>After the sentence has been fully served</b>		
Circles of support and accountability	After completion of the penalty	10-1 C.pr.pén.

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