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VICTIMS
AND
CRIMINAL JUSTICE

European standards
and national good practices

edited by

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by Luca Lupária and Raphaële Parizot

INTRODUCTION

This Work represents one of the main scientific results of the project entitled *Good practices for protecting victims inside and outside the criminal process,* funded by the European Commission within the scope of the *Criminal Justice* program (Just/2011/JPEN/AG/2901).

The research was conducted at the University of Milan in collaboration with the University of Bologna (prof. Silvia Allegrezza), the University of Seville (prof. Juan Burgos Ladrón de Guevara) and the Association de recherches pénales européennes of Paris (prof. Raphaële Parizot). The single investigation units consisted of the coordinators plus several professors and experts in criminal disciplines: Novella Galantini, Marco Scoletta, Chantal Meloni, Martina Cagossi (Milan); Giulio Illuminati, Michele Caianiello, Guido Todaro, Stefania Martelli (Bologna); Antonia Monge Fernández, Angel Tinoco Pastrana, Carmen Requejo Conde, Ana Ochoa Casteleiro (Seville); Julie Alix, Mathieu Jacquelin (Paris).

Among the outcomes of the scientific activities, a reference is here to be made to the conferences organized in Bologna ("The position of the victim in the criminal justice system: good practices and legal framework within the new Directive 2012/29/EU", Faculty of Law, on 12 April 2013), in Seville ("Victims protection within the new EU Directive and their procedural statute", University Auditorium, on 7 November 2013) and in Paris ("The victim within the criminal process after the Directive 2012/29/EU. Comparison between French, Italian and Spanish systems", Liard Auditorium at the Sorbonne University, on 27 March 2014), in addition to the international conference held to close the project in Milan ("Victims and criminal justice. European standard and national good practices", Sala Napoleonica of the University, on 9-10 October 2014). These study meetings were attended by professors of European and American universities, by judges from several

EU States, psychologists, lawyers and other professionals specializing in the protection of the victims.

The volume, spread in its Italian version too, actually aims at offering to the European Commission and to the community of scholars a number of possible interpretations on the position of victims two years after the release of the Directive no 29/2012. In a historical moment when the EU Countries are generally re-thinking the statute of victims within the own criminal systems, the experience of the three Countries being the object of the analysis (France, Italy and Spain) may definitely provide some useful indications to other members of the continental partnership. The whole work organization, as a matter of fact, was aimed at obtaining some hermeneutic approaches to be applied in similar contexts, and to be oriented towards wider reflections on the rights and the guarantees to be granted to the victim, as regards the relationship with the defendant as well.

For sure, the Directive no 2012/29/UE, with its *pendant* of satellite measures (the Directives on human trafficking, sexual violence and the criminal protection order *inter alia*) and of international agreements to be read together (the Conventions of Lanzarote and Istanbul, specifically) represents a real turning point for the years to come as regards the criminal policies – both substantial and procedural – to be issued by European legislators. Not so much for the single indications to be implemented at a national level (the rights to be informed, to language support, access to justice, protection measures, and so on) but mostly for the need imposed by the European text to establish a clear systemic position for the victim. This is possibly the most difficult task for models often characterized by a contradictory or inconsistent organic positioning of the victim and by an incomplete search for the right balance with the fundamental prerogatives of the accused.

The papers collected in here have been divided into three sections. The first one is dedicated to general profiles, among them the exegesis of the contents of the Directive, the analysis of the background issues related to victims in the criminal process and the study of the experiences made in the field of international criminal justice. The second part explores the panorama of the rights and guarantees that the three judicial systems under examination provide for to the benefit of the victims, with special attention to the recent approved reforms

and those currently under study. The final part of the volume aims instead at analysing the four specific aspects of the Directive (restorative justice; the protection of victims of gender violence; the treatment of vulnerability conditions; the right to be compensated for damage) at national level, by means of a comparative approach aimed at identifying common features and possible "transplants" of the solutions that proved to be effective operatively and that can be however considered as "good practices" at a European level.

We hope that this work may be useful for the debate currently in action on the forms of acknowledgement of European standards as regards the protection of victims and, again, it may provide hints to be immediately implemented by lawyers, judges and professionals committed to this field. The attention to the good practices that characterised the whole study, in fact, originates right from the awareness that, quite often, beyond magniloquent principles and highly technical procedural mechanisms, the protection of victims goes through the operator's daily practices and correct behavioural lines. This is the field where we can measure the ability of the judicial machine to take up the victim's psychological frailty and his/her need for the same to be accompanied, informed and protected throughout the whole process.

Prof. Luca Lupária
Scientific director of the research project

PART I

THE ROLE OF THE VICTIM IN CRIMINAL JUSTICE SUPRANATIONAL INPUTS AND FUNDAMENTAL ISSUES

CHAPTER I

VICTIM'S STATUTE WITHIN DIRECTIVE 2012/29/EU

by Silvia Allegrezza[*]

TABLE OF CONTENTS: 1. Progress and setbacks in victim protection: remarks about the European regulatory context. - 2. General principles, definitions and objectives. - 3. Right to information and support. - 4. The victim's right of access to assistance services. - 5. The right to participate in criminal proceedings. - 6. Right to protection. - 7. Individualised protection and protection from secondary victimisation.

1. Progress and setbacks in victim protection: remarks about the European regulatory context

Protection of the victim in criminal matters remains a priority within the Union and Directive 2012/29/EU confirms this. Victims - the first individuals in criminal proceedings to receive criminal protection under community law - find that the rights and guarantees already granted to them by the Council Framework Decision no 2001/220/JHA[1] are confirmed and strengthened by the afore-mentioned directive. Furthermore, the new directive strengthens the European pressure for a reform of the criminal justice in order to accept the victim adopting an

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[1] As well as by other legal texts such as directive 2004/80/EC of 29 April 2004 relating to compensation for victims of crime in cross-border situations; see R. MASTROIANNI, *Un inadempimento odioso: la direttiva sulla tutela delle vittime dei reati*, in *Quad. cost.*, 2008, p. 406. For an analysis of the framework decision, see S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012; D. SAVY, *La vittima dei reati nell'Unione europea. Le esigenze di tutela dei diritti fondamentali e la complementarietà della disciplina penale e civile,* Milan, 2013, p. 37.

inclusive approach, in other words, to become a forum for all the victims[2].

Adoption of the Treaty of Lisbon offered a solid legal basis for revising and strengthening that text: Art. 82(2) TFEU provides for the establishment of minimum rules for the protection of victims of crime. The subsequent roadmap of the Council, adopted in Budapest on 10 June 2011, developed the recommendations of the Treaty and explicitly invites community bodies to move in this direction. The aim of the new directive is to "revise and supplement the principles set out in the framework decision"[3]. Right from the start particular attention was paid to victims of violence against women and children as vulnerable victims. In fact, the new directive follows the adoption of certain fundamental texts within the Council of Europe, in particular the Convention of Istanbul and the Convention of Lanzarote[4].

Still remaining within the sphere of the community in a strict sense, the directive is not the only text in to protect victims. Two directives of 2011 addressed the specific needs of particular categories of victims of human trafficking, sexual exploitation of children and pornography[5]. A further legislative measure is aimed at fostering the mutual recognition of protection measures in criminal matters by establishing the European order of criminal protection, a useful procedural instrument which also guarantees the victim the possibility to

[2] L. CORNACCHIA, *Vittime e giustizia penale*, in *Riv. it. dir. proc. pen*., 2013, p. 1760. One might see a convergence with American scholars that refer to «victim participation model», cfr. D.E. BELOOF, *The Third Model of Criminal Process, The Victim Participation Model*, in *Utah Law Review*, 1999, no 2, p. 289. On victims 'protagonism', see S. LORUSSO, *Le conseguenze del reato. Verso un protagonismo della vittima nel processo penale?*, in *Dir. pen. proc.*, 2013, p. 881.

[3] Recital no 4 of the Preamble.

[4] See the contribution of S. MARTELLI, in *The Lanzarote Convention and the Istanbul Conventions: an overall picture*, in *this volume*.

[5] Directive 2011/36/EU of 5 April 2011 on the protection and repression of human trafficking and the protection of victims (concerning this, see T. OBOKATA, *A Human Rights Framework to Address Trafficking of Human Beings*, in *Netherlands Quarterly of Human Rights*, vol. 24, 3, 2006, p. 379; F. SPIEZIA - M. SIMONATO, *La prima direttiva UE di diritto penale sulla tratta di esseri umani*, in *Cass. pen*., 2011, 9, p. 3197) and Directive 2011/92/EU of 13 December 2011 on to the fight against the sexual abuse and exploitation of children and child pornography.

receive protection outside the borders of the State where the order was issued[6].

The text in question completes and enriches the European regulatory framework by offering national judges the intrinsic strength of the new instrument. Not only the Italian courts need to interpret the national law in conformity with European law, as happened in the past with the previous framework decision after the Pupino case; nowadays they must apply directly the self-executing provisions of the directive and take advantage of the new chances of resorting to the Court of Justice. Shifting from the model 'framework decision' to the model 'directive' implies also a substantial increase of the power of the European acts to influence national laws.

2. General principles, definitions and objectives

The text starts by explaining the two objectives it pursues: on one hand, to guarantee victims adequate information, aid and protection, regardless of the existence of a criminal investigation; and on the other hand, to offer them the possibility of taking part in the criminal proceedings.

However, the two areas of protection seem to be governed in different ways.

The intensity of the protection offered varies according to the objective pursued. The right to information and assistance receives full recognition, so much so that the directive expresses itself in the indicative, almost as if to expresses the intention of obliging member States to adopt certain measures. In this sector no local discretion linked to the peculiarities of the system is allowed.

On the contrary, it must be noted that the directive does not recognise for the victim a veritable "right to criminal proceedings"[7], or a right to take part in the trial, if one should

[6] Directive 2011/99/EU of 13 December 2011 on the European protection order. See T. JIMÉNEZ BECERRIL - C. ROMERO LOPEZ, *The European Protection Order*, in *Eucrim*, 2011, 2, p. 76.

[7] For an overview, see M. CHIAVARIO, *Il «diritto al processo» delle vittime dei reati e la Corte europea dei diritti dell'uomo*, in *Riv. dir. proc*., 2001, p. 938; M. SIMONATO, *Deposizione della vittima e giustizia penale*, Padua, 2014, p. 53. On positive obligations of the ECHR, see M. KLATT, *Positive Obligations under the European Convention on Human Rights*, in *ZaöRV*, 71, 2011, 691.

take place. The Directive is peppered with various kinds of protection clauses: "if such a right exists in the national judicial system", or "depending on the role of the victim in the pertinent judicial system". How should such clauses be interpreted? Perhaps as a protection which varies according to its geographical location, bound to the basic rules governing the national system. The European union action uses these basic rules in order to harmonise the different systems but without having the power to modify them. The impact of European contents within the national systems encounters a barrier in establishing a stringer role for the victim. So, the absence of a requirement for harmonisation on the role of the victim in criminal dynamics emerges.

On this conclusion, the final part of conclusion 22 is cryptic, stating that "member states should establish the reach of the right laid down by this directive, where there are references to the role of the victim in the pertinent criminal justice system". What happens, then, when the internal judicial system makes no reference to the victim?

As far as the temporal application of the rights recognised by the Directive is concerned, conclusion 22 established that these rights start from filing of the charge or the official start of investigations. In fact, a very extensive period of time is in fact appropriate since the most delicate phase for the victim is actually that of the initial investigations; furthermore, the need of protection does not end with the execution of the penalty.

In the wake of the previous Framework Decision of 2001, the Directive in question also offers some general definitions, including that of the victim of crime. The concept, which has criminological roots[8], is in fact stated in national systems. It is therefore fundamental that subjects are entitled to protection in the community sense. Pursuant to Art. 2(1), a "victim" is an "individual who has suffered physical, mental or emotional damage, or economic losses which have been caused directly by

[8] On this conclusion see T. PITCH, *Qualche considerazione sulla nozione di vittima*, in A. BOSI - S. MANGHI (eds.), *Lo sguardo della vittima. Nuove sfide alla civiltà delle relazioni. Scritti in onore di Carmine Ventimiglia*, Milan, 2009, p. 48; M. SIMONATO, *Deposizione della vittima e giustizia penale*, cit., p. 13; T. RAFARACI, *La tutela della vittima nel sistema penale delle garanzie*, in *Criminalia*, 2010, p. 258, remarks that «[i]the term, of a criminological nature and with international derivation, is used in different contexts and does not have a clearly obvious meaning».

a crime", or a "family member of a person whose death has been caused directly by a crime or who has suffered damage as a result of the death of such a person"[9].

Therefore, the exclusion of corporations from the sphere of application of the directive, as happened with the previous directive, is confirmed, with decision of the Court of Justice both with reference to ordinary justice[10] and to mediation[11]. In fact the European legislature, "has legitimately succeeded in introducing a system of protection only for those individuals who are in a situation that is objectively different from that of corporate persons, given their greater vulnerability and the nature of interests that only violations committed against individuals can prejudice, such as, for example the life and physical protection of the victim"[12].

However, the absence of a "definition of victim" shared at the European level remains because other regulatory acts, such as, for example, directive 2004/80/EC of 29 April 2004 relating to compensation for victims of crime, refer, instead to "any other person damaged by crime", that implies a wider definition of the one provided by the directive of 2012[13].

The category of "children" is also defined by known parameters, indicating eighteen years of age as the watershed for the purpose of the application of the directive, a conclusion that is anything but superfluous considering the variety of solutions adopted at national level[14].

A last indication concerns "reparative justice" the essential details of which had already been established at the time the term was defined: it must involve proceedings aimed at solving

[9] See art. 2 of the directive 2012/29/EU (see *infra*, § 2.7) which specified that "family member" must be understood as meaning «the spouse, the person cohabiting with the victim in a close relationship, in the same family and permanently and continuously, relatives in direct line, brothers and sisters, and persons dependent on the victim».

[10] ECJ, 28 June 2007, *Dell'Orto*, C-467/05, § 55. See A. NISCO, *Persona giuridica 'vittima' di reato ed interpretazione conforme al diritto comunitario*, in *Cass. pen.,* 2008, p. 792.

[11] ECJ, 21 October 2010, *Eredics*, C-205/09, § 30.

[12] ECJ, 21 October 2010, *Eredics*, C-205/09, § 30.

[13] L. PARLATO, *Il contributo della vittima fra azione e prova*,.Palermo, 2012, p. 49.

[14] M. PANZAVOLTA, *Humanitarian concerns within the EAW*, in N. KEIJSER - E. VAN SLIEDREGT, *The European Arrest Warrant in Practice*, The Hague, 2009, p. 179.

the main question attended by the victim and the perpetrator of the crime freely with the aid of an impartial third party[15].

In particular, the Directive provides nothing on the relationship between conditions of stay or the juridical status of the migrant and recognition of rights (conclusion n. 10).

3. Right to information and support

The right to understand and be understood is fundamental in order to guarantee adequate protection to the victim of crime[16]. Above all other rights, it represents the very essence of the directive in question; no specific guarantee can work positively if the victim is not put into a condition to understand the contents of the communications and processes of protection offered by the system. To this end, it is necessary to operate on several levels, guaranteeing the quality and the certainty of communications, their contents and the training of people appointed to interact with victims. Therefore, the directive appropriately moves from recognising specific measures aimed at informing and supporting the victim right from the initial contact with the relevant authorities.

Of particular interest are the measures relating to the methods used to communicate information; it should be possible to provide information to the victim by word of mouth, in writing or electronically, sent to the last known postal address or to the e-mail address notified by the victim to the relevant authority. In exceptional cases, for example if a high number of victims are involved in a case, it should be possible to provide information via the press, an official web site of the relevant authority or any other similar channel of communication[17].

The directive states that the minimum contents of information that Member States must offer the victim should include "the type of support he or she may receive and also, if necessary, basic information about access to medical assistance,

[15] See also, § 5.

[16] Article 3.

[17] See also E. VERGES, *Un Corpus Juris des droits des victimes: le droit européen entre synthèse et innovations,* in *Revue de sciences criminelles et de droit pénal comparé*, 2013, p. 121.

and any specialist assistance, including psychological, and alternative accommodation"[18].

Other indications more specifically concern criminal protection and as such will have content that varies according to the reference judicial system. They concern: procedures for presenting a charge regarding a crime and the role carried out by the victim in such procedures; how and at what conditions protection can be obtained, including protection measures; how and at what conditions is it possible to have access to a lawyer, to legal aid paid for by the State[19] and any other form of aid; how and under what conditions is it possible to access compensation; the procedures available for reporting cases of failure to respect the victim's rights by the relevant authority operating within the sphere of criminal proceedings; who to contact for communications regarding the victim's case; available reparative justice services; reimbursement of costs incurred as a result of attending the criminal proceedings.

Specific rules are dedicated to certain delicate aspects of the criminal proceedings.

Particular attention is dedicated to the time when a crime is reported by the victim. The police authorities must issue to victims a written notice of receipt of their report indicating the essential elements of the crime, such as the type of crime, the time and place in which it was committed and any harm or damage caused by the crime itself. The directive states that, for the purpose of allowing monitoring of the proceedings and any insurance indemnity, the notice of receipt should include a file number and the time and place the crime was reported to serve as proof that the crime was reported[20]. Such a notice is obligatory and may not be refused due to a delay in reporting.

Article 6 provides for the obligation of member States to provide the victim with further information concerning the criminal proceedings so that he or she may take conscious procedural decisions. Such information must be detailed and precise, provided by word of mouth, in writing or electronically.

In particular, the victim is entitled to be informed about the decision not to take legal action or not to continue with the investigations, irrespective of which body exercises such a

[18] Article 4.

[19] P. BEAUVAIS, *Nouvelle directive sur les droits de la victime*, in *Revue trimestrielle de droit européen*, 2013, p. 807.

[20] Recital no 24.

power, information that is indispensable in order to be able to contest the dismissal[21]. Also, notification of the date, time and place of the hearing, including appeal phases must be provided. Such information is obligatory in all member States.

On the other hand, other obligations are variable since they depend on the role of the victim in the relevant criminal system. First of all, they include the right to know any final sentence after the conclusion of the proceedings[22]. With the reference to the right to be informed of the "decision", the directive states that the victim must be informed of any declaration of guilt or any declaration that brings an end to the proceedings[23]. The measure must be notified in full, together with the grounds, or via a short summary. Such a right to information may encounter a limitation if disclosure would prevent the proceedings from being carried out correctly or cause damage to a case or to a person or put their safety at risk[24].

Instead, the purposes of notices relating to the status of the defendant are different: the victim has the right to ask the relevant authorities for specific information regarding the release from prison or escape of the perpetrator of the crime, at least in cases where a danger or tangible risk may exist. To this end, the nature and seriousness of the crime and the risk of reprisals must be assessed. Therefore, the notice is excluded for minor crimes where there is a slight risk of damage for victims[25]. These are all assessments that are deferred to the judicial authority which proceeds, even if the directive does not state it.

If provided by the national legal system, the right to information should also include indication of the possibility to present an appeal against the release from prison of the presumed perpetrator of the crime. Such a right encounters a limitation if such notification could entail a tangible risk of damage for the perpetrator, in which case the relevant authority must take into account all the other risks in deciding the appropriate action.

The victim may forfeit the right to receive information concerning the criminal proceedings as long as such a request is

[21] Article 6 and recital no 26.
[22] Article 6(2).
[23] Recital no 30.
[24] Recital no 28.
[25] Article 6(5)(6) and recital no 32.

expressly made and without prejudice to the possibility of changing his or her mind[26].

A third group explicitly protects the victim speaking a different language or a transnational victim who must be able to know how and at which conditions he or she is entitled to interpretation or translation; if the victim is resident in a member State different from the one in which the crime was committed, which measures, procedures and special mechanisms he or she may resort to in order to protect their own interests in the member State in which the first contact with the relevant authority took place.

Understanding and the possibility of being understood are essential aspects of a legal system. From this point of view, also offering the victim adequate linguistic protection by offering suitable interpretation and translation services is an absolute priority. The victim speaking a different language therefore is entitled to present a charge using a language that he or she understands or by receiving the necessary linguistic protection[27], to free interpretation during questioning to allow an active participation in hearings, depending on the role of the victim in the pertinent judicial criminal system[28]. As far as the other aspects of the proceedings are concerned, the need for an interpretation and translation service may vary depending on the specific matters, the role of the victim in the pertinent judicial criminal system, his or her involvement in the proceedings and the other specific rights he or she enjoys. In these other cases, the interpretation and translation service must only be provided insofar as it is useful to the victim in exercising his or her own rights.

Of particular impact is paragraph 5 of article 6, which grants the victim the possibility of requesting the translation of a document considered fundamental, even orally or in a summarised form, as long as this does not prejudice the fairness of the proceedings. The translation obligation is excluded, on the other hand, if the contents are not relevant for the active participation of the injured party in the proceedings. The

[26] Article 6(4) and recital no 29.

[27] Article 5(2).

[28] See L. LUPÁRIA, *Vittime dei reati e diritto all'assistenza linguistica*, in C. FALBO - M. VIEZZI (eds.), *Traduzione e interpretazione per la società e le istituzioni*, Trieste, 2014, p. 97.

directive does not explain the parameters for assessing such significance nor which authority is designated for doing so.

A considerable difference compared with that envisaged in favour of the defendant concerns the possibility of contesting a decision that declares that interpretation is superfluous or the refusal to translate certain documents: while directive 2010/64/UE requires member states to provide a separate mechanism or an appeal procedure with which to contest such a decision[29], here such a right depends on national rules, since no obligation exists for member States to amend their judicial system and "should not unreasonably prolong" trial times. As far as the time extension is concerned, the right to interpretation covers both the initial phase ("from the time when the victim is known to the authorities") and the one following the judgement becoming final.

As explained in the preamble, nothing prevents member States from further lengthening the list of information to be provided to the victim. The important thing is that the need for personalisation should be constantly respected commending the personal circumstances of the victim and the type or nature of the crime. The information obligation includes conditions for reimbursement of incurred expenses[30].

4. The victim's right of access to assistance services

Following on the Framework Decision of 2001, the directive examines the so-called "service rights"[31] for the victim as integral parts of the obligatory protection that member States must guarantee. Such services must be specific, qualified and free of charge; they must support the victim or his or her family members before, during "and for a fair period of time after the criminal proceedings"[32]. They must operate in synergy with the criminal proceedings authorities that direct the victim toward these services right from the initial contact, even if the reporting

[29] See S. CIVELLO CONIGLIARO, *La nuova normativa europea a tutela delle vittime del reato*, in *Diritto penale contemporaneo*, 22 November 2012, p. 3.

[30] Recital no 23.

[31] Cfr. J. DOAK, *Victims' Rights, Human Rights and Criminal Justice*, Oxford, 2008, p. 4.

[32] Article no 8(1).

of a crime does not represent a condition of access to such services. The directive provides that such support services may be of a public or non-government nature, organised on a professional or voluntary base.

The important thing is that that the personnel who come into contact with the victims must receive adequate initial and on-going training "of a level appropriate to the type of contact they have with the victims, so that they are able to identify the victims and their needs and to assume responsibility for them in a respectful, sensitive, professional and non-discriminating manner"[33]. The specialist training of personnel is aimed at making them able to make an individual evaluation of the victim in order to successfully identify their specific protection needs and to establish if specific protection measures are necessary. The directive specifies the minimum contents of the support that assistance services must be able to offer the victim, taking into consideration his or her individual needs here too. It includes: information, advice and assistance, including possibilities of compensation, the role of the criminal proceedings, including preparation in view of attending the trial; information about existing specialist assistance services or direct referral to such services; emotional support and, where available, psychological support; advice concerning financial and practical aspects deriving from the crime; some advice concerning the risk and prevention of secondary and repeated victimisation, intimidation and reprisals[34]. The creation or strengthening of victim assistance services is a challenge for many national systems, as essential on the level of victim protection as it is expensive on the economic level.

5. The right to participate in criminal proceedings

The right of the victim to participate in criminal proceedings is provided for in the directive according to precise rules: the right to be heard[35]; the right to object to the decision not to pursue criminal action[36]; as well as the right to certain possibilities of an economic nature including compensation of

[33] Recital no 61.
[34] M. SIMONATO, *Deposizione della vittima*, cit., p. 88 and 118.
[35] Article 10.
[36] Article 11.

damages, the restitution of assets, free legal aid and reimbursement of costs incurred during the criminal proceedings[37].

A common characteristic of these rights is their dependence on national rules: since the role in court of the victim and investigation rules vary from one Member State to another, the directive can only establish common objectives, leaving it to the individual legal systems to decide the mechanisms that best guarantee such objectives in light of applicable rules. The important thing is that the protections are effective.

With reference to the right to be heard, to be granted to the victim, this represents a way to recognise the right to tell what happened; it represents a moment of recognition for the victim[38]. In fact, the dynamics of recounting one's own pain represents an essential moment in the path of recognition of the victim as such, as far as he or she is concerned and as far as others are concerned. The directive imposes a duty to listen to the victim without indicating in which phase of the proceedings this must take place or before which judicial bodies. However, it requires that these declarations must have the value of "elements of proof". In this way, both those systems of an interrogation tradition, in which proof is formed during the proceedings, and those systems in which proof is formed during the argumentation phase, are compatible with community indications. The question of the powers of the victim in the case of a decision not to exercise criminal action is more complex.

The concept of "decision" includes every measure that puts an end to the criminal proceedings, including the situation in which the public prosecution decides to withdraw the charges or to interrupt the proceedings[39].

The Directive states that out-of-court settlements possibly envisaged by national law are not covered[40]. Here, the directive requires recognition of the "right to request review"[41] of such a decision and of being informed of such an option, but does not define it as an absolute right. If the particular legal system should grant a role to the victim only following exercise of the

[37] Articles 12-16.

[38] A. GARAPON, *I crimini che non si possono né perdonare né punire. L'emergere di una giustizia internazionale*, Bologna, 2004, p. 123.

[39] Recital no 44.

[40] Article 11(5).

[41] Article 11(1).

criminal action, the right to review must only be guaranteed for "serious crimes"[42].

The concept of "review" is also weakened in the sense it does not represent a form of appeal. The directive states that, as a general rule, it would be "expedient that the review of a decision not to exercise criminal action should be carried out by a person or authority different from the one that adopted the original decision"[43]; if, however, the decision not to exercise criminal action is taken by the "maximum responsible authority", a mere review by the same authority seems to satisfy the European provisions[44]. A further limitation for the victim concerns the exclusion of such a right for special procedures such as proceedings against members of parliament or of the government, if the facts have been committed in exercising their official function[45]. Also, out-of-court settlements adopted by the public prosecution that put an end to criminal proceedings exclude the victim from being entitled to the review, as long as the settlement entails "a warning or an obligation"[46].

Court rules that implement the right to review are left totally and for all aspects to national law. The preamble of the directive, however, states that the right to review of the failure to exercise criminal action must be understood as referring to decisions adopted by public prosecutors or investigating magistrates or by authorities such as the police force, but not to decisions adopted by the judging magistrates[47].

The provisions aimed at recognising certain prerogatives of an economic nature in favour of the victim are very different: Member States are obliged to bring their own legal system in line with European regulations, establishing conditions and procedures in harmony with their own procedural rules. They must guarantee the victim access to State legal aid[48]; the reimbursement of costs incurred by the victim for participating in the criminal proceedings[49], irrespective of the role recognised by national law; restitution, without delay of any seized assets,

[42] Article 11(2).
[43] Recital no 43.
[44] Article 11(4).
[45] Recital no 43.
[46] Recital no 45.
[47] Recital no 43.
[48] Article 13.
[49] Article 14.

unless an order to the contrary exists[50]. The right to obtain a decision regarding reimbursement of the damage suffered during the criminal proceedings "within a reasonable lapse of time" must also be guaranteed.

The peremptory nature of the order, which seems to order treatment during criminal proceedings of the request for compensation, is however weakened by the possibility of adopting such a decision in other judicial proceedings. The meaning of paragraph 2 of art. 16 is completely uncertain, according to which "member States promote measures to encourage the perpetrator of the crime to give adequate compensation to the victim". What must understood by "encourage" is not explained nor is the preamble of any assistance in understanding what is meant. .

The section of the directive dedicated to participation of the victim in criminal proceedings includes certain guarantees relating to reparative justice.

The extent of this formula is preferable to the use of the term "mediation", as was included in the Framework Decision of 2001[51]. The concept of "reparative justice" seems to cover all those forms of out-of-court agreements in which the victim and the perpetrator of the crime reach an agreement. Unlike the previous framework decision, however, the directive does not limit itself to encouraging these models, but it dictates their essential paradigm[52].

Summing up, each reparative justice system must guarantee: that the victim should be given the opportunity to participate, on the basis of a free, informed and always revocable consent; that services should be offered by competent personnel and at the service of the victim; that the perpetrator of the crime should recognise his or her own responsibility, at least with respect "to the essential facts of the case"; the agreement must be taken into consideration in criminal justice.

[50] Article 15.

[51] See Article 10 of the framework decision 2001/220/JHA

[52] Article 12. On the various aspects of criminal mediation and the need for a careful balancing, see G. FIANDACA, *Gli obiettivi della giustizia penale internazionale: tra punizione e riconciliazione*, in F. PALAZZO - R. BARTOLI (eds.), *La mediazione penale nel diritto italiano e internazionale*, Florence, 2011, p. 97.

6. Right to protection

The victim has the right to protection during the proceedings and from the proceedings. Article 18 of the directive clearly establishes the obligation for member States to adopt measures that guarantee the protection of the victim and his or her family members. Such measures can be divided into three areas: avoiding secondary and repeated victimisation; creating a shield against any intimidation or reprisals, including the risk of emotional or psychological damage, and protecting the dignity of the victim during questioning or when giving evidence. Such measures however must not have a negative impact on the rights of the defendant, but the delicate balancing is left to the evaluations of the national bodies.

The physical protection of the victim is guaranteed by various measures, all obligatory for member States. First of all, the right to the absence of contacts between the latter and the perpetrator of the crime in the room where the criminal proceedings are being held is required by the directive, unless the co-presence is not ordered by the criminal proceedings. Here the margin of national appreciation re-emerges; it will be the procedural rules in force in the individual legal system to impose the physical presence of the victim during the argumentation[53]. In any case the creation of waiting areas reserved to the victims in the court houses[54] is requested.

Secondly, the European legislature must protect the victim during the most delicate phases of the criminal proceedings: his or her testimony as a witness. To this end, it is envisaged[55] that the hearing of the victim should be limited to the minimum and the hearings should take place only if strictly necessary for the purposes of the criminal investigation. Medical examinations, often necessary during investigation phases relating to crimes of a sexual nature, must also be limited to the minimum and carried out only if strictly necessary for the purposes of the criminal proceedings. All data relating to the private life of the

[53] M. SIMONATO, *Deposizione della vittima*, cit., p. 119; L. PARLATO, *Il contributo della vittima fra azione e prova*, cit., 2012, p. 381; H. BELLUTA, *Un personaggio in cerca d'autore: la vittima vulnerabile nel processo penale italiano*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 96.

[54] Article 19.

[55] Article 20.

victim must be protected and, where possible, not disclosed, especially if the victim is a child[56]. The organs of information are urged to adopt self-regulation measures in this sense.

7. Individualised protection and protection from secondary victimisation

The measures examined so far, find application with reference to every category of victim and family member. The directive, however, does not stop here but takes an important step forward in the construction of an effective and efficacious protection; individualisation of protection of the victim.

"A crime is not only a wrong to society, but also a violation of the individual rights of victims". This is what is stated in conclusion n. 9, summarising a wide-spread feeling at European level. The science of modern criminal law has changed its focus, as if the priority for re-educating the "criminal" is being substituted by that for protection of the victim[57].

The directive in question is the main result of this different perception of the role of criminal law, called upon to respond to the needs of the victim as protagonist. It translates the need to protect not just any standardised victim but a specific person with his or her own precise needs and problems into common provisions. From here arises the need to impose on Member States a strong personalisation of victim protection, which takes into due account the characteristics of the damaged person in all of his or her individual needs[58]. To this end, the directive

[56] Article 21.

[57] In this sense, PARLATO, *Il contributo della vittima fra azione e prova*, cit., p. 91, who refers to H. J. HIRSCH, *Zur Stellung des Verletzten im Straf- und Strafverfahrensrecht*, in AA.VV., *Gedächtisschrift für Armin Kaufmann*, Köln, 1989, p. 699; T. KLEINERT, *Persönliche Betrof- fenheit und Mitwirkung. Eine Untersuchung zur Stellung des Dekliktsopfer im Strafrechtssystem,* Berlin, 2008, p. 28, for which, while in the Sixties and Seventies the identification of each person as a potential defendant was wide-spread, currently each person is considered as a potential victim. See also L. LUPÁRIA, *La victime dans le procès pénal italien à la lumière du récent scénario européen*, in *Revue pénitentiaire et de droit pénal*, 2014, p. 615.

[58] Cfr. M. SIMONATO, *Deposizione della vittima*, cit., p. 108; F. CASSIBBA, *Oltre Lanzarote: la frastagliata classificazione soggettiva dei dichiaranti vulnerabili*, in *Diritto penale contemporaneo*, 11 July 2014, p. 5; M. LAXAMINARAYAN, *Procedural Justice and Psychological Effects of*

suggests analysing all the individual aspects of the victim according to certain specific criteria: a) the personal characteristics of the victim; b) the type of nature of the crime; etc.) the circumstances of the crime.

These have been taken into account in our topical studies.

Criminal Proceedings: *The Moderating Effect of Offense Type*, in *Soc. Just. Res.*, 2012, 25, p. 390; D. SAVY, *La vittima dei reati*, cit., p. 78.

CHAPTER II

VICTIM'S PROTECTION IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS

by *Mitja Gialuz*[*]

TABLE OF CONTENTS: 1. Premise. – 2. Jurisprudence of the Court of Justice: the boundaries of the notion of victim. – 2.1. The position of victims in the trial and their rights – 3. The Court of Strasbourg: seeking a balance between protection of the vulnerable victim and fair trial. – 3.1. Criminalisation and investigation obligations in safeguarding the victim.

1. Premise

The European juridical space has been the stage on which, starting from the Eighties, that process of rediscovery of the crime victim began, which has involved the West as a whole[1].

Considered the poor relation of criminal justice, the victim has changed into the «*nouvelle étoile de la scène pénale*»[2]. The fundamental stages of this path have gone through gradual recognition to the victim, both in terms of service rights and of procedural rights[3].

Certain regulatory documents have had a fundamental importance in this phenomenon, adopted first of all in the

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[1] For a general picture, S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea*, in S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012, p. 1; F. TULKENS - F. VAN DE KERCHÓVE, *Introduction au droit pénal. Aspects juridiques et criminologiques*, Bruxelles, 1999, p. 62.

[2] Literally, A. WYVEKENS, *L'insertion locale de la justice pénale. Aux origines de la justice de proximité*, Paris, 1997, p. 117.

[3] The well-known distinction is owed to A. SANDERS, *Victim participation in an exclusionary criminal justice system,* in V. HOYLE - R. YOUNG (eds.), *New visions of crime victims*, Oxford, 2001, p. 204.

sphere of the Council of Europe and then within the framework of the European Union. On one side, Recommendation (85) 11 on the position of the victim in the area of criminal law and procedure and the European Convention on compensation to the victims of violent crimes have confirmed the principle according to which safeguarding the victim represents an unavoidable addition of the duty of social solidarity. On the other hand, Framework Decision 2001/220/JHA, referring to the position of the victim in criminal proceedings and Directive 2004/80/EC translated the provisions of soft law into rules binding for European States.

But an even more important role in valorisation of the victim as a subject owning rights in the criminal proceedings area was played by the jurisprudence of the two European Courts. On one hand, the decisions of the Court of Justice contributed to defining the notion of victim and the profiles of his rights in the trial; on the other hand, sentences of the European Court of Human Rights outlined the coordinates of a delicate balance between the rights of the victim (above all vulnerable) and those of the defendant. Therefore, it is worthwhile outlining a brief picture of these jurisprudential paths, which have developed along parallel lines before intertwining along the ground of the respect of the canons of the fair trial and arriving at a sort of codification by the European legislator: we cannot help but note that many provisions contained in Directive 2012/29/EU, which establishes minimum provisions in the area of rights, assistance and protection of crime victims have their own roots in important jurisprudential occasions.

2. The jurisprudence of the Court of Justice: the boundaries of the notion of victim

In the decade elapsed between the adoption of Framework Decision no 220 of 2001 and its surmounting, the Court of Justice intervened on more than one occasion on the topics of the victim of crime. Basically, it expressly recognised that the framework decision limited itself to establishing minimum provisions[4] – concerning the trial only[5] – and left a wider

[4] ECJ, 12 July 2012, C-79/11, *Giovanardi and o.*, § 44; ECJ, 15 September 2011, C-483/09 and C-1/10, *Gueye e Salmerón Sánchez*, § 52.

discretional power to the national authorities with regard to the actual procedures for achieving the aims pursued with it[6]: therefore, many doubts arose on the compatibility of national regulatory solutions with respect to the indications established by the European source.

Above all, the Court had to explain the meaning of the term "victim of crime". The reference to mental prejudice and psychological sufferings caused directly by acts or omissions that constitute a breach of the penal right – contained in art. 1 of the Framework Decision – should have resulted in the exclusion of corporate entities from the concept of victim.

Notwithstanding this, the Court of Justice was called on more than once to decide on the point and has always excluded that the protection given by the framework decision could extend to corporate bodies «that have suffered damage caused directly by acts or omissions that constitute a breach of the criminal law of a member State»[7].

Moreover, the position of the corporate body with respect to Framework Decision 220 of 2001 was also assessed with regard to the obligation to guarantee compensation to the victim of crime when his or her responsibility is ascertained for the commission of an administrative crime: art. 9 of Framework Decision 220 of 2001 guarantees the victim the right to compensation within the sphere of criminal proceedings «acts or omissions that constitute a breach of the criminal right of a member State» and that are «directly» at the origin of the damages. If an «administrative» crime is discovered and it is configured as a separate crime that does not have a direct random connection to the damages caused by the crime committed by an individual, the case does not fall within those envisaged by the framework decision. In actual fact, individuals injured as a result of an administrative offence committed by a corporate body, such as the one charged on the basis of the system established by legislative decree no 231/2001, cannot be

[5] According to the ECJ, 15 September 2011, C-483/09 and C-1/10, see, § 50, the framework decision did not contain any provision relating to the forms and extent of the sanctions that Member States must provide in the respective systems for the purposes of repressing criminal crimes.

[6] In this sense, ECJ, 21 December 2011, C-507/10, *X*, § 28; ECJ, 9 October 2008, C-404/07, *Katz*, § 46.

[7] ECJ, 21 October 2010, C-205/09, *Eredics*; ECJ, 28 June 2007, C-467/05, *Dell'Orto*, § 60.

considered, for the purposes of the application of art. 9, par. 1, of the Framework Decision, as victims of a crime who are entitled to obtain a decision, during the criminal proceedings, on compensation by such a corporate body[8].

So, the contribution given by jurisprudence in defining the vulnerable victim was very significant. In fact, Framework Decision 220 of 2001 had assumed the existence of the category (articles 2, 3 and 8, par. 4), without providing any definition and without even indicating the criteria for marking their boundaries: the Court is therefore expected to valorise the defining elements such as the age of the victim, the nature, seriousness and consequences of the offences suffered[9].

2.1. The position of victims in the trial and their rights

The Court has more than once confirmed that, in compliance with that stated by recital nine of Framework Decision no 220, this does not impose on member States the obligation to guarantee victims a treatment equivalent to that of the parties in the trial[10]: therefore, the victim must not necessarily be granted all the rights that national legal systems attribute to the parties.

At a Euro-unitary level, a statute of the victim is outlined that fundamentally revolves around three essential guarantees and two instrumental ones.

Among the first we must mention first of all the *right to monetary compensation*, including the right to compensation (art. 9 Framework Decision 220 of 2001) and that of the indemnity (art. 1 Directive 2004/80/EC, of the Council, of 29 April 2004 relating to the indemnity of crime victims).

Secondly, the *right to participate* in "justice" is recognised, as a primary means of symbolic compensation of the victim: this translates, on one hand, into the victim's right to participate in the traditional trial, in order to contribute to the ascertainment of the facts and responsibilities (art. 3 Framework Decision of 2001) and, on the other hand, into the right to be able to make

[8] ECJ, Sect. II, 12 July 2012, C-79/11, § 46-48.

[9] ECJ, 16 June 2005, C-105/03, *Pupino*, § 53; and, last of all, ECJ, 21 December 2011, C-507/10, § 26.

[10] ECJ, 21 December 2011, C-507/10 § 37; ECJ, 15 September 2011, C-483/09 and C-1/10, § 53.

use of alternative paths of restorative justice and, in particular, mediation (art. 10 Framework Decision 220 of 2001, art. 13 recommendation R(2006)8 and recommendation R(99)19, of the Committee of Ministers of the Member States, on mediation in criminal matters). Finally, the *right of the victim to protection* takes on an important significance with respect to the danger of secondary and repeat victimisation (art. 8, par. 1, Framework Decision 220 of 2001 and art. 10 recommendation R(2006)8).

With respect to these fundamental rights – to these final guarantees – the institutes aimed at ensuring the right *to information* on the proceedings, mentioned in art. 4 of Framework Decision 220 of 2001 and point 6 of recommendation R(2006)8, and to the *right to assistance*, recognised by art. 6 of Framework Decision 220 of 2001 and by point 3 of recommendation R(2006)8 seem to have an instrumental significance.

So, the Court of Luxembourg has pointed out the significance of some of these guarantees. As far as victim participation is concerned, the Court has clarified that, neither the provisions of the framework decision, nor art. 47 of the Charter of the fundamental rights of the European Union guarantee the victim of a crime the right to provoke the exercise of criminal actions against a third party in order to obtain his or her conviction[11]. Valorisation of the victim from the point of view of participation therefore does not arrive at the point of attributing the same a veritable power of impulse or necessarily making the victim a party on the same level as the defendant and the public prosecutor.

What is essential is that the victim is recognised the right to be heard in the trial and the right so that his or her declarations may be assessed by the judge: the victim must be able to give a deposition during the criminal proceedings and such a deposition must be considered as an element of proof[12]. Moreover, in order to guarantee that victims can take part in the criminal proceedings in an effective and adequate manner, the Court has stated that their right to be heard must allow them not only to describe objectively the way the facts occurred but also to be able to express their own point of view on the matter[13].

[11] ECJ, 21 December 2011, C-507/10, § 43.
[12] ECJ, 9 October 2008, C-404/07, § 47.
[13] So, ECJ, 15 September 2011, C-483/09 and C-1/10, § 59.

The interventions with which the Court outlined, in its exact significance, that right to protection from the violence of the trial which must be recognised to the vulnerable victim were very significant. In the famous Pupino sentence, it was clarified that the provisions of Framework Decision no 220 of 2001 must be interpreted in the sense of prescribing to the Member State the obligation of providing a special procedure for taking the deposition of young child victims of cruelty: these procedures must guarantee the victims an adequate level of protection, allowing declarations to be taken outside the court room and before the hearing is held[14]. Considering that the European source did not specify the accurate methods of such a procedure, the Court restricted itself to proving general indications with the subsequent delegation to the national judge to interpret the internal right so as to guarantee protection to the victim[15].

3. The Court of Strasbourg: seeking a balance between protection of the victim and fair trial

There is no doubt that the measures to protect the vulnerable victim during the trial prescribed by Euro-unitary sources may be in conflict with the rights of the defendant and, in particular, with the right to confrontation, recognised by the art. 6, par. 3, let. *d*, European convention of human rights.

So, on the theoretical level, some concerns were expressed on the legitimacy of a balancing between the guarantees of the victim and the rights of the accused. Basically, the presumption of innocence would shield the defendant preventing a conflict in the theoretical sense between his rights and those of the victim from arising. If the defendant must be presumed innocent, he must be considered as a subject to whom primary victimisation and even less so secondary victimisation of the injured person cannot be attributed; in no way, therefore, could the need to protect the latter be translated into a reduction of the rights of the defendant[16].

[14] ECJ, 16 June 2005, C-105/03, § 56.

[15] See ECJ, 21 December 2011, C-507/10, § 33.

[16] G. ORMAZABAL SÁNCHEZ, *El derecho de confrontación del acusado con los testigos-víctima en el proceso penal español. Especial referencia al menor testigo*, in T. ARMENTA DEU - S. OROMÍ VALL-LLOVERA (eds.), *La*

In actual fact, it was the very Court of Strasbourg that responded to these reservations, admitting in explicit terms a balancing between the rights of the victim and the prerogatives of the defendant[17]. In the very well-known *Doorson v. Holland* sentence, the Court in fact sustained that the principles of the fair trial postulate that, in appropriate cases, the interests of the defence must be balanced with those of the victims or of the victims called to give evidence[18].

In spite of the fact that the Convention of Rome did not mention the victim of crime, the Court repeatedly recognised the need «to safeguard victims' rights and their proper place in criminal proceedings»[19].

This above all means justifying those special trial measures aimed at safeguarding the personal life of vulnerable victims: in fact the Court recognises the fairness of a trial in which a personal witness for the prosecution has not been subjected to a cross-examination in order to protect them from the violence of the cross-examination[20]. This applies, above all, if sexual crimes are involved: the procedures for ascertaining such crimes assume a peculiar nature, considering that the evidence of the victim takes on a decisive value and that often participation in the trial turns into an ordeal for the victim[21]. The need to safeguard the victim – and also the witness – can even arrive at the point of allowing anonymous witnesses, the details of whom are not revealed to the defendant and the counsel for the defence[22].

If the Court admits a limitation of the right to confrontation with the accuser, it does, however, require that the latter should be assisted by certain stratagems that counterbalance the

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víctima menor de edad. Un estudio comparado Europa-América, Madrid, 2010, p. 136.

[17] Lastly, the fundamental ECHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*, § 146.

[18] ECHR, 26 March 1996, *Doorson v. Holland*, § 70. On the importance of this general principle, see, for all, M. CHIAVARIO, *La vittima del reato e la convenzione europea dei diritti umani*, in *La vittima del reato, questa dimenticata*, Rome, 2001, p. 111.

[19] ECHR, 24 February 2005, *Sottani v. Italy*; ECHR, 12 February 2004, *Perez v. France*, § 72.

[20] ECHR, 24 September 2007, *W.S. v. Poland*, § 57; ECHR, 20 December 2001, *P.S. v. Germany*, § 22.

[21] ECHR, 27 February 2014, *Lučić v. Croatia*, § 75.

[22] ECHR, 28 February 2006, *Krasniki v. Czech Republic*, § 76; ECHR, 26 March 1996, *Doorson v. Holland*, § 69.

handicap for defence of the defendant[23]. These may consist in the right to ask the police (or the judge) to ask specific questions to the victim, in the right to attend the interrogation behind a darkened window or to watch the film of the first interrogation carried out by the police and to ask questions in view of a second interrogation. In the final analysis, what counts is that, in a reduction of the right to confrontation with the accuser, counterbalancing factors are created.

So, among the measures aimed at specifically safeguarding the rights of the victim, most recent jurisprudence seems to attribute great significance to video-recording the interview of the same during the preliminary phase, followed by showing it in court: this always allows the defence to verify (and possibly dispute) the methods used to carry out the interrogation and to analyse the behaviour of the victim during the examination[24]. However, video-recording cannot be considered, in itself, sufficient to guarantee respect of the guarantees of a fair trial[25]. In fact, the defence counsel of the accused must be placed in conditions to verify the credibility of the witness, asking him questions, even indirectly (i.e. through a psychologist or a family member) or with the use of technologies that prevent direct contact between the victim and the accused[26].

Finally, although with some contradictory remarks by the jurisprudence of Strasbourg, it seems to emerge that declarative proof coming from the vulnerable victim can be said to be respectful of art. 6, par. 3, letter *d*, ECHR only if the witness is *in any case verified*, even if with distinctive methods aimed, precisely, at appeasing the violence of direct confrontation. But the right to an even indirect confrontation cannot be excluded *a*

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[23] ECHR, 2 July 2002, *S.N. v. Sweden*, § 47.

[24] J. MCEWAN (2009), *The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union*, in *ERA Forum*, 2009, p. 379; S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, 2005, p. 322.

[25] ECHR, 18 July 2013, *Vronchenko v. Estonia*, § 65; ECHR, 28 September 2010, *A.S. v. Finland*, § 68; ECHR, 6 November 2009, *D. v. Finland*, § 50; ECHR, 10 February 2006, *Bocos-Cuesta v. Holland*, § 71.

[26] ECHR, 19 February 2013, *Gani v. Spain*, § 48; ECHR, 24 September 2007, *W.S. v. Poland*, § 61; ECHR, 27 April 2009, *A.L. v. Finland*, § 41. In doctrine, B. SCHÜNEMANN, *Protection of children and other vulnerable victims against secondary victimisation: making it easier to testify in Court*, in *ERA Forum*, 2009, p. 395; G. UBERTIS *La prova dichiarativa debole: problemi e prospettive in materia di assunzione della testimonianza della vittima vulnerabile alla luce della giustizia sovranazionale*, in *Cass. pen.*, 2009, p. 4067.

priori: safeguarding the vulnerable victim can never constitute a good reason for allowing a veritable derogation of cross-examination; it only justifies a special discipline with regard to the methods for carrying out the same.

In fact, this approach devised by the jurisprudence of Strasbourg seems to have been accepted by directive n. 29 of 2012: on one hand, this accurately disciplines some protective measures valorised by the European Court (such as, for example, video-recording) (articles 23 and 24); on the other hand, without prejudice to the rights of the defence counsel (and, in particular, the right to confrontation with the accuser as mentioned in art. 6, par. 3, letter *d*, ECHR) (art. 23, recital 58), that cannot be unreasonably sacrificed for reasons of safeguarding the victim.

3.1. Criminalisation and investigation obligations in safeguarding the victim

Moreover, the Court of Strasbourg does not stop at safeguarding the victim *from the* violence of the trial, but has been for some time committed to defining the fundamental principles of a protection of the victim *through* the criminal system. In the recent sentence of the Great Chamber on the Soderman *v. Sweden* case[27], the Court confirmed in a very decisive manner the principles of its decision, which can be divided into two levels, connected to each other.

Firstly, the progressive definition of criminalisation obligations by the States is appreciated. In fact where fundamental assets recognised by the provisions of the European Convention are at play, the Court states the existence of a positive obligation to provide effective protection measures, which translate into the use of the most powerful instrument, i.e. the criminal one[28]. The Court already recognised such penalisation obligations with reference to sexual violence[29], forced labour, intentional bodily harm to the

[27] ECHR, 12 November 2013, *Soderman v. Sweden*, §§ 78-85.

[28] ECHR, 15 February 2012, *M.P. and others v. Bulgaria*, § 108; ECHR, 10 May 2001, *Z and others v. United Kingdom*, § 73. See already F. TULKENS, *Victimes et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme*, in *Arch. pol. crim*., 2002, p. 45-46.

[29] ECHR, 4 March 2003, *M.V. v. Bulgaria,* § 166.

person[30], human trafficking[31] and the disclosure of secret information[32]. As far as children are concerned, it established that any direct intentional act against the physical or moral well-being of a person must be criminalised and punished with a sanction furbished with the efficacy of a deterrent[33]. In less serious cases of breaches of assets protected by the Convention, the State's obligation of protection can, however, be absolved with the provision of instruments of a civil nature[34].

In abstract terms, subsequent to criminalisation, the Court requires that the legal system should guarantee an effective response to the crime by carrying out effective and complete investigations[35]. On this point, the voice of the Court of Strasbourg has always been more decisive and the statement according to which articles 3 and 8 ECHR require that the authorities should conduct an effective investigation which must be, in principle, suitable to leading to ascertainment of the facts and identification and punishment of the guilty party, recurs; these investigations must be conducted independently, promptly and with reasonable speed; the victim must be recognised the possibility of participating in an effective way[36].

So, the Court conducts a *"significant flaw" test* to verify if the flaws and the shortcomings of the investigations have actually been so significant that they lead to a breach of the provision of the convention. And this, both in cases in which the injury depends on the use of force by the police[37], but also in cases of actions committed by private individuals[38].

The Sentence of the Great Chamber indicates a possible development on a further level considered by directive n. 29, i.e. the (already mentioned) right to monetary compensation (art. 16). In fact, in the most serious cases, «the State's positive obligation under Articles 3 and 8 to safeguard the individual's physical integrity may also extend to (…) the possibility to

[30] ECHR, 14 September 2009, *Sandra Jankovic v. Croatia*, § 36.
[31] ECHR, 10 May 2010, *Rantsev v. Cyprus and Russia*, §§ 284, 288.
[32] ECHR, 10 December 2007, *Stoll v. Switzerland*, § 155.
[33] ECHR, 2 March 2009, *K.U. v. Finland*, § 46; and, ECHR, 4 February 2011, *Darraj v. France*, 34588/07, § 49.
[34] ECHR, 17 January 2002, *Calvelli and Ciglio v. Italy*, § 51.
[35] ECHR, 24 September 2012, *V.A.S. and V.S. v. Romania*, § 72.
[36] ECHR, 28 January 2014, *O'Keeffe v. Ireland*, § 172; ECHR, 24 September 2012, *V.A.S. and V.S. v. Romania*, §§ 68-70.
[37] ECHR, 25 August 2009, *Giuliani and Gaggio v. Italy.*
[38] ECHR, 9 June 2009, *Opuz v. Turkey.*

obtain reparation and redress (…), although there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable»[39].

Finally, the Court of Strasbourg has also registered a considerable development with respect to the timescales in which safeguarding of the victim of the crime – through the application of art. 6 ECHR – was subordinated to the exercise of the civil action and to repercussions of the criminal matter on civil claims[40]. Today this approach has been superseded and the Court recognises a protection irrespective of the civil law claim[41]. Certainly, from the point of view of the Court of Strasbourg, we are a long way from recognising a veritable "right to investigations". And even more from the right of seeing a procedure adopted that considers the actual participation of the victim in the dynamics of the trial[42].

But, on this level, although with the necessary precautions, it seems that directive no 29 of 2012 has made significant progress – with respect to the Framework Decision of 2001 – in recognising the participation guarantees of the victim. In the years to come, it will however be up to the Court of Luxembourg to further indicate their significance and supervise implementation of the directive by Member States. In this way, we shall see another episode of that dialogue among the Courts which, in the last decade, has led to a considerable strengthening of the position of the victim in the criminal trial.

[39] ECHR, 12 November 2013, *Soderman v. Sweden*, § 83.

[40] ECHR, 17 January 2002, *Calvelli and Ciglio v. Italy*, § 3. See, for all, M.L. LANTHIEZ, *La clarification des fondements européens des droits des victimes*, in G. GIUDICELLI-DELAGE - C. LAZERGES (eds.), *La victime sur la scène pénal en Europe*, Paris, 2008, p. 149.

[41] ECHR, 24 February 2005, *Sottani v. Italy.*

[42] ECHR, 30 March 2010, *Mihova v. Italy*.

CHAPTER III

THE LANZAROTE AND ISTANBUL CONVENTIONS: AN OVERALL PICTURE

by Stefania Martelli[*]

TABLE OF CONTENTS: 1. The Lanzarote Convention. – 2. The Istanbul Convention.

1. The Lanzarote Convention

The Convention of the Council of Europe for the protection of children against sexual exploitation and abuse is more commonly identified as the Lanzarote Convention, after the place in which the convention was opened for signature on 25 October 2007. The Convention is a supranational instrument, in force since 1st July 2010 and has an *ad hoc*[1] monitoring mechanism through which it aims at providing an effective regulatory fabric for preventing and repressing the rampant forms of sexual exploitation - in particular under the form of pornography and prostitution - involving children. The phenomenon is present in impressive numbers: according to UNICEF, about two million children are utilised, every year, in the "sex industry". More than a million images of 10/20,000 sexually abused children exist on Internet. Of these 10/20,000 children, only a few hundred are identified. The rest are anonymous, abandoned and very likely still abused[2].

In the face of such a social emergency, implemented enormously by modern mechanisms of globalisation of communications and the exchange of information, the

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[1] The reference is to the "Committee of Parties" disciplined in articles 39-41 of the Convention.

[2] Here are the details reported in the Report explaining the Convention, which can consulted on the website *www.conventions.coe.int*.

Convention has declared three essential aims: the prevention of phenomena of child exploitation and abuse, protection of the rights of the victims and, finally, the promotion of national and international cooperation against such events (art. 1).

The unavoidable starting point in drafting the convention was the definition of the list of individuals at whom its measures aim: the supranational vocation of the regulatory instrument, in fact, dictates the accurate and preliminary identification of the - *in primis* subjective - borders within which the member States are called upon to achieve the mentioned protection and repression aims. Therefore, to this end, it is explained that the term "child" must be understood as meaning every person under the age of eighteen (art. 3, let. *a*), while the term "victim" must be understood as meaning all children who are passive subjects of sexual exploitation and abuse[3] (art. 3, let. *c*). Therefore, it is children, the category of "vulnerable victims" par excellence, who polarise the dictates of the convention in question, without any discrimination based on sex, religion, political opinions, economic conditions or any other subjective personal condition[4].

Stating the endo-conventional defining premises in this way, the declared aim of protecting the rights of victims thus identified is pursued with the definition of a series of repressive obligations by the contracting Parties[5], accompanied by a series of additional provisions of a procedural nature.

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[3] Note, in this case also, that «in the face of a significant instinct of common control, the concept of victim, significant at procedural level, is anything but certain, seeing that it is completely subordinate to that of infringement» (so S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea,* in S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA (eds.), *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012, p. 12).

[4] See, in this sense, art. 2 of the Convention, containing the principle of non-discrimination, according to which the Parties are obliged to apply the Convention "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth sexual orientation, state of health, disability or other status". The provision is identical to the one contained in art. 14 European convention of Human Rights, expressly mentioned in the Preamble of the Lanzarote Convention.

[5] See, in particular, articles 18-29 containing a package of repressive provisions (of a substantial criminal nature - therefore) aimed at harmonising the legislations of the various member States concerning the criminalisation of a wide range of actions of sexual exploitation and abuse of children, pornography and child prostitution..

Placing itself perfectly in line with a layout already frequently found in supranational texts "dedicated" to victims, the Lanzarote Convention moves along two main procedural axes: «making the criminal trial an instrument to protect the victim and, at the same time, to protect the victim from the violence of the trial»[6]. This emerges unequivocally from the same *incipit* of the procedural "section" of the Convention: art. 30 (entitled significantly "Principles") begins by stating that «each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child », in this way highlighting the wish to make the procedural instrument a vehicle for defending children violated by the very serious crimes mentioned by the Convention itself.

Immediately after this, however, the other aspect appears, the one which in parallel also intends protecting the child from the inevitable – and above all psychological – violence that the very same trial machine causes him, creating the phenomenon commonly known as "secondary victimisation". According to art. 30, p. 2, each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response if followed by assistance, where appropriate. With regard to the first aspect (defence of the victim *through* the criminal process), this contains all those provisions that aim at equipping children injured by sexual crimes with procedural instruments able to guarantee them and facilitate them in the defence and reinstatement (as far as this is possible) of their breached rights: above all, member States are asked to ensure that the investigations and criminal proceedings are treated "as priority and carried out without any unjustified delay" (art. 30, p. 3), that they are "effective" and that they should allow, where appropriate, for the possibility of covert operations (art. 30, p. 5). This is followed by the imposition of information obligations regarding victims so that they may have access to and are made aware of their right to access the criminal justice system and subsequent participation at the trial: in all phases of

[6] S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea*, cit., p. 17.

the investigations and criminal proceedings, the States must keep the victims "informed of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings and their role therein" (art. 31, p. 1, let. *a*).

Note how this last provision also manifests that aim of protecting the child *from the* trial, doing so by guaranteeing the so-called right to be forgotten, in other words, the right to be kept away from the trial circuit and from information relating to the same (which they would be entitled to, however) if they express a wish in this sense. The need to guarantee the child victim access to justice is then taken up again and mentioned in paragraph 2, art. 31, extending it to every part of the trial, as "from their first contact with the competent authorities" and also in collateral administrative proceedings. It is also clarified *expressis verbis*, that the duty/right of information must be effective: to this end, information given to the victim must be "adapted to their age and maturity and in a language that they can understand" (art. 31, p. 6). States are therefore asked not for a bland and superficial work of information, but in fact, for an effective and attentive information relationship with the victim which, above all because of the particular physionomy of the child, must be adapted to the characteristics - of language and maturity, not only anagraphic - of the same, also through the involvement of parents and/or relatives or, in the absence of these, of «special representative (art. 31, p. 4).

Still remaining in the area of protection of the victim *through* the trial, we must mention the right of the victim to free legal aid "when it is possible for them to have the status of parties to criminal proceedings" (art. 31, p. 3). Clearly, this right is also part of the information which the victim must receive before the trial. To close the circle, we must mention the instructions contained in lets. *c)* and *d)* of art. 31, p. 1, through which States are asked to ensure that victims are heard, to supply evidence and to choose the means of having their views, needs and concerns presented to the competent Authorities and to provide them with «appropriate support services so that their rights and interests are duly presented and taken into account». Not, therefore, victims who are simple passive recipients of information, but subjects made able to take on active and proactive roles within the criminal trial, in *primis* thanks to the

cognitive basis offered to them by the above-mentioned communications.

A much more extensive package of provisions is aimed at what we previously defined as the aspect of protecting the victim *from* the trial, obviously also due to the particular vulnerability that characterises the type of victim protected by the Lanzarote Convention. In similar situations, the key role of the child from the probatory point of view is accompanied by the psychologically and emotionally painful impact that re-evocation of the facts can have in those who have experienced them, especially if carried out in contexts and with procedures that do not protect the declaring party from excessive and perhaps unnecessary stress. In the case of children, then, this need for protection goes hand in hand with the need to identify procedures for gathering declarations that guarantee their reliability: in fact, the high risk that anxiety, pain, fear and shame may produce in the potential witness reactions of refusal ranging from imaginative versions of the facts to refusal to answer any question or appeal, do not escape us. To this we can also add the difficulty of communicating with child witnesses, especially if they are very small and in relation to particularly delicate and offensive matters; often, the greatest difficulty is that of finding the words to define that about which information is asked or also of understanding the meaning of the replies, always maintaining the detachment necessary for avoiding influencing, even unintentionally, the declaration gathered[7]. This delicate mass of needs has been tackled, in various ways, by the Lanzarote Convention, which has answered it in the following terms.

Above all, regarding information, States are asked to ensure "at least in cases where the victims and their families might be in danger, that they may be informed, if necessary, when the person prosecuted or convicted is released temporarily or definitively" (art. 31, p. 1, let. *b*).

The intention to protect the personal safety of victims in situations of potential risks connected to particular phases of the trial is clear. With regard to assistance and protection of the child from the risks of secondary victimisation and traumas that the criminal trial can produce, above all on the forming

[7] C. CESARI, *Il "minore informato sui fatti" nella legge n. 172/2012*, in *Riv. it. dir. proc. pen.,* 2013, p. 161.

personality of children and adolescents, the already mentioned declaration of principle contained in art. 30 of the Convention is integrated and completed by a series of subsequent provisions: first of all, interviews with the child in the capacity of witness (or, more generally, as a source of evidence) are specifically governed. Regarding this matter, States are asked to ensure - through appropriate internal legislative measures - that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact (art. 31, p. 1, let. *g*). This latter provision is the appendix of a couple of more general provisions which, from the same point of view, oblige the Convention Parties to protect child victims, their families and any witnesses from intimidation, retaliation and repeat victimisation (art. 31, p. 1, let. *f*), and to take adequate measures to protect the privacy, identity and image of child victims of these vile crimes, also with respect to the dissemination of any information which could lead to their identification (art. 31, p. 1, let. *e*).

The balancing point between the needs to protect the psyche of the child, the authenticity of the evidence that the same can provide during the trial and the complex communication dynamics (often even of mere language) with this type of victims is expressed, within the Lanzarote Convention, in a bulky article (art. 35) entitled "Interviews with the child". The latter is composed of a catalogue of prescriptions to be observed in interviewing children (even if they are simple witnesses within the criminal events provided by the Convention), with the aim of managing in a specialist manner the path of suffering linked to the traumatic memory that the deposition can re-evoke, and, at the same time, avoiding investigating excesses which could not only damage the psychological stability of the child but also the authenticity of the evidence given[8].

Therefore, it is provided that interviews with the child must be held - where possible - immediately after the traumatic events have been suffered by the child, so as to allow him to be removed rapidly from the mnemonic and trial circuit linked to

[8] See on the point, also M. GIALUZ, *Lo statuto europeo delle vittime vulnerabili*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 83.

the crime; that interviews with the child must take place, where necessary, in premises designed or adapted for this purpose and that they should be carried out by professionals trained for this purpose and with the presence - unless judged inappropriate - of an adult of his or her choice; the number of interviews must be as limited as possible and may be videotaped, so that these videotaped interviews may be accepted as evidence during the court proceedings in the place of new depositions by the child. For declarations made during the trial *stricto sensu*, finally, the possibility of carrying out the trial without the presence of the public or that the victim may be heard in the courtroom without being present. In closing this series of detailed provisions, States are asked "to ensure training on children's rights and sexual exploitation and sexual abuse of children is available for the benefit of all persons involved in the proceedings, in particular judges, prosecutors and lawyers" (art. 36, p. 1); moreover, the same training requirement is also extended to the units and services in charge of the investigations (art. 34, p. 1), and, as seen, also to operators who speak to the children in various ways.

A further shield in protection of the child victim and his emotional fragility can be seen, finally, in the provision of art. 32, where States are prescribed the obligation to ensure that investigations or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim and that «the proceedings may continue even if the victim has withdrawn his or her statements. In this case, valorisation of the vulnerability of the victim leads […] to down-grading of the latter's trial choices, depriving him or her of the direct consequences of the ascertainment of guilt, showing a preference for policies of a clear public law matrix»[9]. An impressive, much discussed topic remains in the background: that of the complex balancing between the procedural protection of the (vulnerable) victim

[9] In such terms S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea*, cit., p. 19, in relation to the identical choice made by Directive 2011/36/UE, concerning the prevention and repression of human trafficking and protection of victims. According to M. GIALUZ, *Lo statuto europeo delle vittime vulnerabili*, cit., p. 92, the *ex officio* mechanism makes one of the "paradoxes of the vulnerable witness" emerge: «by valorising its intention, we do not make its vulnerability grow».

and the rights of the defendant[10]. Due to the economy of this work, we can only touch the surface of this very delicate and articulate topic, above all – it goes without saying – with regard to art. 6, par. 3, let. *d,* European Convention of Human Rights; nonetheless we should mention that this matter was taken up by the Lanzarote Convention: art. 30, p. 4 (not by change the one containing the "principles" applicable to the trial) obliges the Parties to ensure that the provisions adopted in compliance with the Convention itself "do not prejudice the rights to protection and the need for a fair and impartial trial, in compliance with article 6 of the Convention on the protection of Human Rights and Fundamental Liberties". Therefore, in no way can the protections provided in favour of the child victim of sexual crimes prejudice the rights of the defendant.

2. The Istanbul Convention

The Convention on protecting and combatting violence against women and domestic violence, also better known with the name of the city where it was opened for signature on 11 May 2011 (Istanbul, in fact) is another product, as is the previous one - of the Council of Europe. The Convention will come into force on 1st August 2014, after reaching the minimum number of ratifications required by the same Convention[11]. The regulatory text in question is inspired by the assumption according to which "violence against women is a manifestation of the historically unequal relationships of strength between the sexes, that have led to domination over women and discrimination against them by men and has prevented their full emancipation"[12] and recognises, at th

e same time, "the structural nature of violence against women, in that it is based on gender". Women, as the *genus* historically opposite the male genus, are therefore victims of deep-rooted social and cultural imbalances, in turn the generators of mechanisms of violent abuses of power by men, which translate into forms of domestic violence, sexual

[10] M. GIALUZ, *Lo statuto europeo delle vittime vulnerabili*, cit., p. 88.

[11] The status of the ratifications can be consulted in updated format at the website *www.conventions.coe.int*.

[12] The preamble of the Istanbul Convention expresses itself in such terms.

molestation, rape, forced marriages, genital mutilation and even into the so-called "crimes of honour". In the face of this, it is to them that the Istanbul Convention is aimed in terms of protection and the prevention of such events, with a peak of particular attention also focused on the phenomenon of the so-called "assisted violence": in fact, it is specified in the preamble that victims of domestic violence – and, in fact, the recipients of the regulatory provision in question – are not only women, but children also, both as the direct recipients of violence and due to their being the witnesses of violent acts perpetrated within their families, with subsequent repercussions on their psyche and emotionality.

If gender equality is the final horizon (and, it is to be hoped, not only ideal) of the Istanbul Convention, the *modus procedendi* chosen by the Council of Europe is characterised by the encouragement of wide-ranging policies, that aim at a coordination between judicial authorities (understood in the wide sense) and "extra-procedural" organisations (associations of the civil society, social services, the so-called "private social sector", ONG, etc.): regarding this articles 8, 9 and 19 of the Istanbul Convention are illuminating, where constant usage is made of expressions such as "global picture" of assistance and protection, "integrated approach for the elimination of violence against women", "integrated policies of measures and programs, including therein those carried out by the ONG and by the civil society", "effective cooperation" among States and non-governmental organisations and/or associations of the civil society. The Istanbul Convention also takes pains to define at the outset its own field of action, both from the subjective and the objective point of view, after having clarified that its application is reserved to "all forms of violence against women, including domestic violence" (art. 2); from the objective point of view, by "violence against women" we must understand a "breach of human rights and a form of discrimination against women, including all acts of violence founded on gender[13] that cause or are likely to cause damages or suffering of a physical,

[13] With the term "gender" the Istanbul Convention refers to «socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men» (art. 3, let. *c*); consequently, by "gender-based violence against women" it means «violence that is directed against a woman because she is a woman or that affects women disproportionately» (art. 3, let. *d*).

sexual, psychological or economic nature, including threats of carrying out such acts, coercion or arbitrary deprivation of freedom, both in public and private life" (art. 3, let. *a*); by "domestic violence", we mean, "all acts of physical, sexual, psychological or economic violence that occur within the family or family unit or between current or previous spouses or partners, irrespective of the fact that the perpetrator of such acts shares or has shared the same residence with the victim" (art. 3, let. *b*). On the subjective side, on the other hand, it is clarified that with the expression "*victim*" we mean «any individual who suffers acts or behaviour of violence as mentioned above[14] (art. 3, let. *e*), while by "women" we mean all persons of the female sex, even if below 18 years of age (art. 3, let. *f*).

After a lengthy part dedicated to requesting and implementing among the member States - in observance of the approach described above - policies of prevention, sensitization, education about the equality of the sexes, and of information, protection and support of "victims in general[15], the Istanbul Convention states a series of actual cases which the Parties are called upon to criminalise through their own internal legislation[16] (if, clearly, they do not already integrate the crime nationally), going on to dedicate a chapter (chapter VI) to provisions of a decidedly more procedural nature.

In this case also, exactly as happened with the Lanzarote Convention, we find (again) provisions subsumable within the ideal division into two parts: measures of protection of the victim *through* the process and measures of protection of the victim *from the* trial.

The first part explains the obligation, imposed on States, to carry out investigations "without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings" and that must also be effective (art. 49), and give at the same time "immediate and adequate protection to the victims" and include "the employment of preventive operational measures and the collection of evidence" (art. 50). Worthy of attention then are also: information duties with

[14] See note 3.

[15] The reference is to chapters II (Integrated policies and collection of data), III (Prevention), IV (Protection and support) of the Convention.

[16] See, in particular, chapter V of the Convention: it ranges from psychological violence to stalking, from sexual violence to forced marriage, from female genital mutilation to forced abortion.

regard to the victim concerning their rights and services at their disposal, the progress of the investigations or proceedings, his or her role in the trial (art. 56, p. 1, let. *c*); the duty of guaranteeing the victim the possibility of being heard and of supplying evidence (art. 56, p. 1, let. *d*); the duty of guaranteeing assistance to the victim for an adequate participation in the trial (art. 56, p. 1, let. *e*); and an independent and competent interpreter if the victim speaks a different language (art. 56, p. 1, let. *h*). Victims of "gender crimes" must also be guaranteed legal assistance and free legal aid if they are entitled to it (art. 57).

Provisions which are also more "unprecedented" than the previous ones can also be found in the Convention, but which also refer to the matter being analysed: firstly art. 52 according to which the Parties must ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence or person at risk , prohibiting the perpetrator from contacting the victim for a pre-established period of time. Such measures are designed *expressis verbis*, to give priority to the safety of the victims or the persons at risk; secondly, we must point out the possibility, for member States, to adopt restraining or protection orders for the immediate protection of the victim, breach of which by the offender entails criminal sanctions "or other effective, proportionate and dissuasive legal sanctions" (art. 53).

Lastly, note also that the Istanbul Convention also provides that investigations into or prosecution of offences shall not be wholly dependent upon a report or complaint filed by a victim and that the proceedings may continue even if the victim withdraws his or her statement or complaint. (art. 55). The public law and repressive nature that this type of procedural choice entails has already been mentioned.

As far as the question of the protection of the victim *from* the trial is concerned, we find – exactly as for the different profile we have just examined – provisions that are consolidated to varying extents in supranational texts for the protection of victims, including the Lanzarote Convention, proof of a kind of central body of provisions that should act as a common platform of guarantees and protection for all types of victims: we only have to think of the duty to protect the victims and their families and witnesses from the risk of intimidation, retaliation and

repeat victimisation (art. 56, p. 1, let. *a*), of the right for victims to be informed, in cases where the perpetrator is released (art. 56, p. 1, let. *b*), of the need to adopt measures to protect the privacy and image of the victim (art. 56, p. 1, let. *f*), of the prescription to avoid - where possible - contacts between the victim and the perpetrator within court and law enforcement agency premises (art. 56, p. 1, let. *g*) and of enabling the victim to be interrogated during the trial through the use of appropriate communication technologies (art. 56, p. 1, let. *i*)[17].

There is also an *ad hoc* provision for the phenomenon of so-called assisted violence, already introduced in the preamble of the Convention: art. 56, p. 2, in fact, provides a child victim and child witness of violence against women and domestic violence the possibility, where appropriate, of special protection measures taking into account the best interests of the child.

In addition to the central element discussed above, a handful of further provisions, full of significance as far as the trial is concerned is worthy of attention: in fact the Istanbul Convention takes a clear position on the so-called alternative methods of solving conflicts (mediation and conciliation), denying them citizenship if they fall within the area of gender violence as defined by the Convention itself. This seems to be in clear contrast with that «escape from the justice system»[18] advocated benevolently within Europe in order to soften the sharper corners of the criminal trial system to the advantage of a less traumatic as possible management of the matters for the victims of crimes which are in themselves very humiliating for the personality and individual psyche.

The Convention also contains a provision providing extreme respect and protection to the woman victim of gender violence, where States are required to ensure that in both civil and criminal proceedings, evidence regarding previous sexual offences and the conduct of the same are only admissible when pertinent and necessary. The aim, obviously, is to protect the

[17] The provision adds a further angle when it opens up the possibility of hearing the victim in the trial «at least without the presence of the presumed perpetrator of the crime, thanks to the use of adequate communication technologies, if they are available». Consideration about the rights for the accused to participate in the trial and the confrontation between the same and the source of the charge, demanding an inevitable work of conciliation between the opposite pleases in question, is immediate.

[18] S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea*, cit., p. 17.

most intimate and personal areas of this particular category of victim from the greed for information typical of criminal trials.

Very interesting, especially for legislations that distinguish between the injured party and the plaintiff is art. 30 of the Istanbul Convention: in providing a general obligation for States to guarantee that victims can ask for compensation from the perpetrators of crimes of gender-violence they have suffered, a subrogating compensatory responsibility of the State is established: those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions - are entitled to obtain a compensation from the State (which will then be entitled to claim it back from the offender), that is adequate and is granted within a reasonable time. Moreover, States are also obliged to pay civil compensations to the victims of gender crimes if "they have failed in their duty to take the necessary preventive or protective measures within the scope of their powers" (art. 29).

To end, we must also point out that the Istanbul Convention also has a control mechanism, composed of two bodies (the GREVIO and the Parties Committee) assigned to monitor the implementation and correct application of the Convention itself and also to adopt, where appropriate, recommendations of a general nature regarding its application (Chapter IX of the Convention).

CHAPTER IV

VICTIMS IN INTERNATIONAL CRIMINAL JUSTICE

by Chantal Meloni[*]

TABLE OF CONTENTS: 1. The role of victims before international criminal courts in the past: remarks. - 2. Role and participation of the victims before the International Criminal Court. - 2.1. The notion of the victim pursuant to the Rome Statute. - 2.2 A short description of the victim participation and protection system pursuant to the Rome Statute. - 3. *Ratio* of the participation and role of the victims in light of the peculiar characteristics of international tribunals.

1. The role of victims before international criminal courts in the past: remarks

As we know, the international criminal justice system - by that meaning in particular today the complex system that revolves around the jurisdiction of the Internal Criminal Court (ICC) - finds its origins in the experience of Nuremburg and the other internal criminal and/or military courts established after the Second World War[1].

More precisely, we can state that the whole *corpus* of modern internal criminal law was founded on the ashes of the International Military Tribunal (IMT) of Nuremburg, founded in 1945 to judge the most serious German war criminals, and the parallel International Military Tribunal for the Far East (IMTFE), founded in Tokyo in 1946 to judge the responsibilities of commanding officers and members of the Japanese government during the second world war.

However, although the experiences of Nuremburg and Tokyo were milestones for the current structure of international

[*] University of Milan.

[1] G. WERLE - F. JESSBERGER, *Principles of International Criminal Law*, Oxford, 2014, p. 95.

justice - *in primis* for having recognised in a definitive manner the configurability of an individual criminal responsibility at international level[2]-, the role of victims is an aspect that these criminal tribunals of the past did not take into consideration. The millions of victims of the very serious crimes committed by Nazi Germany were given no voice or almost even no role in the Nuremburg trial and in the subsequent associated trials. One of the reasons for this is that the judges based themselves above all on documents and written evidence (meticulously preserved and filed at the times of the *Third Reich*) and had no need to resort to oral testimonies[3]. Some testimonies from victims were collected in reports by national commissions, and then used as proof in Nuremburg, but of the ninety-four witnesses summoned in the trial only a very small part of these was composed of victims. The Tokyo tribunal, on the other hand, had to resort to oral testimonies to a greater extent, in the absence of written evidence bearing witness to crimes on a par with the German ones. Various victims were therefore called to give evidence, but only in so far as they were able to contribute to establishing the guilt of the accused. Also, as has been correctly noted, the selection of the victims did not necessarily reflect the reality of the committed crimes: the victims of many sexual crimes committed both in the areas under German and Japanese control, especially, were totally ignored[4].

Even before the two ad hoc tribunals set up in the Nineties by the Security Council of the United Nations, the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Ruanda (ICTR)[5] - the first tribunals to be established after Nuremburg and still considered as fundamental laboratories for the development of modern internal criminal law – the role of the victims was quite limited. Neither their founding statutes nor their rules of procedure in fact mention the rights of victims of war crimes, crimes against humanity and genocide placed under their respective jurisdiction. Both statutes however

[2] M. C. BASSIOUNI, *Introduction to International Criminal Law*, New York, 2003, p. 107.

[3] T. TAYLOR, *The anatomy of the Nuremberg trials. A personal memoir*, New York, 1992, p. 57.

[4] H. NICOLA, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, in *Int. Journ. Transitional Just.*, 2009, p. 115.

[5] The ICTY and the ICTR were set up by the UN Security Council respectively with Resolutions n. 827 of 1993 and n. 955 of 1994.

provide for a provision relating to protection of victims (alongside that of the accused)[6]. As far as the possible participation in proceedings is concerned, victims may only take part before the two tribunals in the capacity of witnesses and may not bring a civil action, or make requests for compensation of damages during the criminal action. The judges were able to take into consideration certain significant declarations made by the victims and brought to their knowledge via the public prosecution[7], but no victim was called before such courts to express themselves in public on the impact of the crimes they suffered, except in the capacity of witness[8].

The strictly accusatory system adopted by such tribunals, moreover, made a more active role of victims difficult. In any case the proposal to include a defence council for victims was made during preparation of the ICTY statute but was rejected because it was believed that the interest of the international community, of which the public prosecution is recognised as a representative before *ad hoc* tribunals, already included the interest of the victims[9].

Finally, the trial system before *ad hoc* tribunals was structured in a rather essential way and did not allow victims to instigate criminal action, to participate as plaintiffs or to ask for compensation of damage; in actual fact no mandate in this sense was granted by the UN Security Council to the tribunals in question. Notwithstanding this, the need to grant victims a different and more significant role in trials, within the sphere of international criminal justice, has continued to emerge over the last twenty years. Although not being totally successful in achieving their intention of including victims in the actual criminal trial, the advocates of an approach addressed more widely to the rights of the victims in the international justice sphere, have succeeded in establishing organisms centred on the figure of the victim which in some cases have worked in

[6] See art. 21 ICTY Statute and art. 22 ICTR Statute.

[7] In theory, the opinions of the victims should have been brought before judges even as *amicus curiae*. V. MORRIS - M. P. SCHARF, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, Leiden, 1995, p. 167. Such a procedure is provided pursuant to Rule 74 of the Rules of Procedure and Evidence of both the ICTY and the ICTR, but the tribunals rejected all requests in such a sense.

[8] See B. MCGONIGLE LEYH, *Procedural justice? Victim Participation in International Criminal Proceedings*, Cambridge, 2011, p. 137.

[9] *Ibid*, p. 138-139.

parallel in support of the criminal tribunals. Thus, we witnessed the establishment of "truth and reconciliation commissions", the most famous example of which is certainly represented by the commission established in post-apartheid South Africa[10]. Unlike the international criminal tribunals, the role of the victims, before such institutions has maximum significance. The truth and reconciliation commissions, as their name reveals, are in fact aimed at placing the victim in front of the perpetrator of the crime in a search for reconciliation via the truth.

Although the aim of such organisms, that are normally part of a series of measures adopted at the same time as a political transition[11], is to throw light on the serious violations of human rights committed in a given country during a given period, criminal tribunals nor jurisdictional organisms in the true sense, however, were not involved. In this sense not only is South Africa interesting, but so are the experiences of the Commissions for truth and reconciliation established in Timor-Est, Kosovo and Sierra Leone, since in these cases the commissions worked alongside criminal tribunals set up to ascertain the responsibilities of criminals[12].

The veritable leap forward as far as victims in the international criminal justice system are concerned was actually made only with the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003, and with the creation of the ICC in 1998, which we will discuss in more detail in the following paragraph. The Extraordinary Chambers in the Courts of Cambodia, ECCC, are a hybrid criminal or internationalized tribunal[13] set up and governed jointly by the UN and by the Cambodian government. The ECCC was established to judge serious crimes of war and against humanity committed by the Khmer Rouge regime between April 1975 and

[10] Note on the topic A. M. GENTILI, A. LOLLINI, *L'esperienza delle commissioni per la verità e la riconciliazione: il caso sudafricano in una prospettiva giuridico-politica*, in G. ILLUMINATI - L. STORTONI - M. VIRGILIO (eds.) *Crimini Internazionali tra diritto e giustizia*, Turin, 2000, p. 163.

[11] See in this sense, A. M. GENTILI, A. LOLLINI, *L'esperienza delle commissioni per la verità e la riconciliazione: il caso sudafricano in una prospettiva giuridico-politica*, cit., p. 177.

[12] See W. SCHABAS, *The Sierra Leone Truth and Reconciliation Commission*, in N. ROTH-ARRIAZA - J. MARIEZCURRENA (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice*, Cambridge, 2006, p. 21.

[13] See C. RAGNI, *I tribunali penali internazionalizzati*, Milan, 2012.

January 1979, when between one and a half and two million people, representing more than a quarter of the whole population of Cambodia, were killed, starved to death or lived in hardship under the dictatorship of Pol Pot. Because of its approach to victims it stands out from all other tribunals in the past; in fact the first criminal trial in which victims were able to participate as plaintiffs[14] were celebrated before this court.

By adopting the rules of the internal Cambodian procedure, before the ECCC victims can be complainants, appear as plaintiffs or cover the role of witnesses. In the so-called Dutch case, for example – the first degree sentence of which was pronounced on 26 July 2010 – in addition to the two victims who were heard as witnesses, ninety-three victims actively participated as plaintiffs, divided into four legal teams[15]. They were able to access the prosecution file, attend the hearings, including non-public ones, present written and oral remarks, question witnesses, submit evidence to the Court and make final arguments. So, at least on paper, victims were able to take part in Cambodian trials, even though their right was downsized due to the very high number (potentially the whole Cambodian population!) and the peculiar characteristics of international justice[16]. In addition to participation in trials, which was important but for certain aspects 'more symbolic than essential'[17], the experience of the victims before the ECCC was fundamental in wider terms. The presence of the victims in these trials in fact obliged the court to launch a system of assistance and protection for the victims of such crimes, irrespective of their role as witnesses. The value of this first experience was also reflected, as we will see, in the more recent and complex policy of the International Criminal Court.

[14] See B. MCGONIGLE LEYH, *Procedural justice? Victim Participation in International Criminal Proceedings*, cit., p. 167.

[15] *Ibid*, p. 193.

[16] See an accurate analysis in this sense, B. MCGONIGLE LEYH, *Procedural justice? Victim Participation in International Criminal Proceedings*, cit., p. 193-202.

[17] In the same way, B. MCGONIGLE LEYH, *Procedural justice? Victim participation in International Criminal Proceedings*, cit, p. 222, which highlights in particular the dissatisfaction of the victims/plaintiffs with respect to the sentence inflicted in the Dutch case.

2. Role and participation of the victims before the International Criminal Court[18]

The role attributed to victims in important proceedings before the International Criminal Court is often mentioned as one of the most innovations made by the Rome Statute of 1998[19]. For the first time a "pure" international criminal court (therefore not "internationalised" like the ECCC) had the power to sentence an individual to reparation of the damage caused to another individual[20]. For the first time, also, victims were allowed to participate in trials for international crimes. As has been effectively stated, the possibility created by the legal framework of the ICC for victims to participate in proceedings before an international court has been a breakthrough innovation and a first in international justice[21].

2.1. The notion of the victim pursuant to the Rome Statute

Who can be considered a victim in proceedings before the International Criminal Court? To answer this question we must first of all identify the notion of victim accepted by the Rome Statute, which, however, is not a simple task[22]. In fact, although

[18] This paragraph is partially based on a previous statement of mine, in which I already discussed in more detail the participation of the victims before the ICC, in particular in the investigation phase. See C. MELONI, *Le vittime nel procedimento davanti alla Corte Penale Internazionale*, in P. CORSO - E. ZANETTI (eds.), *Studi in onore di Mario Pisani*, II, Piacenza, 2010.

[19] The Rome Statute, institutive of the ICC, was signed on 17 July 1998 and came into force on 1st July 2002, following its sixtieth ratification. The number of ratifications, and therefore the State-members of the Court, currently amounts to 121 (figure recorded in August 2014). The Statute can be consulted on the Court's web site, www.icc-cpi.int, together with the other linked documents, including in particular the *Rules of Procedure and Evidence* (RPE) and the *Regulations of the Court* (*Regulations*).

[20] Pursuant to article 75 of the Statute "the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation". In order to guarantee the efficacy of such measures aimed at damage reparation, the Assembly of States in 2002 created the Trust Fund for Victims.

[21] R. BLATTMANN - K. BOWMANN, *Achievements and Problems of the International Criminal Court. A View from Within,* in *Journ. Int. Crim. Just.*, 2008, p. 728.

[22] In general, concerning the difficulty linked to defining the concept of the victim and the associated rights see E. FATTAH, *Victim's Rights: past,*

there are numerous provisions regarding victims, a *tout court* definition of victims is absent from the Statute. Moreover, certain fundamental aspects and notions concerning victims have been (consciously) ignored in the phase of the preparatory works, or defined in such wide terms to require a significant work of integration by the interpreter.

Although absent from the Rome Statue, a definition of victim is contained in the Rules of Procedure and Evidence – RPE, one of the texts linked to the Statue. Rule 85 RPE[23] establishes, in very general terms, that the term victim must be understood as any individual who has suffered harm following the commission of a crime of competence of the Court[24]. Under the same provision, victims may also be corporate bodies, in particular those organisations or institutions that have sustained harm to any of their property which is dedicated to religion, education, art or science or charitable purposes or harm to historic monuments, hospitals and other places and objects for humanitarian purposes[25]; however, in this case, the provision limits the status of victims to those organisations that have suffered "direct" harm. The first interpretation of rule 85 RPE was given by the Trial Chamber I in the Lubanga case in January 2008[26], later partially confirmed by the appeal judges in July of the same year[27]. One of the points disputed by the Prosecutor and by the defence concerned the notion of harm on which the status of victim depends for the purposes of the

present and future. A global view, in R. CARIO - D. SALAS (eds.), *Oeuvre de Justice et Victimes*, vol. 1, Paris, 2001, p. 81.

[23] On the preparatory works relating to this provision (during the *Prep. Comm.*) see B. TIMM, *The legal position of victims in the Rules of Procedure and Evidence*, in H. FISHER - C. KRESS - R. LUEDER (eds.), *International and national prosecution of crimes under International law,* Berlin, 2001, p. 289.

[24] *Cfr*. Rule 85*(a)* RPE: "Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".

[25] *Cfr*. Rule 85*(b)* RPE: "Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes".

[26] Trial Chamber I "Decision on victim's participation" (ICC-01/04-01/06-1119), 18 January 2008.

[27] Appeals Chamber "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's decision on victim's participation of 18 January 2008" (ICC-01/04-01/06-1432), 11 July 2008.

Court's jurisdiction. In fact, the point in question, i.e. the notion of "harm", had been one of the most thorny points during the Preparatory Commission[28] and the generic nature of the definition of victim finally adopted by the RPE can be attributed to the very fact that no agreement had been reached among the various delegates in particular concerning the notion of indirect harm and collective harm[29]. The judges in the Lubanga case referred, as provided by art. 21(3) St. ICC, to the wide definition of victim outlines by the Basic Principles concerning victims adopted by the UN General Assembly in 2005[30] and in particular to Principles 8 and 9[31]; the Appeals Chamber confirmed such an interpretation, reasserting the notion of victim, in compliance with the mentioned provision, does not necessarily assume that the harm suffered has to be direct[32]. Therefore the harm suffered may also be indirect, in the sense that, as stated by the judges: "harm suffered by one victim as a result to the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims"[33]. The Appeals Chamber however explained that in any case it must be a matter of *personal* harm, i.e. harm suffered personally by the

[28] S. A. FERNANDEZ DE GURMENDI, *Definition of Victims and general principles*, in R. S. LEE - H. FRIMAN (eds.), *The Elements of Crimes and the Rules of Procedure and Evidence of the International Criminal Court*, New York, 2001, p. 426.

[29] See B. TIMM, *The legal position of victims in the Rule s of Procedure and Evidence*, cit., p. 289-291.

[30] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res. 60/147, December 2005.

[31] The point was object of the dissenting opinion of Judge Blattman, attached to the decision of the Trial Chamber in question, since recourse to the Basic Principles – a soft law tool and therefore not binding – had given rise to doubts within the chamber itself about their value.

[32] See § 17-39 of the decision of the Appeals Chamber mentioned above. The point in question, i.e. the notion of "harm" had been one of the most thorny during the Preparatory Commission and the general nature of the definition of victim finally adopted by the RPE can be attributed to the very fact that no agreement had been reached among the various delegates on the notion of harm. In particular, it was the notion of "indirect harm" and "collective harm" that represented a problem for some of the delegates, see B. TIMM, *The legal position of victims in the Rules of Procedure and Evidence*, cit., p. 289-291.

[33] See § 32 of the above-mentioned decision. This notion of victim appears to be wider than the one accepted by ICTY and ICTR, *cfr*. rule 2 RPE of the ICTY and the ICTR.

victim[34]. According to the interpretation given to it by the judges, this notion covers both material harm and physical or psychological harm.

The wide, and in a certain sense, vague notion of victim, pursuant to rule 85 RPE, during those years raised a considerable number of interpretation problems especially with regard to its compatibility with that phase of the investigations where a precise identification of the crimes committed and those responsible (i.e. in the "*situation*" phase)[35] is missing. It is also clear that, even when crimes and presumed perpetrators have been identified (and therefore when the "*case*" phase has been reached), the presumption of innocence imposes that the commission of a specific crime cannot be considered to be ascertained yet, which, in turn, imposes caution in interpreting the term "crime" in compliance with rule 85 RPE. On the other hand, we can see that recognition of the victim status is a separate finding which disregards the (preliminary) recognition of a prejudice that certain individuals report they have suffered due to the commission of criminal events abstractly falling within the jurisdiction of the Court and by the subsequent conviction (or not) of the defendant.

In this sense, the status of victim does not therefore contrast with the assumption of innocence: in this phase it is not a matter of victims recognised as such, to all effects (since the crime has not yet been ascertained nor the perpetrator identified). In this sense such a category could be identified by indicatingit as "alleged victims"[36]. The judges, in the Lubanga case, stated that for the purpose of recognising the status of victims in the first

[34] A different matter is the case covered by let. *b*) of rule 85 RPE which, regarding corporate bodies, expressly provides that the harm suffered must be "direct".

[35] The investigations before the Court were articulated between the level of the "situation" and the "case". Various "cases" can be found within the sphere of a "situation"; unlike the "situation", where wide ranging preliminary investigations are involved, even though in a specific time-space context, the "case" concerns specific individuals in relation to specific crimes (usually defined by the issue of an arrest warrant in compliance with art. 58 St.).

[36] This terminological choice finds its fundament in the vocabulary used in the ONU textbook that speaks about alleged victims. See in this sense D. DONAT CATTIN, Sub *art. 68*, in O. TRIFFTERER (ed.), *Commentary of the Rome Statute of the International Criminal Court*, Munich, 2008, point 23. Thus J. R. W. D. JONES, *Protection of victims and witnesses*, in A. CASSESE - P. GAETA - J. R. W. D. JONES (eds.), *The Rome Statute of the International criminal court,* Oxford, 2002, vol. II, p. 1357.

phase of the investigations, without, at the same time, violating the rights of the defence, it is not necessary to be in possession of evidence of the commission of the crime and the guilt of a specific individual; instead, the existence of a reasonable basis for considering that facts have been committed that abstractly integrate the crime is sufficient, as a result of which the "alleged victims" are supposed to have suffered harm[37]. As we can perceive, there are hundreds, often thousands, of potential victims of each of the crimes under investigation at The Hague[38]. To sort out who has or does not have the right to be represented and present at the trial is objectively a very onerous task, which implies the coordinated work of various bodies within the ICC, from the Office of the Prosecutor to the judges and the Registry.

As a first step towards participating in the capacity of victims in the proceedings in question, a decision of the court in this sense must be obtained: in particular, it is up to the judges of the relevant chamber to analyse the applications received, in compliance with rule 89 RPE[39]. However, many aspects concerning victims' participation are in fact without any explicit regulations and therefore have been deferred to integration by the judges[40]. The problem is that the criteria adopted by the judges in examining such applications have not always been coherent in the case law of the Court of these years[41].

In particular, the new approach adopted by a Trial Chamber within the sphere of the cases concerning crimes committed in Kenya (that also see president Kenyatta in the dock), aroused quite a few concerns[42]. The judges abandoned the procedure

[37] See the standard as per art. 53(1) (a) St. as interpreted by the Pre-trial Chamber I.

[38] At this moment, the Court is carrying out investigations in: 1) Democratic Republic of Congo (DRC); 2) Uganda; 3) Central African Republic; 4) in Sudan, in Darfur region; 5) in Kenya; 6) in Libya; 7) Republic of Côte d'Ivoire; 8) Mali.

[39] The Chamber in charge becomes aware of these applications through the VPRS (Victims Participation and Reparations Section) which is aimed at assisting the victims in the procedure for the recognition of their status, their participation and their compensation before the ICC. See infra par. 2.2.

[40] See in this sense G. BITTI - H. FRIMAN, *Participation of victims in the proceedings*, in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, cit., p. 456.

[41] See infra, par. 2.2.

[42] See the Decision on victims' representation and participation, Trial Chamber V, 3 October 2012 (ICC-01/09-92/11-498), The Prosecutor v.

followed from the Lubanga case onwards, on the basis of which admission of the victims was defined in two phases: an initial one aimed at admission as victims of the applicants who fulfilled the requisites for admission in compliance with rule 85 and according to the procedures mentioned in rule 89 RPE[43], and a second phase relating to the actual modalities of participation, in compliance with art. 68(3) St. ICC[44].

In the declared attempt at simplifying the procedure in dealing with the very high number of victims and the serious problems of safety, in the Kenyan cases, the judges decided to divide the victims into two categories, distinguishing between (a) those who want to participate personally in the proceedings and (b) those that do not participate personally and are represented by a common legal representative. For this second category, the judges envisaged a simplified procedure which does not take into consideration the criteria and rules dictated by the RPE. Such a category, however, would have a different status and fewer rights before the Court than the victims allowed to participate individually[45]. This scheme does not appear to have statutory bases and was the object of criticisms under various profiles, for which reason it seems unlikely that it can become a consolidated procedure before the Court[46].

2.2 A short description of the victim participation and protection system pursuant to the Rome Statute

Considering that the Rome Statute created a new system, in which victims acquired an important role before the International Criminal Court, the question to be asked is what

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Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (and the identical decision of three days previously in the Ruto and Sang case).

[43] See also regulation 86 of the Regulations of the Court, which contains the requirements for the victims' application.

[44] See L. CATANI, *Victims at the International Criminal Court. Some Lessons Learned from the Lubanga Trial*, in *Journ. Int. Crim. Just.*, 2012, p. 908.

[45] Moreover, such a category, represented in loco by a Common Legal Representative, could act before the Court only through the Office for Public Counsel for Victims (OPCV). See infra, par. 2.2.

[46] See the comment of T. BATCHVAROVA on *PhD Studies in Human Rights*,*http://humanrightsdoctorate.blogspot.de/2012/10/comment-on-victims-decision-of-trial.html*.

significance and content is it possible to give to the participation of the victims within the sphere of trials for international crimes. At the point, we must explain that, in terms of trials, victims cannot be formally qualified as "parties"[47] in the trial before the Court instead, their role can be defined as that of "participants" according to the RPE[48].

Victims cannot formally start proceedings, nor, generally speaking, do they have the right to produce evidence during the debate concerning the guilt or innocence of the defendant[49] or to directly appeal against a sentence of absolution or conviction of the defendant. A recent decision by the Plenary of judges also established that through their own legal representative, victims do not have the right to request the disqualification of a judge, a right that would be reserved to the parties in the strict sense, according to art. 41(2) (b) of the Statute, i.e. the Prosecutor and the Defence[50]. Notwithstanding these limitations however, the victims still have wide possibilities of having their own voice

[47] The procedural role of victims before the Court was also indicated as that of "potential parties", see D. DONAT CATTIN, Sub *art. 68*, cit., point 23.

[48] Victims can assume a role of plaintiff in the trial only during the proceedings aimed at obtaining compensation for damage (in compliance with rule 91(4) RPE and regulation 56 of Regulations) or the adoption of special protection measures (in compliance with rules 87-88 RPE). In both cases, the victims have the right to produce evidence in support of their petitions.

[49] However, with the Decision on victim's participation (ICC-01/04-01/06-1119) of 18 January 2008, in establishing the participation procedures of victims in the Prosecutor v. Thomas Lubanga Dyilo case, the first trial before the Court, the Trial Chamber I stated that the right to produce evidence before the Court is not limited to the parties but that it also extends to the victims allowed to participate in the trial if the Court considers that such evidence can be useful for the purposes of determination of the truth. Such a decision was then confirmed by the Appeals Chamber which, with decision issued by majority on 11 July 2008 (ICC-10/04-01/06-1433), stated that although the right to produce evidence concerning the guilt or innocence of the accused and the right to dispute the admissibility of such evidence remains above all a prerogative of the parties in the trial (and therefore of the Prosecutor and the defence), nothing however prevents the victims from producing evidence in this sense (se §§ 4 and 67-105). In a clearly contrary sense, see the Dissenting opinion of Judge Pikis attached to the decision itself.

[50] However, there does not seem to be a consensus on the point: the decision in question, pronounced within the sphere of the Germain Katanga case on 22 July 2014, was taken by a qualified majority (8 judges in favour, three against and two abstaining). See part. 41 of the Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of the Prosecutor v Germain Katanga (ICC-01/04-01/07-3505).

heard and intervening in proceedings before the Court[51]. The central provision is found in art. 68 (3) St. ICC: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is nor prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

This provision grants victims, under certain conditions, the possibility of presenting their own views and concerns before the judges during all stages of the proceedings. In this way from the beginning of investigations until the final phase of the appeal victims are guaranteed a veritable right to participate in proceedings before the Court, to be exercised as established by the judges in the individual case[52].In particular, art. 68 explains that such participation must take place in a way that is not prejudicial or incompatible with the right of the accused to a just and impartial trial (see *infra,* par. 3). According to the Statute, the Court is obliged to adopt appropriate measures for protecting the physical and psychological safety, the wellbeing, dignity and privacy of the victims: many statutory provisions and the Rules of Procedure and Evidence and the Regulations of the Court are aimed at guaranteeing the safety and protection of victims[53]. During investigations, in particular, the responsibility of adopting measures suitable to this purpose lies on the Prosecutor, *dominus* of such a phase[54] and on the judges of the Pre-trial Chamber, to whom judicial control of the preliminary phase is attributed, with a delicate balancing of the powers of

[51]. See the remarks of Judge Steiner, relating to the evidence given by child-soldiers allowed to participate as victims in the trial against Thomas Luganga Dyilo for war crimes consisting in the enrolment and use of child-soldiers: S. STEINER, *Conflitti inter-etnici e vittimizzazione minorile: l'esperienza della Corte Penale Internazionale*, in V. MILITELLO (ed.), *Conflitti inter-etnici e tutela delle vittime*, Milan, 2008, p. 1.

[52] See Pre Trial I Decision on the application for participation in the proceedings of [….], (ICC-01/04-101), 17 January 2006, § 71, 233, infra, § 5.1. Along the same lines, see D. DONAT CATTIN, Sub *art. 68*, cit., point 24. On the possible interpretations of such a provision before jurisprudential pronouncements on the point, see C. STAHN - H. OLÁSOLO - K. GIBSON, *Participation of victims*, in *Journ. Int. Crim. Just*., 2006, p. 236.

[53] Among the many provisions, see in particular art. 68 St. and rules 87-88 RPE.

[54] See the provisions as per art. 68(1), 54(1)(b) and 43(6) St. and rules 87(1) and 88 (1) of the RPE.

the Public Prosecutor[55]. A series of complex mechanisms and practical stratagems were provided and finalised during this first decade of the Court's activity, through the synergy of various bodies assigned to this task, to ensure logistical support to victims and to guarantee that their participation at the proceedings at The Hague should not endanger their safety or that of their families, or be even more harmful and painful in terms of psychological suffering[56]. Special sections of the Court, dedicated to the assistance of victims were set up as provided by the Statute. In particular, within the Court Registry, the Victims and Witnesses Unit (VWU)[57] and the Victims Participation and Reparation Section (VPRS)[58] were established. The Victims and Witnesses Unit is specifically dedicated to providing protection and psychological support to the victims (in a wide sense) who appear before the Court, also in the capacity of witnesses, and to all those potentially at risk with regard to the evidence given during the proceedings under the Court's jurisdiction. The VPRS section, instead, assists those who make an application to be allowed to participate as victims before the Court (as mentioned above) and regarding applications for compensation.

In order to cope with the dimensions of the phenomenon, certain instruments were also provided, including collective legal representation for groups of victims[59]. With regard to this aspect, a very significant role is played by the Office of Public Counsel for the Victims (OPCV) set up in accordance with the Statute, but furbished with a particular position of independence; the OPCV is appointed to act as a link between the Court and the victims' legal representatives, and to represent the interests of the victims who are without other legal

[55] See, beside art. 68(1), also art. 57(3)(c) St. and rule 87 RPE.

[56] Report of Human Rights Watch, Courting History: the landmark International Criminal Court's first years of July 2008, and in particular the Chapter VI (*Victims and Witness Protection and Support*), available at *www.hrw.org*.

[57] See art. 43(6) of the St. and rules 16-19 RPE. According to such provisions, the VWU must include personnel with experience in handling traumatic events, including traumas deriving from sexual violence. Such a unit currently employs around 40 officers, some of them dislocated in the field.

[58] Such a Unit was founded according to regulation 86(9). See also regulations 87 and 88 of the Regulations.

[59] See in this sense rule 90 RPE which provides the possibility for the Court to nominate a common legal representative for groups of victims, in order to guarantee the effectiveness of the proceedings.

representatives in proceedings before the Court[60]. During these first 10 years of activity of the Court, it is estimated that the OPCV represented the interests of around 50.000 victims.

3. *Ratio* of the participation and role of the victims in light of the peculiar characteristics of international tribunals

It is not surprising that the topic of victims before the ICC is one of the most widely discussed matters in the criminal-international panorama of recent years[61].

On one hand, certainly, participation of victims in the criminal trial gives concrete form to the cause of international justice, insofar as the individualization of the harm inflicted, in other words the attribution of a face and a name – and then of a voice – to the victims of the crimes humanises the trial in a context where all too often, due to the macroscopic dimensions of the events in question, the consequences of the crimes tends to be depersonalised not only from the point of view of the perpetrators, but also from that of the victims.

Also, giving the possibility to the victims to participate in the trial, also possibly during the investigation phase, may turn out to be extremely useful for the purpose of gathering information and clarifying the events concerned, as the recent practice of the ICC[62] demonstrated. On the other hand, it cannot be ignored that not only interests, but also counter-interests exist regarding a wide participation of the victims in international criminal proceedings, and in particular before the ICC. Resistance and fears regarding the entrance of victims to the system of the ICC in fact have been widely expressed at

[60] Regulation 81. On the role of the OPCV with respect to participation of the victims, P. MASSIDDA - S. PELLET, *Role and practice of the Office of Public Counsel for Victims*, in C. STAHN - G. SLUITER (eds.), *The emerging practice of the International Criminal Court*, Leiden-Boston, 2009, p. 691.

[61] According to a former deputy prosecutor of the ICC: "no other legal argument has received so much attention at the International Criminal Court as the way in which the judges have interpreted the right of victims to participate in proceedings, C. H. CHUNG, *Victims' participation at the International Criminal Court: are the concessions of the Court clouding the promise?*, in *Northwestern Jour. Int. Human Rights*, 2008, p. 459.

[62] In particular, during the investigations in the Democratic Republic of Congo, the judges have obtained a lot of information thanks to the active participation of the victims. This circumstance is confirmed in the paper already cited written by Judge S. STEINER, *Conflitti inter-etnici*, cit.

various levels[63]. When the number of victims of an international crime is in the hundreds or thousands, it is clear that giving a voice and space to all and each of these within the criminal trial would in practice make is impossible to guarantee the rights of the defendant and more generally the functioning of the judicial machine.

In this sense, the necessary counter-balancing with the right of the accused to a fair trial (in accordance with art. 68 of the Statute), and the need to avert the danger that an excessive number of victims should actually paralyse trials, makes it imperative for the mechanisms of access and participation of the victims before the Court to be governed in the most accurate and clear manner possible. The already mentioned explicit reference to the rights of the accused within the sphere of art. 68 St. ICC, dictated regarding the rights of the victims, is significant in this sense, If, on one hand, the importance of the participation of victims in the trial should not be underestimated, since it contributes positively to pursuing the purposes of international criminal justice, on the other hand - due to the very fact that such a particular sector is involved – their practical difficulties must also be carefully assessed.

The interests that move in the direction of a widest possible participation of the individuals injured by the crimes being investigated by the Court are opposed by the counter-interests of the accused, so that the participation of the victims must not be an obstacle to the right of the defendant to a fair trial. In fact, there is no doubt that the ICC is not a truth and reconciliation commission or a civil tribunal. Nor is it a human rights court – although certain positions orientated particularly (not to say unbalanced) towards the interests of the victims may attempt to present the Court as a hybrid in this sense.[64] On the contrary, in spite of the strong component represented by the presence of victims in criminal proceedings and consideration of their interests, it is the matter of an international purely criminal court, which as such must give maximum consideration to the rights of the accused. In this sense, the rights of the victims, as guaranteed by the international instruments concerning this, and recognised by the Rome Statute, must be carefully balanced with the right of the accused to a fair trial in its fullest

[63] B. MCGONIGLE LEYH, *Procedural justice? Victim participation in international criminal proceedings*, cit, p. 225.

[64] *Ibid*, p. 346.

acceptance, which also includes the expeditiousness of the proceedings.

Widening the field also to the specific topic of the participation in trials, the practice of these first years of activity of the ICC has already shed light on various critical aspects concerning the role of the victims in international justice; in particular, in the procedure of the first years, the absence of consideration of specific groups before the Court, such as, for example, the thousands of victims of sexual crimes committed during the conflict in DRC, was considered to be worrying. The fact that, within the sphere of a "*situation*" of investigation, the Prosecutor only opened specific cases concerning specific crimes and did not, instead, consider it necessary to proceed with regard to other crimes, was denounced as a form of denial of justice by the associations of victims who were excluded. On the other hand, we can see that it is the same (intrinsic) selectivity of criminal justice, and in particular of international justice, that produces such injustices. In this sense, it will not be easy to overcome these criticisms by acting at a merely procedural level; a more global approach would seem to be more sensible, which considers the rights of the victims of international crimes, irrespective of whether they participate in the criminal proceedings or not, for example through the establishment of bodies such as the Trust Fund for Victims – created by the Assembly of States Parties (ASP) of the ICC – or other such ventures which are (even if timidly) starting to make a way for themselves in the international panorama.

CHAPTER V

THE VICTIM AS A WITNESS

by Giulio Illuminati [*]

TABLE OF CONTENTS: 1. The victim as subject of the trial. - 2. The giving of evidence by the victim as a right and as a duty. - 3. Right of the victim to be heard and testimony of the victim. - 4. Vulnerable victim and protection measures. - 5. Giving evidence and secondary victimisation. - 6. "Attenuated" confrontation. - 7. Assessment of evidence.

1. The victim as subject of the trial

Giving evidence is one of the possible forms of participation of the victim in the criminal trial, participation that can assume many different aspects. The ways and forms in which this takes place, in fact, differ considerably according to the specific provisions of internal law of the individual countries and depend, more generally, on the fundamental characteristics of each procedural system, determined by its historical roots and by the configuration of the model[1]. Such characteristics are usually linked to structural choices, such as, for example, the adoption of a tendentially inquisitorial rather than accusatorial system, or whether or not - and this does not necessarily coincide with the previous distinction - the civil action is admitted for restitutions or compensation of damage within the criminal procedure.

The notion itself of victim, as we know, does not have a univocal significance, since it is a generic expression with a criminological matrix. It extends to meanings extraneous to the

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[1] S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea*, in S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012, p. 3.

purely juridical theme, including the indirect effects of the crime, which reflect on the structure and the causes of the same, or on the need that a punishment should be inflicted. As a subject of the proceedings, the victim – as such – does not have autonomous legal significance except to the extent in which his or her participation is envisaged: in Italian legislation, for example, the term victim is only used occasionally and in the atechnical sense[2], while other positions are recognised by the Code of Criminal Procedure (CCP), such as the person injured by the crime, their close family members, the bodies and associations representing the interests injured by the crime, as well as the person damaged by the crime, who has the power of joining the proceedings assuming the actual role of a party.

From this point of view, it is difficult to compare legal systems, due to the variables that can arise according to the different national laws[3]. The right to join the criminal proceedings as plaintiff, which characterises many of the legal systems in continental Europe, the existence of specific crimes punishable only upon a complaint of the injured party, or even the power of exercising a private criminal action, independently or in a subsidiary way with respect to the public prosecution, are crucial for the definition of the subject of the proceedings.

At regulatory level, the European Union currently provides a general and omni-comprehensive definition, contained in art. 2 § 1 *a)* of the Directive 2012/29/UE of 25 October 2012, according to which "victim" means i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death[4]. The focus of the Directive is limited to the promotion of rights, support and protection of victims, and this is not the place for examining in more depth its sphere and significance: the unifying element we wish to highlight is that

[2] The term appears in article 498, par. 4-*ter*, CCP (Code of Criminal Procedure) concerning examination of the «victim» who is a child or who is mentally ill, therefore only as a weak subject who needs protection when they give evidence.

[3] F. M. GRIFANTINI, *La persona offesa dal reato nella fase delle indagini preliminari*, Naples, 2012, p. 53.

[4] Moreover, recital 19 of the Directive states that «the Directive is without prejudice to any national administrative procedures required to establish that a person is a victim».

the victim is, in any case, the bearer of a personal and direct interest in the result of the trial.

2. The giving of evidence by the victim as a right and as a duty

So, it seems clear that the victim, in assuming the role of witness, does not correspond to the characteristic traditionally attributed to this figure, i.e. of a person extraneous to the dispute, according to the principle of *nemo testis in causa propria*: a principle intended to express the impartiality and therefore the reliability of the witness statements. But we must recognise that such a principle has only a tendential significance, because in actual fact admissibility of party testimony is a common rule in various judicial systems of ancient tradition[5], and it is often envisaged in the criminal trial (without prejudice to the defendant's right to remain silent). The choice is understandable, because it involves the person who, better than anyone else, knows the disputed facts. Therefore, in theoretical terms, the problem is not so much that of the suitability of the victim to carry out the function of witness, but rather that of the value to be attributed to his or her testimony, i.e. the judgement of his or her actual reliability. We must also consider that attribution of the role of witness to the victim is characterised by a strong ambiguity. On one hand, in fact, victims are given the power of making a direct contribution to the ascertainment of the facts, and the right for their statements to be assessed by the judge as proof. On the other hand, the evidence of the victim is functional to repression of crimes, an essential task of the State authority, and their statements are often an indispensable instrument to this end, especially for certain types of crime, for which they are the main, if not exclusive, source of proof. So much so that – except in particular cases – victims cannot abstain from giving evidence and cannot fail to fulfil the obligation of collaborating with the investigating authority, or refuse to carry out their role in court.

As we will see, even where specific protection measures are in force, these are addressed to minimising the risk of an

[5] M. TARUFFO, *Prova testimoniale (dir. proc. civ.)*, in *Enc. dir.*, XXXVII, 1988, p. 729.

overexposure, but do not arrive at contemplating the right to abstain from actively participating in the trial when their collaboration is required, a right that, on the other hand, is generally recognised to the defendant. Therefore, as we say, the victim at the same time uses the trial to obtain justice, but also is useful to the trial for its own ends, concerning general public interest[6]. The right to be heard – the value of which transcends the strictly probatory function, to extend to meta-juridical meanings – merges with being subject to the duties of those who are called upon to refer criminally significant facts to the judicial authority.

3. Right of the victim to be heard and testimony of the victim

The right of the victim to be heard is expressly mentioned in the quoted Directive 2012/29, article 10, separate from the right to provide evidence. In fact the two categories do not coincide, even if his or her own evidence is one of the main proofs that the victim can ask to present. In any case, the Directive defers to national law with regard to the methods used in exercising such rights (art. 10 § 2). We will not discuss here the right to call for the admission of evidence, which the victim is entitled to only insofar as he or she is recognised the role of a party in the trial. In the Italian legal system, only the civil plaintiff who has joined the proceedings has the right to evidence, and not the person injured by the crime as such.

When the victim is heard as a witness, we find ourselves before another contradiction. The obligations of the witness include the duty to answer questions and to answer truthfully, a duty whose violation is punishable as a criminal offence.

Therefore, even facts that could be damaging for his or her interests, or also information that can potentially damage the right to privacy, must be revealed (without prejudice, as for all witnesses, to the privilege against self-incrimination). On the other hand, however, evidence is a proof to all effects, and in virtue of the duty to tell the truth imposed on those who assume the formal role of witness it is assisted within certain limits by a

[6] In this order of ideas see, for example, L. PARLATO, *Il contributo della vittima tra azione e prova,* Palermo, 2012, p. 381.

presumption of reliability, which is not in the same way recognised to the free statements that can be made as a party in the trial, or given by a person who finds himself in a position in which the right of defence is guaranteed, such as, for example, the defendant of a connected or linked crime against which a separate prosecution is underway. So, in this sense we must recognise that the victim is benefitted by assuming the role of witness, since it regards the weight of their statements; but at the same time, they are forced to provide a truthful version even if it can damage them, or to find themselves in the uncomfortable position of having to lie, with the risk of being prosecuted.

The problem arose at the time of the reform of the Italian CCP, with reference to the civil plaintiff: the incompatibility of this party, as a holder in the trial of a personal interest, in assuming the position of witness[7] was excluded at the end. Forfeiture of the probatory contribution of the civil plaintiff was considered «too great a sacrifice in seeking truth in the trial»[8].

However, the fact remains that, with reference to the right to be heard, there is no provision in the code that makes the examination of the person injured by the crime obligatory, if no-one requests it[9]. When the person injured by the crime joins the proceedings as civil plaintiff, if they have not been called as witness, they can in any case ask to be examined as a party; otherwise, if they do not join the proceedings as civil plaintiff, in the capacity of simple person injured by the crime, they only have the right to indicate evidence, but not the right to have it admitted.

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[7] Incompatibility that was envisaged by the preliminary draft of the CCP of 1978, which was the model that inspired the current Code, issued in 1988. This draft reserved for the civil plaintiff the right to be examined at their own request and the right not to answer the questions, essentially putting such examination, as a plaintiff, on the same level as examination of the defendant. Such a choice was widely criticised at the time by the inter-parliamentary Commission appointed to express an opinion on the preliminary draft presented by the Government: see *Parere sul progetto preliminare del codice di procedura penale*, Istituto poligrafico dello Stato, 1979, p. 172.

[8] *Relazione al progetto preliminare del codice di procedura penale*, in *Gazzetta Ufficiale*, *Serie Generale*, n.250 of 24-10-1988 - *Suppl. Ordinario* n. 93.

[9] L. LUPÁRIA, *Quale posizione per la vittima nel modello processuale italiano?*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 47.

Therefore, even if they ask for it, they do not have the right to be heard in person, unless the judge exercises the discretionary power to allow admission of such evidence *motu proprio* if he or she considers it absolutely necessary[10].

Apparently, therefore, due to how the Italian criminal trial is structured – but the phenomenon is also common to other legal systems – the hearing of the victim assumes significance if and in as much as it is considered useful for ascertaining the crime. Which opens up a series of collateral problems, with reference to the other interests that deserve to be protected in the trial: in particular, together with the one just mentioned, the interest in protecting the person, especially if he or she is a vulnerable victim, through protection measures, and the interest in protecting the right of the defendant, that is not always easy to balance.

4. Vulnerable victim and protection measures

Protection measures can concern any witness as such, especially when participation at the trial can put their safety in danger, also due to the type of crime being prosecuted. In addition to general measures to be applied case by case, such as the hearing without the presence of the public or those particular procedures for taking evidence which may be appropriate (for example the use of screens), in specific cases, in order to safeguard the person making the statement, distance examination through video-conference can be used, and in certain legal systems even anonymous testimony[11] is allowed.

Among witnesses, specific attention is dedicated to vulnerable witnesses, in other words those individuals who find themselves in a situation in which, due to their being minors or to the mental illnesses they suffer, giving evidence in court could cause them excessive stress, jeopardising their

[10] L. LUPÁRIA, *op. loc. cit.*

[11] As we know, the European Court of Human Rights has recognised that the use of anonymous witnesses is not always incompatible with the European Convention. In certain cases, such as those linked to organized crime, witnesses must be protected against any possible risk of retaliation which may put their life, liberty or security at stake: ECHR, *Doorson v. The Netherlands*, 26 March 1996, §§ 69-70; see also for further clarifications, ECHR, *Van Mechelen v. The Netherlands*, 27 April 1997.

psycho-physical development or balance[12]. The aim of protection measures is to prevent the vulnerable witness from having to undergo a traumatising experience, but also to ensure the most truthful contribution possible, without external influences, when the person giving evidence is, due to his or her personal condition, particularly sensitive and less able to find their way, especially when faced with the psychological stress they inevitably must suffer in those trial systems in which confrontation is carried out through cross-examination. The category of the vulnerable victim does not coincide with that of the vulnerable witness: but when the vulnerable victim assumes the role of witness he or she receives specific forms of protection, which satisfy the more general needs for protection of his or her particular position. From this point of view, and naturally irrespective of the guarantees of assistance and participation in the trial that must be recognised for them, we can identify in the victim a sub-category of vulnerable witness.

The concept of vulnerability however does not have a well-defined profile, and it varies according to judicial systems[13].

Directive 2012/29 requires an individual assessment, for the purposes of which the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime (art. 22 § 2) must be taken into particular consideration. More precisely, «particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime, victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics, victims whose relationship to and dependence on the offender make them particularly

[12] G. UBERTIS, *La prova dichiarativa debole: problemi e prospettive in materia di assunzione della testimonianza della vittima vulnerabile alla luce della giustizia sovranazionale*, in *Cass. pen.,* 2009, p. 4059.

[13] Art.1 d. law 4 March 2014, no 24, concerning the prevention and repression of human trafficking and the protection of victims, defines as vulnerable subjects «unaccompanied minors, the elderly, the disabled, women, in particular if pregnant, single parents with children, people with mental illnesses, people who have suffered torture, rape or other serious forms of psychological, physical, sexual or gender-related violence». This is a provision of a strongly programmatic nature, difficult to apply immediately (F. CASSIBBA, *Oltre Lanzarote: la frastagliata classificazione soggettiva dei dichiaranti vulnerabili*, in *Diritto penale contemporaneo*, 11 July 2014, p. 9), but it may have the value of a criterion of orientation for the discretion of the judge, in cases provided for by the CCP.

vulnerable», in addition to victims of specific categories of crimes and those with disabilities (art. 22 § 3); while a specific provision in particular concerns children, who it is presumed always have special need for protection (art. 22 § 4), and who therefore are the recipients of the further measures provided for by art. 24.

Vulnerability, therefore, can depend on an "objective" profile or on a "subjective"[14] profile, depending on whether reference is made to the type of crime (for example organised crime, crimes against sexual freedom, domestic crimes) or whether it involves a condition of personal weakness (for example, children or the mentally ill). The two assessments, however, may also intertwine or overlap: we just have to think of gender-based violence, or sexual crimes against children.

What is relevant above all, in the European legislation, is the valorisation of individual assessment of vulnerability in concrete terms, without recourse to presumptions, the role of which is destined to become residual[15]. The result of this is that access to the protected examination does not find limits in the legislative predetermination of specific criminal cases, but it must be possible to establish recognition of the victim-vulnerable witness status with a case-by-case approach[16], on the basis of the parameters established generally.

The case-law of the Court of Justice of the European Union has been moving in this direction for some time, starting from the famous Pupino[17] case, which – beyond its disputable technical implications, which we do not need to discuss again – had established that the obligation of interpretation in conformity with Framework Decision 2001/220/JHA[18] requires that the national judge has the chance of using a special procedure (such as the gathering of evidence through the "*incidente probatorio*") and special methods for particularly

[14] L. PARLATO, *Il contributo della vittima tra azione e prova,* cit., p. 428.

[15] S. RECCHIONE, *Il dichiarante vulnerabile fa (disordinatamente) ingresso nel nostro ordinamento: il nuovo comma 5 ter dell'art. 398 c.p.p.*, in *Diritto penale contemporaneo*, 14 April 2014.

[16] In this sense the guidance document of the EU Commission for implementation of Directive 2012/29 (*Ares*(*2013*)*3763804-19/12/2013*, p. 44).

[17] ECJ, Grand Chamber, 16 June 2005, *Pupino* (C-105/03).

[18] Now, as is known, replaced by the repeatedly quoted Directive 2012/29/EU.

vulnerable witnesses, irrespective therefore of the fact that the crime being prosecuted is expressly indicated by the law[19].

Concerning the methods of examination during court proceedings, article 23 § 3 of Directive 2012/29 provides that vulnerable witnesses can make use of «*a)* measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology; *b)* measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology; *c)* measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and *d)* measures allowing a hearing to take place without the presence of the public». The guidelines of the European Commission for implementing the Directive[20] invite Member States to consider adapting national procedures for introducing the indicated measures, emphasising that good practice suggests offering the measures listed in § 2 *a)* and *b)* (related to interviews during criminal investigations) to all victims of the crime, not just to victims recognised as having specific protection needs.

5. Giving evidence and secondary victimisation

The risk of secondary victimisation is always present when vulnerable victims are called upon to make their contribution to the establishment of facts during the trial. As we have seen, victims must be protected through suitable compensation measures that will guarantee them maximum peace of mind;

[19] The Italian legislator, who with the mentioned legislative decree no 24 of 2014 introduced in article 398 CCP a paragraph 5-*ter*, which envisages the use of protected procedures for gathering evidence also when among the people involved in the gathering of evidence there are adults in a condition of particular vulnerability, also deduced by the type of crime being prosecuted, seems to be in line with the mentioned way of thinking. In this sense, S. RECCHIONE, *Il dichiarante vulnerabile fa (disordinatamente) ingresso nel nostro ordinamento: il nuovo comma 5 ter dell'art. 398 c.p.p.*, cit.; see however F. CASSIBBA, *Oltre Lanzarote: la frastagliata classificazione soggettiva dei dichiaranti vulnerabili*, cit., according to whom the provision must be interpreted restrictively, meaning that also the objective condition, namely the tipe of crime being prosecuted, is to be understood as implicitly referred to.

[20] *Ares*(*2013*)*3763804*, cit., p. 47.

and, we mustn't forget, that this is also to ensure the accuracy of the evidence. But another no less important need must be considered, as well as that of protecting the victim-witness through the adoption of particular protection measures when giving evidence. It must be ensured that the occasions when it is necessary to attend the trial are reduced to the minimum, as such occasions are not only the source of inevitable psychological stress implied by any contact with judicial officers but also an occasion of further suffering caused by the need to recall and therefore relive events which are difficult and stressful to elaborate and remove, even more so because they are in a formal context, and due to its very nature conflictual. as that of the trial. It has been observed that protection of vulnerable victims operates on at least two levels: in addition to protection "within" the trial through the special regulation of giving evidence, the person must also be protected as much as possible "from" the trial, reducing their participation in it to the absolute minimum[21].

Among the rights to protection during investigations, art. 20 letter *b)* of Directive 2012/29 provides that «the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation». The provision refers to all victims, not only to vulnerable ones, and the reference to criminal investigations must not be understood as limited to a specific phase in the proceedings, also because a clear distinction between preliminary investigations and the trial such as that present in the Italian system is not common to all legal systems.

In the already mentioned Pupino[22] case, the Court of Justice had applied the corresponding article of Framework Decision 2001/220 then in force (art. 3), which yet did not contain specific reference to the need for the number of interviews to be limited to the minimum. The reasoning however states that the judge must have the possibility, for particularly vulnerable victims, to adopt a special procedure, such as the gathering of evidence in advance, «if that procedure best corresponds to the situation of those victims and is necessary in order to prevent

[21] H. BELLUTA, *Un personaggio in cerca di autore: la vittima vulnerabile nel processo penale italiano,* in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 103.

[22] *Supra*, note 17.

the loss of evidence, to reduce the repetition of questioning to a minimum and to prevent the damaging consequences, for those victims, of their giving testimony at the trial»[23].

In the case in question, the gathering of evidence in advance which was discussed was, as we have already said, the one contemplated by the Italian CCP, i.e. the "*incidente probatorio*".

In fact, designed with the typical function of ensuring the acquisition and utilisation (through reading of the statement during the trial) of not-deferrable evidence, this procedure was later used as a privileged occasion for examining children under sixteen years of age for specific crimes, mainly – but not only – of a sexual nature, the catalogue of which gradually increased; and following this the provision was extended to other children[24] and to the adult person injured by the crime (art. 392 paragraph 1-*bis* CCP). The aim is that of fostering a rapid removal of the traumatic experience; but also, at the same time, to avoid alteration or dispersion of the testimony given by the vulnerable person, through the formal establishment of the evidence at a time closer to the criminal episode[25].

In the envisaged cases, the judge adopts the particular procedures mentioned in art. 398 paragraph 5-*bis* CCP that allows, amongst other things, that the hearing can be held in a place other than the court, including the home of the person involved in the giving of evidence. With the recent introduction of paragraph 5-*ter*[26], the legislator then expressly established that such protected procedures should be applicable generally also where the persons involved in the giving of evidence include particularly vulnerable adults,

[23] § 56 of the judgment.

[24] For children, the guidelines of the Noto Charter also indicate the "*incidente probatorio*" as a good occasion for acquiring their statements, as long as this is conducted in a way that respects the personality of the child and the right to evidence (point 15 of the Noto Charter III, *Linee guida per l'esame del minore vittima di abusi sessuali*, updated on 12 June 2011). The "*incidente probatorio*" therefore is beginning to become the best occasion for questioning the child irrespective of the type of crime: the case-law of the Italian Court of Cassation also seems to lean in this extensive sense (Italian Court of Cassation, 11 March 2008, *Messina*, *Ced* 240321)

[25] Concerning this, see F. CASSIBBA, *La tutela dei testimoni vulnerabili*, in O. MAZZA - F. VIGANÒ (eds.), *Il "Pacchetto Sicurezza" 2009*, Turin, 2009, p. 312; G. GIOSTRA, *La testimonianza del minore: tutela del dichiarante e tutela della verità*, in *Riv. it. dir. proc. pen.*, 2005, p. 1019.

[26] *Supra,* note 19.

irrespective of the fact that they are injured parties. Current Italian legislation however has various coordination flaws and shortcomings. To indicate only the main ones, it is not clear if the victim has a veritable right, if the conditions for it exist, to be heard through the "*incidente probatorio*". The law provides that the request must be lodged by the public prosecutor, whom the injured person can in turn ask, but without binding effect and without any possibility of appealing to the judge[27]. Also art. 190-*bis* CCP, which has the precise function of avoiding the repetition of the testimony in court by vulnerable persons heard in the "*incidente probatorio*", making it possible to exclude the evidence requested by the parties at the trial, was not updated neither with reference to the list of included crimes nor with reference to the extension to all children and adults injured by the crime[28].

In short, the impression is that of a legislative stratification that is not sufficiently organic and meditated, also due to the incomplete integration of Italian internal legislation with European law. We are still very far from a veritable "statute" of the giving of evidence by the victim, such as it should be obtained from Directive 2012/29.

6. "Attenuated" confrontation

In recital 12 of Directive 2012/29 it is stated that the rights provided by the same «are without prejudice to the rights of the offender», and that the very term "offender", when it refers to a suspected or accused person before conviction, «is without prejudice to the presumption of innocence». Recital 66 adds, perhaps pleonastically, that the Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union». Recital 58 mentions the need that protection measures should not prejudice the rights of the defence: and the formula «without prejudice to

[27] The Court of Justice of European Union has however excluded that the absence of provision of the power of the victim to independently request the "*incidente probatorio*" and to challenge a possible refusal by the public prosecutor breaches framework Decision 2001/220: ECJ, 21 December 2011, X (C-507/10).

[28] F. M. GRIFANTINI, *La persona offesa dal reato nella fase delle indagini preliminari*, cit., p. 239.

the rights of the defence» is repeated in articles 7, 18, 20 and 23.

Awareness of the risk that the victim's protection measures might come into conflict with the rights of the defendant and in particular the right to confrontation is clear[29]: this naturally applies to the protected testimony, especially if this takes place outside the trial. However it is now commonly accepted that the right of the defendant to confront the accuser – as well as, if reference is made to the Italian trial, the so called principles of orality and immediacy – can be balanced with the necessary guarantees of the victim. The consolidated case-law of the European Court of Human Rights admits that with regard to an attenuation of the right to confrontation, it is sufficient that suitable guarantees are applied to compensate it.

Taking into consideration, the "*incidente probatorio*", the instruments for a re-balance in favour of the defence – which in any case has the right to participate – are represented by the full disclosure of the records of the investigation carried out up to that time, in order to give the accused the possibility of consciously confronting the accuser, and by the sound and audio-visual recording of the witness examination, so that assessment elements can be obtained at the trial. Moreover, the judge, in the case of children, can be assisted by a child psychologist. Such prescriptions, however, are not backed by adequate procedural sanctions, such as the exclusion of the evidence.

It should also be emphasised that since there are no limits to the previous conducting interviews without cross-examination by the investigating bodies or by the counsel of the person injured by the crime, there is the risk that the subsequent taking of evidence during the pre-trial stage might, even unconsciously, be tampered with. Perhaps it would be expedient to provide a direct and exclusive involvement of the judge, also in order to fully respect the principle of avoiding the repetition of depositions, in the interest of the victims themselves[30].

The fact remains that, due to the previously examined reasons, the system is built to avoid the repetition of the

[29] M. GIALUZ, *Lo statuto europeo delle vittime vulnerabili*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 88.

[30] F. M. GRIFANTINI, *La persona offesa dal reato nella fase delle indagini preliminari*, cit., p. 245.

testimony during the trial, i.e. in the phase during which the collection of evidence has been completed and so called orality-immediacy is ensured. In this way the statements of the witness remain crystallised in the record of the "*incidente probatorio*", and the possibilities of raising objections by the defence are therefore reduced. But also in the cases where the examination is carried out at the trial, conspicuous limitations remain, if vulnerable witnesses are involved. In fact, the questioning of children or the mentally ill is carried out directly by the Presiding Judge, in this way usually eliminating the possibility of cross-examination. Moreover, the protection measures provided for by art. 398 paragraph 5-*bis* CCP with regard to the "*incidente probatorio*" are also applicable during the trial.

In order to guarantee the right of defence in a better way, then, it is precisely the assessment of the condition of vulnerability, currently mostly deferred, for adult witnesses, to the discretion of the judge, that should be guided by well-defined regulatory parameters and ascertained in a verifiable and formalized way, considering the attenuations of the right to confrontation that may derive from them[31].

7. Assessment of evidence

As a source of conviction, the testimony of the victim is weak evidence, on a par with all controvertible evidence, because it comes from a subject who in any case is affected by the result of the trial. So when it involves a vulnerable witness, the weakness doubles[32], because it must also be considered from the point of view, strictly linked, dependent on the procedures to be followed when examining the person. The techniques of questioning and the context, in which it is carried out, obviously influence the result, even in a crucial manner in relation to the personality of the witness. It is not necessary to repeat that the admissibility of witnesses is something very different from their reliability. The objective then is inevitably

[31] S. RECCHIONE, *Il dichiarante vulnerabile fa (disordinatamente) ingresso nel nostro ordinamento: il nuovo comma 5 ter dell'art. 398 c.p.p.*, cit.

[32] G. GIOSTRA, *La testimonianza del minore: tutela del dichiarante e tutela della verità*, cit., p. 1019; F. M. GRIFANTINI, *La persona offesa dal reato nella fase delle indagini preliminari*, cit., p. 231.

moved to the criteria of assessing the evidence, within the sphere of the free conviction of the judge. As we know, with reference to the declarations of co-defendants, art. 192 paragraph 3 CCP expressly provides for the presence of corroboration that confirm their reliability. We can ask ourselves if the same method should be used for the statements of the victim. According to consolidated jurisprudence, corroboration is not indispensable[33]: and in fact always demanding corroboration would be a risky solution for ascertaining many crimes, for example those of a sexual nature[34].

The Constitutional Court, in turn, although declaring a question concerning the testimony of the civil plaintiff inadmissible, ruled that the statement of the person injured by the crime «must be assessed by the judge with cautious appreciation and a critical spirit, since it cannot be considered as purely and simply equal to that of the witness, immune from the suspicion of interest in the result of the case»[35]. The importance of an adequate justification is often emphasised by the case-law: the subjective credibility of the declarant and the intrinsic reliability of the evidence must be verified, since the assessment of reliability must be more penetrating and rigorous compared with the generic one to which the declarations of any witness undergo[36]. As evaluation criteria, the constancy and uniformity of the allegation, the circumstances and modalities of the event, the capacity to re-evoke the facts, the absence of conditioning factors and emotional and environmental conditions are significant. What is required, essentially, is a surplus of justification, which demonstrates the use of particular caution in the utilisation of a proof which in its own right is insidious like the one we are discussing.

We can doubt that these cautions are enough to overcome the basic problem, represented by the intrinsic ambiguity of the victim-witness role. And if the victim benefits from the possibility of providing proof of the facts, it is the accused that

[33] See for all, Italian Court of Cassation, Plenary Session, 19 July 2012, *Bell'Arte and o.*, in *Ced* 253214.

[34] L. PARLATO, *Il contributo della vittima tra azione e prova,* cit., p. 400.

[35] Italian Constitutional Court, 19 March 1992, n. 115.

[36] Italian Court of Cassation, Plenary Session, 19 July 2012, *Bell'Arte and o.*, cit.

benefits in the event of a doubt, under the presumption of innocence.

But as always - and this is a structural characteristic of criminal procedure law - it is a matter of finding the point of balance between needs that potentially come into conflict: the interest of the State in the correct administration of criminal justice, the interest in protecting vulnerable persons, the interest of the victim in supporting the allegation, the interest of the defendant in defending himself. The law is called to provide the most clear and precise parameters possible, but essentially the reconciliation can only be made case by case on the basis of the circumstances, even if within non un-questionable limits of reasonableness.

PART II

VICTIM'S POSITION WITHIN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS

CHAPTER VI

VICTIMS PARTICIPATION IN FRENCH CRIMINAL PROCEEDINGS: CURRENT STATUS AND FUTURE PERSPECTIVES IN VIEW OF DIRECTIVE 2012/29/EU

by Mathieu Jacquelin[*]

TABLE OF CONTENTS: 1. Foreword. - 2. Procedural privileges. - 2.1 The right to be heard and provide evidence. - 2.2 The right to a review of a decision not to prosecute. - 3. Financial prospects of victims. - 3.1 The right to return of seized property. - 3.2 The right to decision on compensation from the offender.

1. Foreword

By stating that "crime is a wrong against society as well as a violation of the individual rights of victims[1]", who should receive appropriate support to facilitate their "recovery" and should be provided with sufficient access to justice, and by pointing out that "the role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more criteria, the Directive of 25 October 2012 places victims at the heart of criminal proceedings and vests Member States with the responsibility to better specify their role, given that, pursuant to recital (9) of Framework Decision no 220 of 2001, "the provisions of this framework decision do not (...) impose an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings".

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[1] Recital (9) of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council framework decision 2001/220/JHA.

In the framework of the above-said well-structured and complex text, answering to a need for synthesis, chapter three establishes the conditions allowing victims to participate in national criminal proceedings. This concept is even further discussed, since art. 12 concerns enforcement conditions of restorative justice proceedings, which in French law represent an option other than the enforcement of criminal proceedings, but also highlights some conceptual ambiguities by the writers.

Actually, there are two other provisions in chapter three which, while not making reference to the participation modes of victims, should allow the latter to effectively and concretely exercise their rights as otherwise granted. That is to say, the right to legal aid, which grants to victims the status of real and proper parties to criminal proceedings, as per art. 13, and the right to reimbursement of expenses incurred as a result of their active participation in criminal proceedings, as provided for in art. 14. In fact, the strictly procedural privileges granted to victims are mostly to be found in articles 10 and 11 of the Directive. On the one hand, the right to be heard is mentioned, as well as the right to provide evidence during criminal proceedings. On the other hand, reference is made to the right to a review of a decision not to prosecute. Finally, articles 15 and 16 of the Directive deal with the matter from a financial perspective, as the former establishes the victims' right to return of property which is seized in the course of proceedings, while the latter recognises to victims the right to decision on compensation from the offender, always in the course of criminal proceedings. The concrete and effective enforcement of those rights for victims resident in another Member State is also facilitated. This is the subject of art. 17, even though many recitals in the preamble equally refer to it. Thus, "the authorities of the Member State where the criminal offence was committed shall, in particular, be in a position: *a)* to take a statement from the victim immediately after the complaint with regard to the criminal offence is made to the competent authority; *b)* to have recourse to the extent possible to the provisions on video conferencing and telephone conference calls laid down in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 for the purpose of hearing victims who are resident abroad".

In France, these opportunities are already partially conceivable, as interviews, questionings and confrontations

among several people can be carried out in a number of places throughout the French national territory, provided they are connected by telecommunications means able to ensure the confidentiality of the transmission (art. 706-71, applicable to investigations and to the pre-trial stage, but also before the judge during hearings). Furthermore, art. 694-5 French code of criminal procedure extended the reach of this provision precisely to keep the convention of 29 May 2000 into account, since by now: "The provisions of article 706-71 are applicable for simultaneous enforcement, on French national territory and on foreign territory, of requests for judicial assistance coming from foreign judicial authorities or acts of judicial assistance executed at the request of the French judicial authorities"[2]. Showing some consensus, the first comments remarked that the Directive of 25 October 2012 should not "upset"[3] French legislation and that France should not "face any difficulties in transposing those provisions, as its criminal procedure traditionally grants many privileges to victims or civil parties"[4].

Only organisational aspects concerning accompanying victims could undergo considerable changes. On the other hand, the Information report by the Senate of 30 October 2013, concerning the compensation of victims, entails more controversial arguments, and points out some "lights and shades": although in France a provision is present allowing

[2] The only thing that can be done now is to ensure as follows: "2. Member States shall ensure that victims of a criminal offence committed in Member States other than that where they reside may make a complaint to the competent authorities of the Member State of residence, if they are unable to do so in the Member State where the criminal offence was committed or, in the event of a serious offence, as determined by national law of that Member State**,** if they do not wish to do so. 3. Member States shall ensure that the competent authority to which the victim makes a complaint transmits it without delay to the competent authority of the Member State in which the criminal offence was committed, if the competence to institute the proceedings has not been exercised by the Member State in which the complaint was made".

[3] P. BEAUVAIS, *Nouvelle directive sur les droits des victimes*, in *RTD Eur*., 2013, p. 806.

[4] S. DETRAZ, *Plus d'attention portée aux victimes. A propos de la directive du 14 novembre 2012*, in *La Semaine Juridique, Edition générale*, no 1-2, January 2013, p. 9. See also E. VERGES, *Un* corpus juris *des droits des victimes: le droit européen entre synthèse et innovations. À propos de la Directive 2012/29/UE du Parlement européen et du Conseil établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité*, in RSC, 2013, pp. 121-136.

victims to join the proceedings as a civil party with a view of obtaining damage, observers noticed some "weaknesses or rigidity" which, in fact, make the exercise of rights more difficult, an "unequal" treatment of the parties in proceedings which may be ascribable to court practice, as well as a "staking of not very readable texts"[5], which may put the approval shown by academic literature in perspective. Indeed, while the analysis of the rights to participate in the proceedings granted to victims by French law shows that, in general, the model applied by the French system meets European expectations, there are still some particular cases where victims' rights prove to be rather diminished, as well as some moments during French criminal proceedings when they are ultimately quite reduced, both as concerns procedural privileges (2) and as concerns financial issues (3).

2. Procedural privileges

In the Directive, the victims' active participation in criminal proceedings develops around two complementary poles, i.e. on the one hand, the right to be heard and provide evidence (2.1), which may be ascribed to a duty to listen, and on the other hand, the right to a review of a decision not to prosecute (2.2), which implies a possible right of criticism.

2.1. The right to be heard and provide evidence

By introducing Chapter III of the Directive, art. 10 seeks Member States to "ensure that victims may be heard during criminal proceedings and provide evidence"[6], with the possible authorisation to "make statements or explanations in writing"[7], given the fact that "justice cannot be effectively achieved unless

[5] *Pour une meilleure indemnisation des victimes d'infractions pénales*, Information report no 107 (2013-2014) by C. BÉCHU and P. KALTENBACH, drawn up on behalf of the Committee for Constitutional Laws, Legislation, Universal Suffrage, Regulations and General Administration, submitted on 30 October 2013, p. 10.

[6] See article 10 of the Directive.

[7] Recital (41): "The right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing".

victims can properly explain the circumstances of the crime and provide their evidence in a manner understandable to the competent authorities"[8]. It is also pointed out that "the procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law"[9].

In the broad sense, the right of victims of criminal offences to be "heard" implies a legal context requiring attention by the plaintiffs. Although the victim admitted as a civil party is in a privileged position, the French law still grants the opportunity to promote the interests of the victim regardless of the fact that he/she is a civil party or, to use an expression which has become a classic, "as such"[10]. After all, it is with a very general provision that the preliminary article of the French code of criminal procedure underlines that "the judicial authority shall inform and guarantee the rights of victims throughout the whole criminal proceedings".

With the exception of any measures as adopted by them, victims of criminal offences may first of all be heard, not so much as victims in the positive sense of the word, but rather as persons not involved in a criminal offence subject to an inquiry.

As a matter of fact, art. 61, par. 5, establishes that Judicial Police Officials and Officers may "question and hear whoever may provide information on the events", including victims, regardless of the fact that the latter have made a compliant. The special cases of confrontation (simultaneous interview of several people) and identity parade (line-up of people for identification purposes) should also be highlighted. Indeed, in the former instance, the legislator established that, during confrontation with a person in custody, the victim as such may ask to be assisted by a lawyer entitled to examine the report of his/her interviews[11]. However, here the chance for a victim to

[8] See recital (34).

[9] See article 10 of the Directive.

[10] S. GUINCHARD - J. BUISSON, *Procédure pénale*, Paris, 2013, p. 823, n°1170.

[11] Article 63-4-5 of law of 14 April 2011: "Should the victim be subject to confrontation with a person in custody, he/she shall be entitled to ask to be assisted by a lawyer of his/her choice in turn, or, if a minor, by a lawyer appointed by his/her legal representative or, upon his/her request, appointed by the President of the Professional Association of Lawyers. The victim shall be informed about this right before confrontation. Upon his/her request, the

be heard does not arise from his/her personal will, but rather and entirely from the choices made by investigators.

By filing a complaint, the victim may concretely[12] have the chance of being heard on his/her own initiative, although this chance becomes interesting and significant for the victim only if the complaint may be transmitted in some way to a competent authority that is able to follow it up. However, the French system more specifically features the granting of the right of action to victims of criminal offences, arising from the damage caused by the offence, and shows a double aim: allowing victims to be compensated and offenders to be prosecuted[13].

This dual compensatory and retributive nature thus underlines that the exercise of the right of action is not necessarily linked to the victim's intention to seek damages. A non-recent court decision managed to rule that "the intervention of a civil party may be exclusively justified by the concern of confirming public action"[14]. Having said that, it is important to remind that article 2, pursuant to which "all those who personally suffered from damages directly caused by an offence, crime or infraction are entitled to bring a civil action to recover damages caused by that offence", refers to direct (criminal) and indirect (civil) victims, or to victims' family members, provided that the damage claimed and personally suffered by them directly results from the facts being dealt with in the criminal proceedings[15]. The holders of the civil action would seem to match with what is stated in the Directive[16],

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lawyer may examine the reports of his/her client's interviews. Article 63-4 3° shall apply".

[12] Pursuant to article 15-3 of the French ode of criminal procedure: "The judicial police must receive any complaints filed by victims of criminal offences and transmit them, if appropriate, to the judicial police service or unit with jurisdiction in the territory. Records of all filings shall be kept and any filing of complaint shall result in the immediate issue of a receipt to the victim. If the victim asks for it, he/she shall immediately receive a copy of the report".

[13] B. BOULOC, *Procédure pénale*, Paris, 2006, p. 125, n°156.

[14] French Court of Cassation, crim. sect., 10 October 1968, Boll. no 249.

[15] French Court of Cassation, crim. sect., 9 February 1989, Boll. no 63.

[16] Indeed, article 2 of the Directive provides that 'victim' shall mean "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence", as well as "family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death"; it also provides that 'family members' shall mean "the spouse, the

which, in article 2, points out that, in any case, "Member States may establish procedures (...) to limit the number of family members who may benefit from the rights set out in this Directive taking into account the individual circumstances of each case".

Filing a complaint together with an application to join the proceedings as a civil party is the act by means of which victims can put the public action in motion, and may occur at different stages of the proceedings: during investigations, before the trial or, with law of 15 June 2000, already during the inquiry before the Judicial Police Official or Officer. Nevertheless, two limits should be underlined. The first one, of legal kind, concerns a certain time location imposed by article 85[17]. The second one, of factual nature, makes reference to the practice based on which "police records do not give explicit evidence of the victim's application to join the proceedings as a civil party", which means that "if the victim does not personally appear before the Registry of the Court or for the hearing, the judge could be unaware of the fact that the victim him/herself has joined the proceedings as a civil party".

Therefore, the information is not transmitted to the court through the application software *Cassiopée*[18]. In lack of this, there is still the event of a direct prosecution with which the judge is vested by a victim. However, starting from the moment when the victim obtains that special status, relevant rights[19] are

person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim".

[17] "The complaint with application to join the proceedings as a civil party is only admissible if the person gives evidence both of the fact that the Public Prosecutor has informed him/her, following the filing of complaint before him/her or before a judicial police service, that he/she shall not bring any legal action, and of the fact that a term of three months has elapsed after the filing of such complaint before the judge, against receipt or via registered letter with return receipt, or after having sent to the judge, in the same ways, a copy of the complaint filed with a judicial police service".

[18] See *Pour une meilleure indemnisation des victimes d'infractions pénales*, cit., p. 16, senators recommend to ensure "interconnection between police records on the one hand and judicial records on the other hand, so as to guarantee control of victims" (Proposal no 2).

[19] During the pre-trial stage, art. 120 of the French code of criminal procedure provides that, in case of interview of the civil party by the investigative judge, the latter may ask questions and submit remarks. The principle of hearing both sides also imposes, to the section in charge of instituting the proceedings, the duty to invite the parties, including the civil

conferred upon him/her, and it is interesting to highlight that, within the French criminal proceedings, during the pre-trial stage, the victim's role in looking for the truth may be seen as active, without stretching language: this means that the latter may demand fulfilment of certain acts[20], or even ask the investigative judge to issue a decision on the follow-up of the case[21], showing, for his/her benefit, a *right of intervention* as well as a *right of control over the pre-trial stage*, which is never mentioned in the text of the Directive.

However, it is appropriate to make a distinction depending on the context, as the modes of accelerated proceedings, which may be enforced, could jeopardise the protection of the victims' interests. As a consequence, the Information report drawn up by senators on victims' compensation at the end of 2013 pointed out that those proceedings still place the victim in an exclusively "secondary" position. By underlining that the accusation order is a procedure that does not allow the equal hearing of both parties, i.e. during which the judicial authority does not hear the victim longer than the accused, senators showed their concerns in relation to the opportunity introduced by the law of 13 December 2011, allowing to resort to the procedure in the presence of victims, and suggested to limit that practice[22]. In the same sense, it is true that the rules that may be applied to appearance after acknowledgement of guilt exclude victims from the first stage of the proceedings: therefore, even though victims are invited to appear at the public hearing for court approval, they are unable to be heard before the issue of

party, to submit remarks if certain aspects are at stake, such as the admissibility of an application to join the proceedings as a civil party. During trial, the civil party may provide evidence, ask questions to witnesses and submit conclusions. As far as procedures applicable in the Court of Assize are concerned, the civil party may ask questions to the accused through the president, submit conclusions or even call witnesses. In any case, on the one hand, his lawyer may pose direct questions asking the president for permission to speak, and the civil party may do the same through the latter, and on the other hand the judge must provide an answer to the conclusions submitted by the civil party, regardless of the fact that they are substantive or formal issues. As a general rule, a decision issued on 7 May 1996 by the criminal section demands, based on the principle of equality of arms, that any party - including the civil one - may be heard during the hearing before the judge.

[20] See art. 82-1 of the French code of criminal procedure.

[21] See art. 175-1 of the French code of criminal procedure.

[22] *Pour une meilleure indemnisation des victimes d'infractions pénales*, cit., pp. 23-24.

the Public Prosecutor's decision on the penalty. Thus, a proposal contemplated the adjustment of the procedure in order to "enable victims to be heard by the Public Prosecutor before the latter has issued his/her decision on the penalty for the offender"[23]. However, it appears that a restructuring of the procedure would necessarily entail an increase in workload for magistrates and longer terms for managing flows. It is still interesting to point out that this procedure, which raises perplexities in connection with the reduction of guarantees offered to the joined party, is also disapproved for the – too limited – role that it reserves to victims.

2.2. The right to a review of a decision not to prosecute

Article 11, whose paragraph 1 provides as follows: "Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute", should be read in the light of recital (43), which recognises to the scope of application its proper value, by stating that "the right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts". This means that this provision not only refers to the event in which the case is dropped with no further action by the magistrates of the Public Prosecutor's Office, but also to any prior decision by investigation services refusing to register a complaint and definitely to the subsequent decision by the investigative judge to end the proceedings. More generally, this is a real chance for the victim to obtain the review of a decision not to prosecute, a real and proper right of criticism to be enforced at different stages of the proceedings. As a matter of fact, the right of criticism exists when victims must deal not only with the case in which not to "prosecute" is understood in its technical sense (i.e. triggering public prosecution), but also, more generally and maybe with priority over the meaning of current language, when it is understood as not to follow up and not to proceed continuously.

[23] *Ibid*., p. 28 (Proposal No 7).

In France, the Public Prosecutor's decision not to prosecute may be blocked first and foremost by the victims' exercise of their right of action, whereby victims can put the public action in motion by joining the proceedings as a civil party, although the laws of 23 June 1999 and 5 March 2007 limited this chance and the law of 13 November 2007 excluded it, as these offences are deemed of general relevance. The Directive does not include this case, as it mentions a "review" of decision, which makes specific reference to the mechanism of filing of complaints and to the registration practice, as already described. With regard to this, the *Défenseur des droits*, on 26 March 2013, remarked as follows: "a police officer or a Gendarmerie soldier may not refuse to register a complaint, unless the absence of offence is undisputed without need for further assessments. On the contrary, if the facts submitted to the services in charge of receiving complaints call for a more in-depth legal or substantive analysis in order to ascertain the co-occurrence of elements giving rise to a criminal offence, the police officer or *Gendarmerie* soldier must receive the complaint and transmit it to the Public Prosecutor for facts to be characterised.

The *Défenseur des droits* asks to remind to police officers in the police station of Clichy la Garenne, and more generally, in the light of the great number of deficiencies acknowledged in this regard, to all security services in charge of receiving complaints, their duty to receive all complaints filed by victims of crime pursuant to article 15-3 of the Code of Criminal Procedure and to article 5 of the charter of welcome of the public and assistance to victims"[24]. As far as pure practice is concerned, refusing to register a complaint is not allowed by the law besides the cases described. Thus, the fact that no appeal is provided is not surprising at all, while the only option would be to send a letter to the Prefect, given the impossibility to vest the *Défenseur des droits* with the rights at issue. Pursuant to the laws of 9 March 2004 and 31 December 2007, the Public Prosecutor has the duty to inform the victims if the case is dropped with no further action, and also about the "legal or opportunity reasons" justifying its dropping, in compliance with article 40-2 of the French Code. The said notification currently

[24] Decision no MDS-2013-41 of 27 March 2013 by means of which, following a claim no 10-012189 (formerly 2010-163) concerning a refusal to register a complaint, the *Défenseur des droits* acknowledges a violation of deontological ethics.

applies as a general rule (regardless of the identification or non-identification of the victim and regardless of the kind of offence). In spite of the fact that this - totally lawful - decision remains of purely administrative nature, it is possible to file an internal appeal before the General Public Prosecutor, who may confirm the dropping with no further action or force the Public Prosecutor to take legal action. Therefore, the right to a review stated in the Directive is real for victims and does not depend on their special status: it involves all victims, at least after their identification as such. During the pre-trial stage, only the civil party – i.e. the victim with a certain status – is granted the power to obtain a review of some decisions. The orders of non-lieu issued by the investigative judge are a typical case of decision not to prosecute adopted by investigative judges. The right to a review exists to the extent to which a civil party victim may challenge any "orders not to institute proceedings, of non-lieu and damaging his/her civil rights", as stated in article 186 of the Code of criminal procedure. On the other hand, article 186-1 establishes the possibility to obtain a review of other decisions issued by the investigative judge, among which, according to case law, the case of a fragmented decision constituting an order to appeal on ground of jurisdiction which would result in the omission of ruling on certain charges originally being dealt with by the judge[25].

In the light of the above, this case refers to a judicial decision being appealed, in the technical meaning of the word, and the event of an appeal in cassation should not be ruled out.

3. Financial prospects of victims

Besides the matter concerning the victims' participation in criminal proceedings, two other aspects of the victims' rights also emerge from the Directive: while the reference to the right to decision on compensation from the offender (3.2) is not surprising at all, the reference to the right to return of seized property (3.1) is more unconventional and gives evidence of the writers' concerns for the victims' financial interests.

[25] French Court of Cassation, criminal section, 23 November 1993, Boll. No 349.

3.1. The right to return of seized property

French law reserves to investigators the authority to seize some objects, if deemed useful in looking for the truth, given that article 56, paragraph 1 establishes, as a ground for practice, that it is necessary "for the nature of the offence [to be] such as to allow obtaining evidences by seizing papers, documents, electronic data or other objects in possession of people who may have taken part in the offence, or may be in possession of information or objects regarding offending activities".

However, once they have been carefully inventoried and placed under seal, some of the objects seized may be recovered according to some rules, which may vary depending on the stage of the proceedings when a party applies for their recovery. Now then, pursuant to the provisions of art. 15, "Member States shall ensure that, following a decision by a competent authority, recoverable property which is seized in the course of criminal proceedings is returned to victims without delay, unless required for the purposes of criminal proceedings. The conditions or procedural rules under which such property is returned to the victims shall be determined by national law".

During the inquiry, a Judicial Police Officer may revoke seizure of any item no longer deemed useful to determine the truth[26], provided in any case that returning such item does not pose a danger to people or assets, even though the legislator did not deem it useful to explicitly state this condition[27]. During the pre-trial stage and pursuant to article 99, the investigative judge, by means of justified order, may rule on return, for which both the Public Prosecutor and the civil party, but also more generally any person allegedly holding title on the property may apply. In fact, if a decision may not be challenged by applying for its annulment[28], an appeal may be filed before the section in charge of the pre-trial stage of proceedings, whose decision may be subject to appeal in cassation. In addition to the cases when the law provides for the confiscation of the object giving rise to a litigation, refusing to return it may only be grounded on the fact that the ownership of the object seized is seriously

[26] See articles 56, par. 7, and 76, par. 3, of the French code of criminal procedure.

[27] F. DESPORTES - L. LAZERGES-COUSQUER, *Traité de procédure pénale*, Paris, 2013, n°2399, p. 1552.

[28] French Court of Cassation, crim. sect., 30 October 2001, Boll. no 223.

challenged, on the nature of return, if it is able to jeopardise the ability to find out the truth or the protection of the parties, or if returning the object poses a danger to people or assets, being those limitative grounds[29].

If no decision has been taken on the return during preliminary investigations, the judge shall rule on the matter, if an order of non-lieu is selected, according to article 99. This only means specifying that the grounds for refusal are limited to the case of danger to people or assets, to seriously challenged ownership or to the case in which the law provides for the destruction of the object. In lack of this, the court dealing with the proceedings may autonomously order to return the property, upon request of the civil party, but also *ex officio*. Namely, article 420-1 establishes the procedure for victims to apply for recovery before the court. In any case, the court shall rule on the matter, upon judgement of the main proceedings: only the cases of confiscated property, of lack of the applicant's right over the seized object and of danger to people or assets shall represent valid grounds for refusal. Finally, if no court is dealing with the proceedings or any forums dealing with the proceedings failed to rule on return, having completed their jurisdiction, the Public Prosecutor shall be in charge of deciding, pursuant to the remarks in article 41-4. Although the Public Prosecutor is entitled to rule on return *ex officio*, any application in that sense must be filed by six months after the dropping or latest decision issued on the case; after that, the object shall become property of the State. Once again, return is prevented by serious challenge of the ownership of the object, danger to people or assets or provision ordering the destruction of objects.

To sum up, the French system provides, at different stages of the proceedings, for the chance, especially for the civil party, to ask for the return of property initially seized in order to ascertain the truth. Indeed, the recovery of property as provided does not appear to be excessively "belated", although in some cases the competent authority may suspend the proceedings on the matter (which is transferred to the tribunal, under article 480). Finally, the exceptions provided for in the Code, in principle, do not cause French law to clash with the Directive requirements, as article 15 includes the provision: "unless required for the purposes of criminal proceedings". At most, it

[29] French Court of Cassation, crim. sect., 6 February 1997, Boll. no 55.

may be pointed out that this need gives rise to several remarks, which change according to the procedural framework within which return is applied for and end up tangling the issue up, to the detriment of the rights of the party in the proceedings, who may easily get lost in such an unstable context. The number of players (police, ruling magistrates, public prosecutors) on whom the decision is based further increases complexity.

It should also be added that, in French law, the seizure of assets of the accused may also affect the victim of a criminal offence, as assets have been confiscated pursuant to a decision which has become final. Victims may obtain, from the Agency for the management and recovery of seized and confiscated assets, that compensation for damages suffered is paid to them by using the debtor's assets, under article 706-164 of the Code of Criminal Procedure. However, here we are leaving the field of recovery to enter the field of compensation, which the Directive only sees as an obligation for the person found guilty of the events representing the offence.

3.2. The right to decision on compensation from the offender

Indeed, pursuant to article 16, "Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings". In that case, the judicial authority shall rule on the victims' financial interests. In practice, the analysis of the French system reveals that the order to compensate victims of criminal offences is mostly satisfied by resorting to national solidarity funds, both when the person causing the damage remains unknown or cannot be found, or when he/she is unable to pay the amount of compensation, and when the enforcement of sentences proves itself to be difficult. By stating that "Member States shall promote measures to encourage offenders to provide adequate compensation to victims", the Directive certainly aims at strengthening the connection between accused and victim, besides facilitating compensation to the latter. These incentives may actually be perceived as instruments that contribute to make the offender feel responsible and, at the same time, to make him/her pay compensation, which may be construed as a

sign of attention vis-à-vis the victim, and as such may be rewarded by the judge based on various mechanisms progressively implemented by the legislator. Without a doubt, compensation of victims is essentially based on the civil proceedings, as the action for personal damages caused by the offence, with a view to "restoring the balance destroyed by the damage as precisely as possible"[30].

Victims may prefer a civil action rather than a criminal action, but this option is considered by the Directive without condemning it, with a reference to a "decision (...) made in other legal proceedings". On the contrary, in France, the measures aimed at encouraging offenders are not specifically linked to the victims' exercise of their right of action and may also be enforced within criminal proceedings "in lack of a decision on the civil action"[31]. Furthermore, some of them are directly linked to mechanisms giving rise to measures other than legal actions, whereby the accused is not subject to criminal proceedings and, as such, is not included in a criminal proceeding in its strictest sense. As a consequence, the measures for compensation of damages caused to the victim which are to be applied for by the offender form part of this logic: in this sense, dropping with no further action is subject to compensation of the victim[32].

Mediation, which aims at reconciling the parties in order to ensure compensation of the damages suffered by the victim[33] and tries to achieve a "solution freely negotiated by the parties within a conflict originated from an offence"[34], also implies that the size of damages incurred by the victim is assessed from a compensation perspective, which is often the main commitment for the offender. Incidentally, a criminal settlement agreement

[30] French Court of Cassation, civil section 2, 9 July 1981, Boll. no 156.

[31] Pursuant to article 132-45 "the original judge or the judge enforcing the penalty may order the accused to comply with one or more of the following duties (…) 5th to compensate the damage caused by the offence, in full or in part, depending on one's own ability to pay, also in lacking a decision on the civil action".

[32] Art. 41-1-4th French code of criminal procedure and art. 12-1 of decree of 2 February 1945 which, in dealing with minors, reads as follows "the Public Prosecutor, the judge in charge of instituting the proceedings or the trial court shall have the authority to propose to the minor support or compensatory measures or actions for the victim or in the interest of the community".

[33] See article 41-1-5th of the French code of criminal procedure.

[34] Explanatory note by the Ministry of Justice of 3 June 1992.

allows the Public Prosecutor, "when the victim has been identified and unless the offender is able to prove that he/she has remedied the damage caused", to propose to the latter "to compensate any damage caused by the offence within the peremptory term of six months"; compensation may be in the form of "restoration of an asset damaged by the offence"[35].

Nevertheless, the changes in the mechanism gradually brought its nature to evolve into a real and proper mode of criminal proceedings, even though the remedy at issue is not always intended as a sentence[36]. As far as procedures applicable in case of institution of legal actions are concerned, by now they are full of mechanisms making direct reference to the perspective outlined in the Directive. During the pre-trial stage, bails or personal guarantees[37], for instance, may be imposed upon the accused to ensure his/her representation and the compensation of damages caused by the offence. This representation, however, is not based on the status as a civil party of the victim whose damage is being examined, as it is possible that the latter has not yet been identified at that stage[38].

In the judgement, both exemption from penalty – which may be granted "when it appears that the guilty party's requalification has been acquired, that the damage caused has been compensated and that the disturbance caused by the offence has ceased"[39] – and deferred sentencing – which may be contemplated when it appears "that the guilty party's requalification is being acquired, that the damage caused is about to be compensated and that the disturbance caused by the offence is about to cease"[40] – are to be claimed.

On the other hand, another instance of measures encouraging compensation concerns the suspended sentence, whereby the accused may have to comply with one or more duties as per article 132-45 of the French criminal code, among which in particular the duty to "compensate the damage caused by the offence, in full or in part, depending on one's own ability

[35] See art. 41-2 of the French code of criminal procedure.

[36] In this sense, see F. DESPORTES - L. LAZERGES-COUSQUER, *Traité de procédure pénale*, cit., n°1178, p. 797.

[37] See art. 138, par. 2, 11th and 15th.

[38] See art. 142 of the French code of criminal procedure. Pursuant to art. 142, par. 3, of the Code, in these cases, a provisional beneficiary shall act on behalf of the victim.

[39] See art. 132-59 of the French criminal code.

[40] See art. 132-60 of the French criminal code.

to pay, also in lacking a decision on the civil action[41], and failing to comply with this condition justifies the revocation of the suspended sentence from which the offender has benefited. Finally, upon enforcement of the penalty, further reductions are possible for those found guilty "who show serious efforts of social rehabilitation, namely (...) by trying to compensate their victims"[42]. More generally, the "victim's condition" is an aspect to be taken into account in planning the penalty; as a matter of fact, article 1 of the penitentiary law of 24 November 2009 establishes that "the regime of enforcement of the penalty of deprivation of freedom combines social protection, punishment of the party found guilty and interests of the victim with the need to facilitate the introduction or reintroduction of the convict, so as to allow him/her to live life in a responsible manner and avoid committing new offences"[43].

This brief analysis enables to reach different logics, as the European Directive is based on categories or principles that not always easily harmonise with the notions known to the French jurist. If the victims' right to be heard and provide evidence still appears to be very theoretical if resort is made to fast trials, the wide right of criticism granted to the latter by the Directive may even lead the French legislator to a more binding framework for the mechanism of filing of complaints. As for financial aspects, besides the special issue of return, it is undeniable that the Directive, rather than focusing on merely financial compensation, shows the intention to restore the relationship between the parties, broken by the offence, in relation to which encouraging to compensate damages appears as a mere tool.

This may be a limit of the text, which, by failing to explicitly mention national solidarity, fails to fully regulate the matter of compensation and, after all, does not rule on those mechanisms that, in practice, appear to be the most effective ones in facilitating compensation to victims.

[41] See art. 132-45-5th of the French criminal code.
[42] See art. 721-1 of the French code of criminal procedure.
[43] French penitentiary law no 2009-1436 of 24 November 2009.

CHAPTER VII

THE ITALIAN SYSTEM FOR THE PROTECTION OF VICTIMS OF CRIME: ANALYSIS AND PROSPECTS

by Guido Todaro[*]

TABLE OF CONTENTS: 1. Premise. – 2. Information obligations. – 3. The participation of the victim in the trial. – 4. The right to be heard: the paradox of the special evidentiary hearing (so called *incidente probatorio*).

1. Premise

An unusual paradox stands out against the background of relationships between the is-ought of Italian law regarding the protection of the victim of crime: the attention of the legislator in regulating the rights and powers of the victims does not correspond with the ideal role they should be entitled to in the capacity of «"depositary of first instance justice" [1]».

In turn, such a lack of harmony indicates a clear index of incoherence in the internal system with respect to supra-national standards, blurring that which should be the guiding star of assiologically orientated criminal proceedings and which should move in the difficult but unavoidable balancing between opposite poles, seeing that «the principles of the fair trail demand that […] the interests of the defence be weighed with those of the witnesses and the victims called upon to give evidence»[2].

Certainly, the cultural approach which has permeated the current criminal procedure code stands out among the many reasons behind the declared inefficiencies: with eyes focused on

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[1] So F. M. GRIFANTINI, *La persona offesa dal reato nella fase delle indagini preliminari*, Naples, 2012, p. 17.

[2] ECHR, 26 March 1996, *Doorson v. Holland*.

the guarantees to be granted to the defendant – whereby to overcome the inquisitional drifts of the old system – very little attention has been dedicated to the injured party, in fact relegated to the margins.

In short we are still a long way from the level required by Europe and more precisely by Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 which dictates minimum standards concerning the rights, support and protection of victims of crime.

It is not as if actions have not multiplied in recent years. The fact is that the quantity of such actions did not correspond with the quality of the regulatory products, starting from the way of legislating which seemed to be unaware of systematic and overall vision, and developed, mostly, through the pattern of the issuing of urgent decrees[3], symbolically used as a way of calming that climate of "collective hysteria" that often arises around the serious types of crime under discussion. In short, the impression of an manipulation of the victim «as the picklock of increasingly aggressive safety policies»[4] is anything but rare, since, not so much the injured party as a purpose in himself as, rather, protection of public safety in its widest and, probably, less noble sense has risen to the centre of gravity.

2. Information obligations

Aware that the actual exercising of rights assumes previous knowledge of the same, the Directive on victims, we know, contains in its article 4 a large amount of information (if necessary translated into the relevant languages) which should be guaranteed to the injured party right from his or her first contact with the relevant authority. Concerning this, the

[3] The reference is, for example, to legislative decree 23 February 2009, no 11, converted into law 23 April 2009, no 38, containing urgent measures concerning public safety and against sexual violence, and also concerning persecutory acts; and to legislative decree 14 August 2013, no 93, converted into law 15 October 2013, no 119, containing urgent provisions concerning safety and for combatting violence in general and also concerning civil protection and commissioning of the provinces.

[4] So S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea,* in S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA (eds.), *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012, p. 4.

distance of domestic discipline is sidereal[5]: the deficit deriving from the absence of a general information communication to be served at the beginning of the proceedings and constituting a sort of charter of the victim's rights[6] is not filled by the individual provisions. You just have to think that it was only with l. no 119 of 2013, converted into legislative decree no 93 of 2013, interpolating the text of art. 101 Italian code of criminal procedure (from now on, c.p.p.) that the duty was prescribed for the public prosecution and for the judicial police to inform the injured party, at the time of acquiring news of the crime, of the right to appoint a defence council and to access, in the allowed cases, legal aid from the State.

Still in conversion law no 119 of 2013 the matter regarding the discipline of the request for dismissal: the new paragraph 3-*bis of* art. 408 c.p.p. establishes that for crimes committed with violence to the person, notice of the request for dismissal must in any case be served, by the public prosecution, on the injured party and therefore also irrespective of his or her request and the deadline for raising an objection should be increased from ten to twenty days.

Again, in legislative decree 93 of 2013, a further information obligation is referable, this time introduced for the case in which the institutional player intends exercising criminal action. The notice of conclusion of preliminary investigations *ex* art. 415-*bis* c.p.p. must now also be given to the defence council of the injured party or, failing this, to the injured party: but only if action is taken for the crimes as per articles 572 e 612-*bis* Italian criminal code. A manifestation of the fundamental «right to obtain information about one's own case» ratified by art. 6 of the Directive on the victim, the provision denounces obvious gaps, both of a general and an internal coherence nature. Under the first point of view, limitation of the provision to the two specifically mentioned crimes certainly does not cover the area of crimes with a victim who deserves

[5] See, amongst others, A. BALSAMO - S. RECCHIONE, *La protezione della persona offesa tra Corte europea, Corte di giustizia delle Comunità europee e carenze del nostro ordinamento*, in A. BALSAMO, R.E. KOSTORIS (eds.), *Giurisprudenza europea e processo penale italiano*, Turin, 2008, p. 315.

[6] According to the proposal made by the doctrine: see in clear terms, L. LUPÁRIA, *Quale posizione per la vittima nel modello processuale penale?*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 54.

protection[7]: and this, without counting the inhomogeneity with respect to the objective sphere contemplated by the provision concerning dismissal, which we also owe to the same text of law[8]. From the second point of view, the amendment made only to paragraph 1 of art. 415-*bis* c.p.p. does not allow us to give an unequivocal answer to this question concerning the extension of the rights given to the injured party: if, i.e. these can avail themselves, and subject to the necessary adaptations, of the rights expressly mentioned by the following paragraphs and literally referring only to the person under investigation or if, on the other hand, in the silence of the law, all that remains are the already ratified paths, such as, *in primis*, the possibility of presenting briefs and requests to the public prosecution in compliance with art. 367 c.p.p.[9]. Not to mention the various consequences resulting from the nullity of the request for committal to trial deriving from failure to serve the notice of conclusion: intermediary nullity where there is violence regarding the investigated person demotes to mere relative nullity if the breach concerns the victim since it is difficult for such a transgression to be considered within the sphere of art. 178 let. *c)* c.p.p.

Concluding this short examination of the duties of information, one of the nerves uncovered by Italian legislation has always been represented by the restraining order. Not that no specific measures are envisaged, the main purpose of which, in addition to the preventive requirements according to art. 274 c.p.p., is protection of the victim: an example of this is removal from the family home according to art. 282-*bis* or a ban on approaching places frequented by the injured party according to art. 282-*ter* c.p.p.[10]. But until the recent legislative decree no 93 of 2013 no internal provision could be said to respect the prescription contained in art. 6 paragraph 5

[7] See P. DE MARTINO, *Le innovazioni introdotte nel codice di rito dal decreto legge sulla violenza di genere, alla luce della Direttiva 2012/29/UE*, in *Diritto penale contemporaneo*, 8 October 2013, p. 7.

[8] R. A. RUGGIERO, *La tutela processuale della violenza di genere*, in *Cass. pen*., 2014, p. 2356.

[9] P. DE MARTINO, *Le innovazioni introdotte nel codice di rito dal decreto legge sulla violenza di genere, alla luce della Direttiva 2012/29/UE*, cit., p. 7.

[10] Without counting the recently introduced pre-cautionary measure (by the already-mentioned leg. decree no 93 of 2013, converted into law no 119 of 2013), i.e. the urgent removal from the family home according to art. 384-*bis* c.p.p.

of the Directive, according to which, «the member states guarantee the victim the possibility of being informed, without undue delay, of the release or escape from prison of the person placed in pre-trial custody […] ». In short, in the relationship between the injured party and the person in pre-trial custody, the image of the "forgotten"[11] victim seemed to reach its peak. So, in providing a remedy for this gap, legislative decree no 93 of 2013, as converted into Law no 119 of 2013, through the new mechanism represented by paragraph 2-*bis of* art. 299 c.p.p., orders that, in relation to trials involving crimes committed with violence against the person, repeal measures, substitution *in melius* or application with less onerous methods of the measures laid down by articles 282-*bis*, 282-*ter*, 283, 284, 285 and 286 c.p.p. must be notified immediately, by the judicial police, to the social-assistance services and to the defence lawyer of the injured person or, failing this, to the injured person: this, as is obvious, in order to allow the victim to take the necessary actions, in order to be able to adopt, if considered necessary, the appropriate protection measures made necessary by the change to the preventive regime of his or her aggressor. But yet again, the technique of selective interlocking brings various problems with it: the specific intervention on art. 299 c.p.p. leaves out all those hypotheses, considered in various ways by our de *libertate* system, in which the preventive matter can vary irrespective of the institute in question; an example of his is the possible epilogues of preventive impugnments, in the case of a favourable result for the investigated person/defendant, or, more in general, the other extinctive cases of precautions. The provision doesn't even deal with cases of escape [12].

3. The participation of the victim in the trial

Characterised by the public monopoly in exercising the criminal action that precludes almost any assimilation of it to a

[11] To consider again the evocative title of the Conference organised in December of 2000 by the *Accademia Nazionale dei Lincei*: acts can be read in Aa.Vv., *La vittima del reato, questa dimenticata*, Rome, 2001.

[12] See R. A. RUGGIERO, *La tutela processuale della violenza di genere*, cit., p. 2356.

private accuser[13], the physiognomic configuration of the victim is influenced by the distinction between the injured party *tout court* and the plaintiff. Mere subject and not party, the injured party has less penetrating rights than the system recognises to the victim who, having exercised criminal action, through joining the proceedings as a plaintiff, assumes a role that is certainly more prepositive. In truth, the injured party – the only capacity reserved to the victim during investigations – also has a range of differently modulated powers: but once the trial starts, if the victim does not join the proceedings as a plaintiff, he or she joins the so-called limbo in juridical indifference. For example, only the plaintiff, and not the injured party, is entitled to the right of proof in the strict sense according to art. 190 c.p.p., to which the tendential duty of the judge to provide is correlated. The injured party does have the right at every state and level of the proceedings to present briefs and, with the exclusion of the Court of Cassation, to indicate elements of proof (art. 90 c.p.p.): but no obligation, in these situations, falls on the judicial authority. And again: only the plaintiff can dispute the sentence in relation to his application for compensation which may have been rejected, but not the injured party who has a mere power of making a plea to the public prosecution *ex* art. 572 c.p.p.

Without considering a strange short circuit which could occur: although it is an acquired rule that the provisions on the corroborations dictated by art. 192 paragraphs 3 and 4 c.p.p. do not apply to the declarations of the injured party, which can be legitimately made only in support of the confirmation of criminal responsibility of the defendant, jurisprudence tends to demand a more penetrating and rigorous examination - in some cases, assessing the expediency of proceedings with corroboration - where the victim has joined proceedings as a plaintiff and is therefore the bearer of economic claims[14].

So here, then, are the possible scenarios: in order to ascertain that his deposition is considered even alone as suitable to back up a decision to convict, the injured person would have to abandon the function of plaintiff, but in this case, in the hypothesis of an unfavourable result, any form of impugnment

[13] See M. CAIANIELLO, *Poteri dei privati nell'esercizio dell'azione penale*, Turin, 2003.

[14] See, *ex plurimis*, Italian Court of Cassation, Plenary Session, 19 July 2012, n. 41461, *Bell'Arte*, in *Ced Cass.*, no 253214.

would be precluded for him; where, on the other hand, he should join proceedings, he would be authorised to impugn but with the tangible risk of an attenuated evaluation of his declarations.

Perhaps, in order to overcome the restrictions and aporias mentioned above, the main path – already indicated by the doctrine – could be a reform of the system, which moving from a reflection about the expediency of retaining the currently existing *summa divisio*, could protect for the injured person, in his capacity as such, the role of plaintiff in the real sense[15]: with full recognition of the right to cross-examination and the centrality which European sources seem to demand. This, also from the point of view of strengthening his position in relation to special proceedings[16]. In summary trials, for example, the victim cannot express an opinion on the decision of the defendant where a simple application is involved, and also in the case of a complex application, the right to contrary proof refers by the letter of the law only to the public prosecutor: moreover it is possible for the plaintiff to join proceedings and so in this case, in spite of every logical stunt, the powers granted to them correspond, notwithstanding the cross-examinations, to those that can be exercised during the debate.

This is not so in "Italian plea-bargaining", which in fact remains a matter between the accused and the defendant: who, therefore, by selecting in advance such a procedure, can completely exclude the injured party. Above all, the latter cannot criticise the fairness of a sentence he may consider to be too light[17]. But not only this: in virtue of the explicit contents of

[15] Concerning this, see H. BELLUTA, *Un personaggio in cerca d'autore: la vittima vulnerabile nel processo penale italiano*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 124; G. TRANCHINA, *La vittima del reato nel processo penale*, in *Cass. pen.*, 2010, especially p. 4059.

[16] On the point, see L. LUPÁRIA, *Quale posizione per la vittima nel modello processuale italiano?*, cit., p. 44; G. VASSALLI, *Sintesi conclusiva*, in *La vittima del reato, questa dimenticata*, cit., p. 85.

[17] ECHR, *Mihova v. Italia*, 30 March 2010. Moreover, recently, appealing to the obligation of interpretation in compliance with Directive 2012/29/EU (pending the deadline for its implementation fixed at 16 November 2015), the judge for the preliminary investigations at the Court of Turin, separating the figure of the victim from that of the damaged party in the strict sense, established the right of the first to know the ritual dynamics and to be able also to speak in the event of application of the sentence on request of the parties, with arguments which, at an indirect level, could in some way

the provision (art. 444 paragraph 2 c.p.p.), the judge must not decide on the application for compensation connected to joining proceedings, since he can only liquidate their costs. The procedure by decree and suspension with putting on probation recently introduced by law 28 April 2014, no 67 is certainly more respectful of the prerogatives of the victim. In the first case, a manifestation of the plaintiff's intention, in order to block the definition of the person being re-judged through the issue of the criminal decree, with consequent continuation of the trial in a different form is sufficient. Concerning the second case, the injured party acquires an unusual significance for our tradition but one that is certainly coherent with the postulates of the Directive on the victim: the motion to suspend the procedures with putting on probation must contemplate a program which, *inter alia*, must envisage «prescriptions of behaviour and other specific commitments that the defendant assumes also for the purpose of avoiding or attenuating the consequences of the crime, considering to this end damage compensation, reparatory actions and restitutions», as well as «actions aimed at promoting, where possible, mediation with the injured person» (art. 464-*bis* paragraph 4 letter *b)* e *c)* c.p.p.); and again, the injured person must in any case be heard and autonomous powers of impugnment are attributed to him or her (art. 464-*quater* paragraphs 1 and 7 c.p.p.); also, the domicile indicated by the defendant must be suitable to guarantee the requirements for protecting the victim (art. 464-*quater* paragraph 3 c.p.p.). Finally, in the overall mechanism which could lead to cancellation of the offence due to a positive result of the evidence carried out by the defendant, is it not perhaps risky to maintain that the injured party seems to become the main part of the decision, influenced mostly by the healing of the wound that the crime has caused him.

Continuing, and irrespective of the powers of impulse of the trial (we can think of the option of presenting a denunciation, or of the right to file a charge) and the probatory powers to be enforced during the investigation phase (on all of these, the investigations of the defence that obviously also concern the injured person) for the gathering of evidence, we

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have an impact on the judicial assessment of the fairness of the sentence: Court of Turin, section G.i.p., ord. 28 January 2014, in *Diritto penale contemporaneo*, 3 March 2014, with note of H. BELLUTA, *Per piccoli passi: la vittima di reato cerca spazio nel procedimento penale*.

must examine here the role of the victim in relation to the dismissal procedure and regarding applications for repeal or substitution in a cautionary measure.

With regard to the first point, we have already mentioned that Italian law on this matter, is, perhaps, the jewel in the crown as far as guarantees recognised to the victim are concerned: i.e. also in virtue of certain corrections introduced by internal jurisprudence; corrections that go beyond what the law would have provided, creating veritable virtuous procedures that, on a whole, design a power of participation of the injured person certainly syntonic with respect to the right to «review of a decision not to exercise criminal action» provided, as we have seen, by art. 11 of Directive 2012/29/EU. It is a known fact that the request for dismissal, through which the public prosecution considers the crime without grounds, must be presented to the judge for the preliminary investigations: in fact the applicant does not have autonomous powers of definition of the trial, since the decision falls solely on the jurisdictional. With regard to the victim, articles 408, 409 and 410 c.p.p. provide an articulated range of rights. First of all, the injured person can ask the public prosecutor to be informed about a possible request for dismissal and in such a case, the institutional protagonist must serve him with notice of the request. Not only this: within ten days the victim can object to the request for dismissal causing a hearing to be held before the judge and in the presence of the parties, in which he can make his reasons be heard and seek to obtain possible alternatives to closure of the proceedings: the continuing of investigations or, even, the formulation of the charge. Finally, the law states that the injured party may appeal for cassation against the dismissal order, but only in order to denounce failure to observe art. 127 paragraphs 1 and 3 c.p.p. and, in other words, failure to serve or untimely serving of the notice of the date of the hearing or failure to observe his rights to participate in the hearing. Strictly speaking, the regulatory discipline would prevent the victim from resorting to cassation in the presence of serious breaches of his right to intervene: for example, when he has not been served with the notice of the dismissal request pursuant to art. 408 paragraph 2 c.p.p., or when the dismissal decree was issued *de plano* by the judge for preliminary investigations without observance of the deadline of ten days laid down by art. 408 paragraph 3 c.p.p., or, again, when the judge has accepted the

public prosecution's request illegitimately neglecting to take the objection into consideration. Moreover, jurisprudence, both of the court of Cassation and the Constitutional Court[18], right from the start showed that it was sensitive to the needs of the injured party and, forcing the principle of the obligatory nature of impugnment and the principle of the obligatory nature of the nullities, admitted, in similar circumstances, appeal to cassation: here is an example of how the narrow spaces provided by the provisions resulted in the development of procedures so harmonious that the spectrum of intervention of the victim was widened. To this we can add that the deadline of ten days provided for raising an objection is of a merely dilatory nature, with consequent admissibility of the same even if respected and simultaneous obligation for the judge who has not yet decided to take it into account, fixing the hearing of the chamber for the purpose. And again, we must consider that the objection can also be presented by the victim of the crime who has not asked to be notified of the request for dismissal, but who became aware of it *aliunde*[19]. Finally, we must consider the changes illustrated above and relating to procedures with violence to the person[20]. To sum up, the overall picture that appears seems to give concrete form to the Directive on the victim, in the best possible way.

Less positive is the judgement on the recent change to art. 299 c.p.p. In addition to the information instruments examined above[21], law. n. 93 of 2013, conv. in l. n. 119 of 2013, also provided a concrete intervention of the injured party in relation to the institute in question: either by changing paragraph 3 or by interpolating paragraph 4-*bis*, in proceedings concerning crimes committed with violence to the person, requests for repeal or substitution *in melius* of the measures pursuant to articles 282-*bis*, 282-*ter*, 283, 284, 285 and 286 c.p.p., which were not proposed during interrogation of guarantee interrogation, must be notified immediately, by the requesting party (therefore, by

[18] Italian Const. Court, 16 July 1991, no 353, in *Giur. cost.*, 1991, p. 2820. In doctrine, see G. GIOSTRA, *L'archiviazione. Lineamenti sistematici e questioni interpretative*, Turin, 1994, p. 59. For some criticisms of the extensive theory, see F. CAPRIOLI, *L'archiviazione*, Naples, 1994, p. 430.

[19] Italian Court of Cassation, Plenary Session, 30 June 2004, *Apruzzese*, in *Cass. pen.*, 2004, p. 3547.

[20] *Supra*, § 2.

[21] *Supra*, § 2.

the public prosecution or the defendant) and under penalty of inadmissibility, to the defence lawyer of the injured party or, in the absence of the latter, to the injured party, unless in this last case he has not declared or elected domicile. The defence council and the injured party, in the two days after being notified, may present briefs pursuant to art. 121 c.p.p., aimed, obviously, at disputing the motion *libertate*.

Here the impression is that things have gone too far, unbalancing the trial to the detriment of the accused/defendant. And in actual fact, the legitimate right of the victim to be informed about the absence or the weakening of cautionary protections is something else; it is something else to grant the victim a veritable power to oppose the aspiration to freedom of the defendant. Let it be clear: it is not only a question of lengthening the times of the cautionary action, certainly destined to be extended thanks to the intervention of the injured party. Certainly, this shows it will end with the impact of the typological structuring of these institutes which postulate the need to adapt immediately and without undue delays the *status libertatis* to the actual continued existence and level of the assumptions of coercive power. The discussion is more general: i.e. it appears that the ideological-political inspiration behind these mechanisms, the intimate *ratio essendi* innate to them is radically dystonic with respect to the new contrary power given to the victim. In short, the topic of the difficult balancing between the trial protection of the injured party and the rights of the defendant[22] that runs, like a red thread, throughout the entire matter we are discussing emerges in all its importance. What must be avoided is that the defendant becomes, as we have said more than once, the, «victim of the victim»[23]. Otherwise, the race forward in protecting the injured person would mark in one sense a regression of the principles of the fair trial – to the detriment of the defendant, who, note well, remains in any case one of the protagonists (if not the main protagonist) of a

[22] Concerning this, see M. GIALUZ, *Lo statuto europeo delle vittime vulnerabili*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 88.

[23] Thus H. BELLUTA, *Un personaggio in cerca d'autore: la vittima vulnerabile nel processo penale italiano*, cit., p. 125. In the same order of ideas, see F. CASSIBBA, *Oltre Lanzarote: la frastagliata classificazione soggettiva dei dichiaranti vulnerabili*, in *Diritto penale contemporaneo*, 11 July 2014, p. 10.

criminal process that must be understood above all as a guarantee[24].

4. The right to be heard: the paradox of the special evidentiary hearing (so called *incidente probatorio*)

In tracing the regulatory and development details of the institutes aimed at acquiring declarations from the victim of the crime, focus must be placed on the *incidente probatorio*. As we know, the latter is designed for other aims. Its existence depends on the very structure of Italian criminal proceedings, and specifically by its division into phases (the investigations, in which usually evidence is not taken; the debate as an elective place of processing evidence). When for specific reasons it is not possible to defer the taking of evidence to the judgement (for example, dying witness), the early formation of evidence is envisaged with the characters of jurisdiction, and therefore in the presence of a judge and with intervention of the parties, during the investigations or preliminary hearing[25]. Gradually, moreover, a «special»[26] figure has accompanied this general system, which has become characterised as the paradigmatic mechanism of gathering knowledge of the injured person.

The first amendment dates back to art. 13, par. 1, of l. 15 February 1996, n. 66 (provisions against sexual violent) which, with reference to proceedings for the crimes pursuant to articles 609-*bis*, 609-*ter*, 609-*quater*, 609-*quinquies* and 609-*octies* c.p.

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[24] Therefore, we seem to be able to agree with the restrictive interpretation which gave rise to the first application , both referring to the onus of notification under penalty of inadmissibility only to petitions of repeal or substitution and not also to those involving changes to the executive procedures, and, finally, profiling the possibility of limiting the obligation in question to the sphere of the hypothesis in which the violent conduct must be included within the sphere of a prior relational relationship between the perpetrator of the crime and the victim and not already when there is a mere occasional nature of the violent action: see. Court of Turin, section G.i.p., ord. 4 November 2013, in *Diritto penale contemporaneo*, 28 November 2013, with note of H. BELLUTA, *Revoca o sostituzione di misura cautelare e limiti al coinvolgimento della vittima*.

[25] P. RENON, *L'incidente probatorio nel procedimento penale*, Padua, 2000.

[26] Thus M. G. COPPETTA, *Il contributo dichiarativo del minorenne nell'incidente probatorio*, in C. CESARI (ed.), *Il minorenne fonte di prova nel processo penale*, Milan, 2008, p. 121 - 123.

(sexual violence, serious sexual violence, sexual acts with children, corruption of children, group sexual violence), inserted paragraph 1-*bis* into art. 392 c.p.p., providing a peculiar hypothesis of *incidente probatorio* for obtaining the evidence of children under sixteen years of age even in the absence of the ordinary requisites of admissibility pursuant to art. 392, par. 1, letter *a)* and *b)* c.p.p.

Further legislative interventions (l. n. 269/1998, l. n. 228/2003, l. n. 38/2006) have gradually widened the crimes justifying recourse to the gathering of special evidence, with regard to crimes of paedophilia (articles. 600-*bis*, 600-*ter* and 600-*quinquies* c.p.), and to those linked to the phenomenon of human trafficking (articles. 600, 601 and 602 c.p.) and the crime of virtual pornography (art. 600-*quater* c.p.).

In this trend to expand the mechanism, an important phase is certainly represented by legislative decree no 11 of 2009, conv. in l. n. 38 of 2009. This decree contains two new aspects: the first of an objective nature, i.e. concerning the list of crimes covered by said provision; the second, instead, regards subjects for whom the gathering of evidence is attemptable. On the first hand, the crime of persecutory acts pursuant to art. 612-*bis* c.p. has been added as well as the crime of cruelty within the family ex art. 572 c.p. As far as the second aspect is concerned, while in the previous version, as we have seen, the child under sixteen years of age appeared as an exclusive point of reference, with the matter in question, the object of the *incidente probatorio* becomes the testimony of the child *tout court*, as well as that of the adult who at the same time is the party injured by the crime.

A further and last change to art. 392 paragraph 1-*bis* c.p.p. was made in law 1 October 2012, no 172, containing «Ratification and execution of the Convention of the Council of Europe for the protection of children against sexual exploitation and abuse, made in Lanzarote on 25 October 2007, and also the provisions to adapt the internal system», through inclusion of the crime of solicitation, introduced ex *novo* by the same law l. no 172/2012 with art. 609-*undecies* c.p.

For such types of crime, therefore, the public prosecution, also on the request of the injured party, or the person subjected to the preliminary investigations can ask for the special evidentiary hearing to proceed, even outside the sphere of the hypotheses provided by paragraph 1 of the above-mentioned art. 392 c.p.p. and, therefore, without the otherwise necessary

indication of the circumstances that establish the non-deferability of the evidence to the debate, as if the same is presumed to be *ex lege* in that it is implied by the nature of the significant crimes and by the subjective conditions of the particular declaratory evidence: the child, (whether a victim or not, since his particular needs always make him a vulnerable subject, in need of protection)[27] and the adult victim of the crime.

In short, in the provision contained in art. 392 paragraph 1-*bis* c.p.p. delicate balances are reflected, aimed, on one hand, at favouring in the victim the right to forgetfulness, i.e. a rapid removal of the traumatic experiences as are those typically connected to the crimes considered herein and that the context of the debate might be extended, but also, on the other hand, to ensure the reliability of the ascertainment, through formation of evidence at a time much nearer to the criminal episode, so as to avoid the loss of information or alteration of the same from the gnoseological point of view[28]. Two *rationes*, therefore, reflected in the provision in question and that lead, on the whole, to state the precipitated technique of an intention which appears to be coherent with European sources: we only have to remember the historic Pupino[29] sentence, which, in relation to the Council Framework Decision of 15 March 2001 (2001/220/JHA) concerning the position of the victim in the criminal trial (substituted, as we know, by the recent Directive), made itself

[27] L. DE CATALDO NEUBURGER, *Proteggere il minore e proteggere la testimonianza?*, in AA.VV. , *Verso uno statuto del testimone nel processo penale*, Milan, 2005, p. 193; G. SPANGHER, *Le leggi contro la pedofilia. Le norme di diritto processuale penale*, in *Dir. pen. proc.*, 1998, p. 1233.

[28] Concerning this, G. CANZIO, *La tutela della vittima nel sistema penale delle garanzie*, in *Criminalia*, 2010, p. 255; G. GIOSTRA, *La testimonianza del minore: tutela del dichiarante e tutela della verità*, in *Riv. it. dir. e proc. pen.*, 2005, p. 1019; T. RAFARACI, *La tutela della vittima nel sistema penale delle garanzie*, in *Criminalia*, 2010, p. 257; S. RECCHIONE, *La tutela della vittima nel sistema penale delle garanzie*, in *Criminalia*, 2010, p. 274.

[29] ECJ, 16 June 2005, case C-105/03, *Pupino*, in *Cass. pen.*, 2005, p. 3167, with note by L. LUPÁRIA, *Una recente decisione della Corte di giustizia sull'allargamento delle ipotesi di audizione del minore in incidente probatorio*, *ivi*, p. 3541. On the point also see S. ALLEGREZZA, *Il caso "Pupino": profili processuali*, in F. SGUBBI - V. MANES (eds), *L'interpretazione conforme al diritto comunitario in materia penale*, Bologna, 2007, p. 53; M. CAIANIELLO, *Il caso "Pupino": riflessioni sul nuovo ruolo riconosciuto al giudice alla luce del metodo adottato dalla Corte di giustizia*, *ivi*, p. 89.

the promoter of an extensive exegis of the institute in question. However, Directive 2012/29/UE also concerns itself with guaranteeing that the victim may be heard and can provide elements of evidence (art. 10), but, at the same time, also seeks to ensure that the hearing takes place without undue delay and perhaps in the immediacy of obtaining information about the crime, at the same time limiting its number to the strictly indispensable (art. 20) and focusing in any case on preserving the personality of the subject with specific protection needs through the provision of suitable means established on the basis of an *individual assessment* (art. 22 ff.).

All these comments contribute to making the gathering of evidence the best practice in relation to the discussed topic, because the capacity of conjugating the two moments of protection traditionally reserved for the victim: whether it be protection "in the" trial, through a copious file of participation rights; or protection "from the" trial, i.e. from the risks, we must repeat, of secondary victimisation (and under this profile we think about art. 398 paragraph 5-*bis* c.p.p. concerning the peculiar protected procedures through which the gathering of evidence is carried out, or, again the new paragraph 5-*ter* concerning adults in conditions of particular vulnerability)[30].

But, the mechanism in discussion presents many structural defects which illustrate obvious paradoxes.

Starting from the absence of a direct legal right, by the victim of the crime in general and by the person with specific protection needs in this case, to ask the judge for them to be admitted: although it is a measure guaranteeing the injured party, it can only be activated following a plea by the pubic prosecution or of the person subject to investigations[31]. If to this

[30] Order introduced by legislative decree 4 March 2014, no 24, in implementation of directive 2011/36/EU relating to the prevention and repression of human trafficking and victim protection. Not that other mechanisms aimed at guaranteeing protected examinations are missing: in debate, of particular significance are, for example, the provisions of art. 498 paragraph 4, 4-*bis*, 4-*ter* e 4-*quater* c.p.p. on expedients for examining the child, on the screened hearing and more in general on the guarantees with which the victim's deposition can be surrounded. Under another perspective, it has to be underlined the lack of coordination between articles 392 and 190-*bis* c.p.p. The latter is aimed at avoiding the deposition in the trial of the child with reference to sexual violence crimes, when he has been already examinated during the *incidente probatorio.*

[31] On the internal front, the order with which the preliminary investigations judge ordered the gathering of proof in forms of evidence

we add that the mere power of appeal of the requesting body that pertains to the victim is without protections, since any explicit refusal on the matter by the institutional protagonist is final, and if we also consider that in any case the refusal order pronounced by the judge who has rejected the request of such a special hypothesis[32] cannot be disputed, we then understand how clear the contradictions throughout the mechanism under discussion are. Without forgetting that the reference to evidence as a sole means of attemptable proof is certainly limiting and undermines the effectiveness of the institute, compared with other potentially harmful means - such as, for example, comparisons, recognitions, etc.[33]. Finally, a difficulty without solution seems to be that of radically de-structuring the system: the selective and gradual technique of criminal cases - which, moreover, do not exhaust the area of vulnerability - seems to clash with those of individual assessment of the needs of the injured party which, note, constitutes the new turning point in the European construction of victim protection, as assimilated by Directive 2012/29/UE.

The challenge, then, to overcome the *impasse*, cannot help but move from an overall and extensive reform which must

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gathering on the request of the injured party was considered to be abnormal: and so Italian Court of Cassation, Sect. III, 27 May 2010, no 23930, in *Ced Cass.*, no 247874. On the international side, we register a "conflict" between Courts, arising with regard to Italian legislation concerning the obligations then deriving from the framework 2001/220/JHA. The Court of justice considered both the lack of the provision in our system of a direct power of the victim to request the gathering of evidence as compatible with the European reference point, as was the absence of a specific right of impugnment of the injured party to dispute the rejection of the public prosecution to start the early formation of evidence requested by the victim himself: concerning this, ECJ 21 December 2011, case C-507/10, X, which appealed to the exceptional nature of the mechanism with respect to the gathering during the trial of evidence. Only a few years before this, the European Court of human rights expressed itself differently: although considering the appeal unacceptable because internal paths had not been exhausted, in the case of Sottani against Italy, it had raised doubts about the compatibility of the Italian trail discipline – in the part in which the injured party is not allowed to ask the judge directly for the gathering of evidence – both with right to equality of arms and with the right of access to justice, written in art. 6 of the Convention.

[32] Italian Cort of Cassation, Sect. III, 13 March 2013, no 21930, in *Ced Cass.*, no 255483.

[33] See H. BELLUTA, *Un personaggio in cerca d'autore: la vittima vulnerabile nel processo penale italiano*, cit., p. 107.

have the courage to break away from certain objections which, to tell the truth, seem, at the moment, to have only a retro flavour: such as that of avoiding the widening of the operations of gathering evidence, hiding behind the exceptional nature of the mechanism. If we look at it clearly, very little already remains of its original physiognomy[34], but this is not the point. Here it is not a question of changing the ordinary mechanism mentioned in art. 392, paragraph 1, c.p.p., but rather of intervening on the special mechanism which, whether we like it or not, is not compatible with the straightened circumstances into which it seems to be forced. And then, de *iure condendo*, in protection of the victim, perhaps it could be utilised on a wider scale, allowing the judge – even on the request of the injured party – to admit it where the *individual assessment* makes it necessary. Without forgetting to guarantee the constant balancing of the rights of the injured party with those of the defendant/person under investigation[35] and respect of cross-examination, both at the time of the individual assessment of the particular protection needs and in the tangible assumption of the means of evidence.

[34] See P. RENON, *L'incidente probatorio vent'anni dopo: un istituto sospeso tra passato e futuro*, in *Riv. it. dir. proc. pen.*, 2011, p. 1019.

[35] L. LUPÁRIA, *L'Europa e una certa idea di vittima (ovvero come una direttiva può mettere in discussione il nostro modello processuale)*, in R. MASTROIANNI - D. SAVY (eds.), *L'integrazione europea attraverso il diritto processuale penale*, Napoli, 2013, p. 91.

CHAPTER VIII

VICTIM'S RIGHTS IN SPAIN WITHIN THE NEW DRAFT FOR A LEGAL STATUTE FOR VICTIMS IN CRIMINAL PROCEEDINGS

by Juan Burgos Ladrón de Guevara[*]

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1. Introduction

Similarly to the right to action in court and to access an effective judicial protection, also the so-called "procedural rights" have to be granted to all the subjects who take part in a criminal trial. Among these subjects, there are also crime victims, whose protections has become one of the strategic European Union's aims[1].

Concerning the Spanish legal framework, the draft for a statute for crime victims has arisen from fundamental principles contained in the European Council framework decision no 2001/220/JHA[2], which has been the first European legal act that has recognized the victim position within the criminal proceedings. As it is known, the framework decision has been replaced by the recent directive no 2012/29/EU dated 25 October 2012. The Spanish Constitution, in its Article 24, par. 2, provides that everybody must be granted with procedural rights. In particular, the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public

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[1] S. OROMI VALL-LLOVERA, *Víctimas de delitos en la Unión Europea. Análisis de la Directiva 2012/29/UE*, in *Revista General de Derecho Procesal*, 2013, no 31, p. 2.

[2] GU L 082 del 22.3.2001.

trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent[3]. Within the Spanish legal system, also the right to information, protection and assistance are ensured.

As stated in the EU Commission report dated 20 April 2009 and delivered in compliance with art. 18 of the framework decision no 2001/220/JHA[4], Spain is one of the few Member States that envisage legal provisions concerning the crime victims.

Nevertheless, the recent directive no 2012/29/EU states that these legal provisions have to be as effective as possible in providing victims with "real" procedural rights.

We can say that the existing Spanish laws on this topic are effective exclusively vis-à-vis some selected victims of specific crimes, as confirmed by the following legal texts: law no 35 of 11 December 1995, on legal aid and assistance to victims of violent crimes and crimes against sexuality (this legislation has been developed by the *Real Decreto* no 738 of 23 May 1997); *ley orgánica* no 1 of 15 January 1996, on the legal protection of minors; *ley orgánica* no 1 of 28 December 2004, on protection against gender violence victims; law no 29 of 12 September 2011, on protection of victims of terrorism.

Recently in Spain a new draft law, dated 28 April 2014, on child protection[5] have had a considerable echo, as it provides for the minor (even if under 12, if they are mature enough) has the right to be heard before the judicial authorities. Besides, in order to avoid the so-called "secondary victimization", the minor has to be heard only once, without the need to repeat the deposition, and has the right to be assisted by an expert. Finally, according to the above mentioned draft law, the judges have to order specific and temporary measures in order to protect children of those women having been victims of domestic violence.

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[3] Cfr. J. A. GÓMEZ MONTORO, *Los derechos procesales del art. 24.2 CE*, in C. VIVER I PI-SUNYER (eds.), *Jurisdicción constitucional y judicial en el recurso de amparo*, Valencia, 2006. p. 167.

[4] *http://eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=CELEX:52009 DC0166&from =EN.*

[5] *https://www.msssi.gob.es/normativa/proyectos/home.htm*. According to article 39 of the Spanish Constitution and to international laws on minors protection, the draft aims at updating the national legal framework on the topic.

2. Common rights for victims

Article 3 of the Statute for crimes victims (*Anteproyecto*) recognizes their right to protection, information and assistance, together with the right to actively take part in criminal proceedings[6]. The provisions of this draft fully reflect the provisions of chapter II and III of the Directive 2012/29/EU[7].

Actually, the *Anteproyecto* for a statute for victims complies not only with the above mentioned 2012 directive, but also with the needs expressed a Spanish society asking for equal and complete legal provisions, together with other International legal texts. In fact, the Spanish draft takes into account not only the indications that come from the 2012 directive, but also those coming from the United Nation Convention for the protection of all persons from enforced disappearance[8].

The *Anteproyecto* tends to be a general catalogue of extra-procedural and procedural rights addressed to all crime victims, whether they are "direct" or "indirect" victims, such as family or similar. Therefore, the protection of the victim within the new Spanish draft law is not limited only to the "real" trial phase, but has also an extra-trial dimension, making reference to a broad interpretation of concepts of recognition, protection and support, in order to provide victims with a total legal protection.

In order to guarantee this integral protection, the new draft foresees any possible facility, such as: information and assistance on rights and services; addressing to the competent judicial authority; human treatment; possibility to be assisted by a trusted person; specified and personalized services and measures, even for the economical and moral aspects; complete institutional collaboration between Government, judicial authorities, professional experts; specialized offices that can coordinate and promote the above-mentioned indications.

[6] The draft law can be consulted on *www.mjusticia/gob.es*.

[7] Articles 3-17 of directive 2012/29/UE. Cfr. GU l. 315 del 14.11.2012, pp. 66-70.

[8] Adopted by the CED (Committee on Enforced Disappearence) on 31 October 2006, entered into force on 23 December 2020; cfr. P. GALELLA, *La Convención Internacional para la protección de todas las personas contra las desapariciones forzadas. Un gran paso hacia una mayor protección en la lucha contra este fenómeno*, in *Revista Jurídica de la UAM*, 2010, 21, p. 77.

We can say that the global purpose that permeates the *Anteproyecto* is to provide victims with rights and protection reducing the bureaucratic aspects and avoiding secondary victimizations. The purpose of providing rights and protection measures for all the crime victims (no more only for those persons who have been victims of certain selected crime) is due to the principle that the tragedies may be different, but the injustice is the same.

Therefore, Title I[9] of the draft is entitled "*Derecho básicos*" and provides several extra-procedural rights for all the crime victims, without prejudice depending on their choice to bring the civil action into the criminal trial or not, and since the first stages of the proceedings (not only during the trial). In the same Title I also restorative justice instruments and reimbursement of the legal costs are regulated.

Title II[10] of the draft regulates in a systematical way the procedural rights within the criminal proceedings, omitting the protection measures. We can mention, above the various rights, the right to receive the notification of the judicial decision (even if the Judge has decided not to proceed), the right to appeal, the right to refund the sustained costs. In particular, victims refund is more important than the claim of the State when the criminal proceedings has arisen from a claim filed by the victim or when the sentence has been ordered after the appeal or the reexamination of the case asked by the victim. Besides, according with art. 13 of the draft law, the victim keeps his rights also during the execution phase of the sentence.

In fact, the victim in this particular stage has the right to be informed and to give information to the authorities, the right to appeal against some decisions on probation, seizures and confiscation, the right to ask to adopt protection measures[11], and the right to access restorative justice services. Regarding this latter institute, it is important to underline that, maybe, the Spanish draft has focused essentially on the victim, overlooking the accused and his fundamental rights (such as the presumption of innocence), especially when it asks the recognition of the fact by the accused.

[9] Articles 4-10 of the *Anteproyecto.*

[10] Articles 11-18 of the *Anteproyecto*.

[11] In case of dangerous situation for victims (see articles 36.2 and 78.3 of the Spanish penal code).

3. Protection and recognition issues

Title III of the *Anteproyecto* deals with victims' protection, focusing particularly with specialized protection instruments aimed at avoiding retaliation, threat, psychological damages, assaults during their questionings and examinations.

These instruments include not only measures aimed at ensuring physical protection (such as the utilization of separated rooms in courts), but also other different devices, such as the timetable of the victim's deposition (the victim has to be heard immediately after his/her claim, and the questionings have to be reduced at the minimum number). Besides, the victim has the right to be assisted by a trusted person during the questionings.

In the Spanish judicial system the fundamental principles of the hearing of the parties and of the defense right are granted also to minors[12]. In fact, the existing legal provisions[13] and the case-law[14] foresee protection instruments for the minor without prejudice for the accused. In particular, the victim's examination has to be carried out before experts and in the hearing of the parties. Besides, it is recorded in order to avoid its repetition in other judicial phases. All of these prescriptions must respect the minor's privacy and take into consideration his/her individual and peculiar characteristics[15]. In particular, specific assistance and protection have to be ensured to victims particularly vulnerable, victims of domestic violence, victims of repeat violence. By the way, the minor's protection must not damage the accused position and rights, together

[12] The Spanish Supreme Court, in its decision no 940 of 13 December 2013 (on *www.iustel.com*, *sección RI 1124084*) has not found any violation of law in the judicial practice of the anticipated evidence when the examination of the minor is recorded on a digital support and, later, is reproduced during the trial, in order to avoid the meeting and the direct confrontation between the victim and the accused.

[13] Articles 433, 448, 455, 707, 731 *bis*, 777.2 and 797.2 *Ley de Enjunciamiento Criminal*.

[14] Cfr., *ex plurimis*, Spanish Supreme Court, no 19 of 9 January 2013, no 80 of 10 February 2012 and no 174 of 7 November 2011 (*www.iustel.com*).

[15] Decision of the Spanish Constitutional Court no 57 of 11 March 2013, that has stated that, in the minor's interest, it is possible to avoid his/her questioning during the trial; in the same terms, decision of the Spanish Supreme Court no 940/2013, cit.

with the efficient mood of operation of the trial and the privacy of the subjects involved[16].

Finally, in the second final disposition (*desposición final segunda*), the draft wants to modify some articles of the Spanish procedural law (*Ley de Enjuiciamiento Criminal - LEcrim*) that directly produce effects on the crimes victims' protection, always keeping an equilibrium between their interests and the accused's rights. In particular, the *Anteproyecto* modifies, inside the *LEcrim* the dispositions related to: the subjects that can act into the trial (articles 109 - 109-*bis*); the restitution of the deposit (art. 281); the Police's obligations (articles 282 and 284); measures to be adopted during the instrucción (art. 301); the confiscation of the *corpus delicti* (art. 334); the witnesses that are recognized as victims, in particular if they are minors or affected by disability (ar. 433); the application of accessory sanctions for those crimes foreseen by art. 57 of the Spanish penal code (art. 544 *quater*); the notification of the trial (art. 636); the publicity of the trial and the closed doors rules (articles 680-682); possible technologies to be used during the questioning of the minors (art. 707); the interview's rules (art. 709); the decisions to not proceed (art. 779.1.1).

Also important for victims' protection are the common provisions contained in Title IV, that are related to the assistance agencies, their officers and their training (in particular, see art. 30). The creation of general agencies that are able to gather a lot of victims would be very important in this historical period, when the economic conditions of the population (and so, also of victims) are awful and crimes such as terrorism and criminal organization provoke a huge number of victims. Concerning the protection measures, there is another European directive that has been adopted by Spain, i.e. directive 2011/99/EU on the European protection order. In fact, recently the *Comisión parlamentaria de Justicia* of the Spanish Parliament has approved on 24 June 2014 a law that extents the

[16] Through the provisions of Title III on victims' protection, the draft tries to solve some problems that exist in the Spanish criminal procedure since always (cfr. E. URBANO CASTRILLO, *Es necesario un estatuto de la víctima*?, in *Rev. Aranzadi Doctrinal* n. 9/2012, p. 1; J.J. MANZANARES SAMANIEGO, *Estatuto de la víctima (Comentario a su regulación procesal penal)*, in *Diario La Ley*, n. 8351/2014). Regarding this, the Spanish association for disasters victims (REVES, *Red de Víctimas de Catástrofes Españolas*) has adfirmed that most of the problems in this matter regard especially the criminal investigation phase.

protection order to all the victims within the EU[17]. This law has the same *ratio* of the Spanish draft law on the mutual recognition of the judicial decisions within the EU and the draft law on the exchange of information regarding the status of the criminal proceedings and the sentences among the Member States[18].

4. Conclusions

The recent draft law on a legal statute for victims, granting rights and protection to the victim within the criminal proceedings, fully complies with the provisions of Chapter II and III of directive 2012/29/EU. In particular, the Spanish legislation can be considered advanced in foreseeing procedural and extra-procedural rights for victims in participating in the criminal trial.

Of course, in order to further strengthen the victim protection, it would be necessary to foresee a power to participate to the criminal trial also for legal entities recognized by laws (such as victims' associations), that would be able to better represent the victims' interests.

It is also important to underline how in Spain there are several important drafts law in progress, on minors' protection and mutual exchange of juridical information aimed at adapting the national legislation to the European standard.

[17] Cfr. J. B. LADRON DE GUEVARA, *La orden europea de protección: analogías y diferencias con la orden de protección del proceso penal español*, in *Diario La Ley*, n. 8022/2013, in *www.laley.es*.

[18] In Spain, both of the drafts have been approved by the Government on 14 March 2014. It has been created the *Registro Central de Penados*, entitled to send and receive infromation on criminal proceedings and criminal sentences (*www.mjusticia.gob.es*).

CHAPTER IX

VICTIM'S RIGHT TO PARTICIPATE IN THE PROCESS AND *ACUSACIÓN PARTICULAR* IN SPAIN

by Ángel Tinoco Pastrana[*]

TABLE OF CONTENTS: 1. Introduction. - 2. About private prosecution. - 2.1. Premise. - 2.2. *Locus standi*. - 2.3. Requirements for the activity - 2.4. Costs to be incurred for the proceedings. - 3. The victim' right to be informed and to participate even though he is not *acusador particular*.

1. Introduction

This contribution shall specifically focus on the compliance and the good practices of the Spanish criminal procedure compared to the minimum standards as provided for in Chapter III of the EU Directive no 2012/29 as regards the victims' right to participate in the criminal proceedings. The Directive *in se* does not acknowledge the victims' subjective right to undertake prosecution because it aims at reconciling with the different systems existing in European Union, where the implementation of criminal proceedings might be a monopoly of the public prosecution office, as for instance in France, Italy and Germany[1]. Special attention shall be focused on the private prosecution institution (*acusación particular*), that directly affects the specific model of criminal proceedings and co-exists with the public prosecution. The analysis shall be twofold,

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[1] For an overview on the monopoly of the exercise of criminal actions being referred to the public prosecutor in different EU Countries and on the victim's position, T. ARMENTA DEU, *La víctima como excusa: su posición en los sistemas procesales en relación con el ejercicio exclusivo de la acción penal y el procedimiento de menores*, in *El Derecho procesal español del siglo XX a golpe de tango; Juan Montero Aroca,* Liber Amicorum *en homenaje y para celebrar su LXX cumpleaños*, Valencia, 2012, p. 930.

performed considering both a *de lege data* current perspective and a *de lege ferenda* future one, the latter based first on the current *Proyecto de Ley Orgánica del Estatuto de la Víctima del Delito* (PLOEVD)[2] and, secondly, on the *Borrador de Código Procesal Penal* (BCPP)[3] might be considered as well. However, the PLOEVD shall be only referred to, since no procedures have yet been started for the enforcement of the BCPP and since the PLOEVD further studies the contents provided in the Directive. The PLOEVD rules the private prosecution institution and introduces some innovations in it, by amending the provisions in the *Ley de Enjuiciamiento Criminal* (LECrim). In addition to the above, it outlines in a detailed way the victims' new rights to participate in the prosecution, both during the process and during the execution of the sentence. Even though the PLOEVD respects the private prosecution institution, the same might drive the victim not to resort to the same: as a matter of fact a victim might simply exercise the own right to be informed, as defined in art. 5.1, let. *m*) PLOEVD.

This might have impacts on several fronts, and particularly the proceedings involving a high number of victims would considerably benefit from this.

2. About private prosecution

2.1. Premise

Originally, victims and prosecution coincided in the criminal law. However that of the prosecution has become an official role thereafter, while in several orders the victim's role

[2] The *Anteproyecto de Ley Orgánica* was introduced on 24 October 2013. The text used in this analysis is the *Proyecto de Ley Orgánica* dated on 1 August 2014. The PLOEVD aims at introducing into the Spanish legal system all the provisions required to comply with the provisions in the EU Directive no 2012/29. As the date confirms, the *Anteproyecto* was submitted in a moment when the ruling by the ECHR in the *Del Río Prada v. España* case (C-42750/09) of 21 October 2013, that cancelled the so-called *Doctrina Parot* and that had a considerable impact on the rulings issued for serious offences in Spain, was likewise rejected by the Spanish society, specifically by the associations representing the victims of terror attacks.

[3] The BCPP was issued by the *Ministerio de Justicia* on 25 February 2013 and includes the repeal of the LECrim currently in force. Art.59 - 68 of the BCPP specifically regard the "Victim's procedural statute". Custody and protection of victims are instead dealt with in art. 14, 43-45 and 190-194.

has been reduced to that of a simple witness. Notwithstanding the above, it is important to remember that the victims' legal treatment is not the same in all crimes and that in some Countries where the prosecution is a monopoly of the public prosecution office, there are some contrary trends whose goal is to allow the victim to join the proceedings, specifically if this is aimed at restitution[4].

In Spain the prosecution is public and it can be exercised by both the public prosecution office – the *Ministerio Fiscal* (pursuant to art. 105 LECrim) – and by the citizens (art. 101 LECrim). However it must be specified that, pursuant to the criminal laws currently in force, the individuals apart from the *Ministerio Fiscal* are acknowledged with the *locus standi* right only during the proceedings and not in the execution of the sentence. In case of public and semi-public crimes, the victim may sit next to the public prosecution to join the civil and criminal proceedings as an *acusador particular*. Instead, in the case of private crimes (slander and insults), the prosecution is exercised by the victim by means of the so-called *acusación privada*. If the victim decides to exercise the civil prosecution only originating from the crime, we will have an *actor civil* ("civil party"), corresponding to art. 12 and 13 of the Directive. The citizens' right to undertake prosecution is also provided for if the individual is not directly a victim of the crime, and this right can be exercised by means of the popular accusation institution (*acusación popular*)[5], according to art. 125 of the Spanish Constitution and art. 101 LECrim.

Since the victim taking up the role of a private prosecutor is not entitled to any subjective right to have the State inflict a specific punishment, the criminal claim must not be intended

[4] B. SCHÜNEMANN, *El papel de la víctima dentro del sistema de justicia criminal: un concepto de tres escalas*,in *La víctima en el proceso penal: dogmática, proceso y política criminal*, Lima, 2006, pp. 28, 29 e 31. This is the case of the German Law, for instance, as regards the protection of victims in criminal offences, injuries, deprivation of freedom and sexual crimes.

[5] The *acusación popular* has its regulatory foundation in the provisions of art. 125 of the *Constitución Española* (CE), ruling the popular participation in the administration of justice. This is a prestigious institution, studied by foreign jurists who compare it to collective action indeed. Pursuant to the provisions in articles no 101 and 270 of the LECrim, the Spanish citizen who does not fall in the categories as reported in articles no 102 and 103 LECrim may join any proceedings for public crimes as an *acusador popular*. This role is acknowledged to the Spanish legal persons as well, notwithstanding the fact that jurisprudence moves away from this possibility or limits it in some cases.

from the point of view of the subjective right to punishment (Windscheid), but from different dogmatic perspectives, such as the Gerland one, considering this as a secondary concept originating from the State's subjective duty to inflict punishment. The issue is similarly dealt with by Esser, Burckhart and Huder. Please note the conceptual delimitation proposed by Ihering as well, who talks about "legitimately protected interests" and thereby considers the practical goal of the law as a substantial characteristic and the instrument, e.g. the legal protection, the action[6], as a formal characteristic. It was observed that in the latest decades the criminal procedural systems in the Civil law Countries are evolving from "formal" or "mixed" prosecution systems of a French origin to become "pure" prosecution systems, thus increasing the power in the hands of the public prosecution to the detriment of the investigating judge's role (in Spain *Juez de Instrucción*), and assigning him/her with the investigation phase. In Spain this system is defined by the BCPP and by the previous *Anteproyecto de Ley de Enjuiciamiento Criminal* of 2011[7].

This evolution was considerably influenced by the so-called adversarial system in the Common law (particularly in the United States), where the public prosecution office has the monopoly over the exercise of the prosecution. This system shows important signs of the "principle of opportunity", acknowledging the discretional character in the exercise of the prosecution for different purposes. The said principle might be at risk if the victim is entitled to join the proceedings, because victims are of course driven by different interests and purposes compared to those of the public prosecution office. The prosecution system was adopted in Spain for criminal proceedings in the presence of child victims. The original formulation of the law excluded the private prosecution[8].

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[6] H. KAUFMANN, *Pretensión penal y derecho a la acción penal. La delitimación entre el Derecho penal material y el formal*, Madrid, 2009, p. 138.

[7] This *Anteproyecto* has not been finalized: it was submitted by the *Consejo de Ministros* on 22 June 2011, about at the end of the previous term, and it was never examined by the Parliament.

[8] This issue is ruled by the *Ley Orgánica 5/2000* of 12 January, «*reguladora de la responsabilidad penal de los menores*», whose promulgation was a need imposed by the provisions in the LO no 4/1992. The question was solved three years later by the LO 15/2003 with an amendment to art. 25, that entitled the victims toexercise the right to prosecution.

However, victims wanted to be acknowledged the right to join the proceedings[9].

2.2. Locus standi

The faculty to join the proceedings is acknowledged to both Spanish and foreign citizens (art. 270 LECrim), in compliance with the provisions in art. 24 of the Constitution establishing the fundamental right to "real jurisdictional protection". Specifically, the prosecution may be exercised by both the natural and legal person "offended" or "damaged" by the crime. The said party may bring both criminal and civil action, as defined in articles no 3 and 11 of the PLOEVD as well. This concept cannot be extended to civil proceedings in absolute terms, since the victim taking up the role of an *acusador particular* is not assigned with any real subjective rights and because the *ius puniendi* is a monopoly of the State: the victim is not entitled to any subjective right to have the State inflict a defined punishment. In the definition of the *locus standi* for the prosecution, the LECrim is not using the term "victim", but talks about an "injured party" and "offended party" (articles 100 to 117). The "offended party" is the owner of the legal asset that is damaged or harmed in the crime (direct victim), while the "injured party" is the individual who suffered a damage or a harm as a consequence of the crime, however the same is not the owner of the legal asset (indirect victim)[10].

Used in an incorrect way in the law, the expressions "injured party" and "offended party" were then explained in the jurisprudence. These two parties substantially correspond to the concept of victim as provided for in art. 2 of the Directive. The

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[9] J. PÉREZ GIL, *Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain,* in *Law & Policy*, v. 25, no 2, p.152. The author analyses the advantages of private prosecution compared to the inactivity or ineffectiveness of the public prosecution office linked to the executive power. In addition to the above, he underlines the importance of private prosecution for the involved victims and groups (p. 156 and 157), since it establishes a real "school of citizenship" (p. 161 and 162).

[10] M. D. FERNÁNDEZ FUSTES, *La intervención de la víctima en el proceso penal (especial referencia a la acción penal)*, Valencia, 2004, p. 51. As regards the distinction between injured party and successor, a discrepancy has been detected in the jurisprudence of the civil and criminal section of the *Tribunal Supremo*.

content of this article is present in art. 2 of the PLOEVD, that defines a range of priorities for the exercise of the rights. Pursuant to such range, precedence in the exercise of the prosecution is to be given to the direct victim[11].

Legal entities may also join the proceedings, for instance corporations, associations and victims' groups (pursuant to art. 7.3 of the Organic Law of the Judicial Power and the new art. 109 part two no 3 introduced by the PLOEVD). In addition, the PLOEVD includes the exemption from guarantee if the said individuals are of Spanish nationality[12], as it is for both direct and indirect victims (reform to art. 281 LECrim). To conclude, as regards the exercise of the prosecution, the Spanish Law provides for a wider concept of victim compared to that given in the Directive. Hereinafter the term "victim" will be used keeping in mind the considerations as here above.

2.3. Requirements for the activity

First of all, the victim as an *acusador particular* may join the proceedings by means of the *querella* (articles from 270 to 281 LECrim). The *querella* allows the victim to request the implementation of the proceedings; it includes the *notitia criminis*, that gives notice of the crime and confirms the will to exercise the civil or criminal prosecution, and it must be signed by the lawyer and by the procurator[13]. Therefore the *querella* implies the wider acknowledgement of the right to denounce a crime as provided for in art. 5 of the Directive.

Again considering the provisions in Chapter 2 of the Directive, the *querella* provides for the acknowledgement of the right to be informed on the own case (art. 6) as well. Instead, as

[11] Within the scope of the LECrim reform in art. 109-*bis*, the PLOEVD keeps on using the expressions "offended party" and "injured party", notwithstanding the fact that art. 2 refers to "victims". To clarify this party and to update the LECrim nomenclature, the expression should have been preferably standardized in those articles or replaced with the expression "victim" as used in art. 2 of the PLOEVD.

[12] If they are foreign citizens, the exemption from the guarantee is subordinated to international treaties or to the reciprocity principle (art. 281.2 LECrim).

[13] In Spain the legal help in the proceedings is double: the lawyer acts for the defense, while the representation in the process is assigned to the procurator.

concerns the rights provided for in Chapter 3 of the Directive, the faculty to start a *querella* acknowledges the victim's right – since the very beginning – to be heard during the course of the proceedings and to provide evidence of proof (art. 10), the right to re-examination if the decision is made not to bring prosecution (art. 11), the right to access legal representation paid by the State (art. 13) and sundry rights in the context of restorative justice (art. 12). The said rights have been expressly recognized and developed in articles no 5, 7, 11, 12, 14, 15 and 16 of the PLOEVD, that provide for additional ones too.

Once the proceedings have been brought, the victim may exercise the right to undertake prosecution by submitting a document together with both the lawyer and the procurator, by virtue of the so-called "*ofrecimiento de acciones*". The rights as provided for in the afore said articles no 6, 10, 11, 12 and 13 of the Directive are recognized too if the victim joins the proceedings by means of this modality. In the case of the *ofrecimiento de acciones*, the registrar (*Secretario Judicial*) informs the victims of their right to undertake prosecution (articles 109, 110, 771.1º, 776 and 796.1.2ºLECrim). The victims must be informed about their rights by the police too (pursuant to art. 771.1 LECrim)[14]. This right to be informed complies with the provisions in art. 1 paragraph 1, letters b), d) and k) of the Directive, and it is widely dealt with in art. 7 of the PLOEVD, which amends art. 282.1 LECrim.

The *dies ad quem* for the prosecution is established during the *calificaciones provisionales* for the *proceso ordinario* (articles 642, 643 and 649 LECrim); at the moment of the *escrito de acusación* for the *procedimiento abreviado*(art. 780 LECrim); and before the opening of the hearing for the *procedimiento para el enjuiciamiento rápido de determinados delitos* (art. 800 LECrim). In these latter proceedings and in the *procedimiento abreviado* an additional feature is provided. At the end of the criminal investigations, if the public prosecution office is the only prosecuting party and requests the dismissal of the proceedings, the investigating judge may decide - before

[14] T. ARMENTA DEU, *La víctima como excusa: su posición en los sistemas procesales en relación con el ejercicio exclusivo de la acción penal y el procedimiento de menores*, cit., p. 935. This right has been recognized in the Spanish legal system by law no 35/1995, *de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual*, and thereafter integrated, to a larger extent, with the reform of the LECrimin 2002.

issuing the ruling - to inform the victim of this request, for the same to have fifteen days to appear in court and support the prosecution (ar. 782.2, let. *a*) LECrim).

2.4. Costs to be incurred for the proceedings

As a general rule, the current regulation provides for the private prosecutor to bear the costs incurred during the proceedings, with an exception in case the same benefits from free legal assistance (art. 240.1°LECrim). The private prosecutor may be sentenced to pay the costs for the proceedings only if it is confirmed that the same acted with recklessness or malice (art. 240.3ºLECrim).

Instead, if the defendant is sentenced to pay for the incurred costs, the private prosecutor will be paid as third in line, after the defendant has restored the caused damage and compensated prejudgments, and after the State has been compensated for the amount of the costs incurred on his/her behalf during the case (art. 126.1 Spanish procedure code). The right to the compensation of costs acknowledged for the victim pursuant to the provisions in art. 14 of the Directive[15] is established in art. 14 of the PLOEVD as well, which also amends the order of the payment beneficiaries: the victim shall be paid first if the sentence inflicts payment and sentences the defendant upon the victim's request, e.g. if the *Ministerio Fiscal* had not formulated any accuses or if the victim did not request the case re-examination and if the same had thus obtained the revocation of the sentence establishing the nonsuit.

3. The victim' right to be informed and to participate even though he is not *acusador particular*

We are now going to describe those procedural acts that the victim may adopt if the same did not join the criminal proceedings. This paragraph shall be substantially in the form of the conclusions, in the sense that the important rights that the PLOEVD acknowledges for the victim not exercising the

[15] A. M. SANZ HERMIDA, *La situación jurídica de la víctima en el proceso penal*, Valencia, 2008, p.77.

prosecution might dissuade the same from availing of the right to join. We can't dismiss the relevant questions related to the effectiveness, duration and scope of the criminal proceedings[16] which may come up in the case of crimes involving a high number of prosecutors. It is also interesting to note that art. 8 PLOEVD provides for a "period of reflection" equal to one month during which lawyers and procurators may not address either direct or indirect victims to offer professional assistance in case of crimes that produced a high number of victims.

The victim's right to be informed on the own case[17] (art. 6 of the Directive), is explicitly recognized by the PLOEVD in art. 7, upon condition that the victim has exercised the right as provided for in art. 5.1, let. *m*). The notices may be sent by e-mail or any other means of communication as proposed by the victim. In addition, both direct and indirect victims are entitled to be informed on the decisions made during the execution of the ruling, and this is a really innovative element. The right to ask for a nonsuit sentence to be re-examined is particularly interesting (art. 11 of the Directive and art. 12.1 of the PLOEVD). The PLOEVD acknowledges those rights too that had never been contemplated up to now neither for the crime victims nor for any other prosecutors apart from the public prosecution. For some crimes, the victims have the right to contest the judge's decisions related to condemned individuals classified as "third-level condemned parties" (the prison regime

[16] J. PÉREZ GIL, *Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain*, cit., p. 166 and 167. The interests of the private prosecution may bring about distortions in the criminal proceedings, since its real motivations are not always well known. If no increase in the punishment is agreed as required by the prosecution, the intervention by one private prosecutor may seem superfluous. The private prosecution may prove to be a dangerous Trojan horse for criminal justice. Sometimes, for the sake of the victim's compensation, better channels should be pursued, for instance civil proceedings

[17] A. M. SANZ HERMIDA, *La situación jurídica de la víctima en el proceso penal*, cit., pp. 72-77. To this purpose, it is appropriate to highlight item A.6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations by means of the Resolution no 40/34, that treats access to justice and a fair treatment, and defining that the appropriateness of the judicial proceedings shall be supported by the victim's needs, thus providing the same with information on his/her role, scope, timing and evolution of the proceeding, and on the decisions as regards the case, specifically in the presence of serious crimes and anyway whenever such information is requested.

is defined as *abierto*), release from jail, penitentiary benefits, probation and conditional suspension of incarceration, without the need for a lawyer's intervention.

In addition thereto, the victim may ask the judge to impose on the condemned party already under probation or suspended incarceration, any orders aimed at guaranteeing his/her security; moreover he/she may provide the judge with any additional information which may be relevant to resolve on the execution of the inflicted punishment (art. 13 PLOEVD). The victim, simply as such, is no more a "third party": he/she may undertake any procedural actions without effectively joining the proceedings. The "victim" as provided for in art 2 PLOEVD is a new figure with no need to resort to procedural actions to be recognized, but who only can ask for information pursuant to the provisions in art. 5.1, let. *m*) PLOEVD. Apart from the need to define the juridical nature of this new right to participation, the virtues of the victim's wider right to participate are not to be dismissed. As a matter of fact, this right might persuade the victims to join the proceedings.

The scope of the right to participation acknowledged to the victim who did not undertake prosecution shall not only comply with, however transcend the rights established in Chapter 3 of the Directive by far too and, as regards the victim's decision join the proceedings, it may generate important economic and various advantages. Therefore it looks like the idea of the PLOEVD is not only to acknowledge the Directive in the Spanish order, but also to meet the needs of the victims' associations (this will originates from the historical context in which Spain was sentenced by the ECHR; this event had a considerable impact on the public opinion); and to avoid that the criminal proceedings become non-applicable and that its goals are changed, in a possible case in which there is a high number of prosecutors. Please do not forget that the execution proceedings have specific goals aimed at supporting the criminal's social reintegration (art. 25 EC). It is required to focus the necessary attentions for PLOEVD not to change the goals of the criminal proceedings.

PART III

MINIMUM STANDARDS IN THE EU DIRECTIVE AND NATIONAL MODELS: A COMPARATIVE ANALYSIS

SECTION 1

RESTORATIVE JUSTICE

CHAPTER X

RESTORATIVE JUSTICE IN FRANCE: *STATUS ARTIS* AND FUTURE PERSPECTIVES

by Marc Touillier[*]

TABLE OF CONTENTS: 1. Another approach of justice. - 2. Other instruments for guaranteeing justice. - 3. The absence of official recognition of restorative justice in French law. - 4. Expectations linked to the development of restorative justice in international and European law. - 5. The space given to restorative justice in the Directive. - 6. Approach of the problem. - 7. Absorption of restorative justice in French law. - 7.1. A real acceptance: the consolidation of criminal mediation. - 7.2. Poor usage of criminal mediation. - 7.3. Indirect manifestations of acceptance of restorative justice. - 8. An insufficient acceptance. Intrinsic shortcomings of French law. - 8.1. Shortcomings to be overcome in view of the content of the Directive. - 8.2. A *status loci* unsatisfactory. - 9. Renewal of restorative justice in French law. - 10. A matter of ends. The search for a balance between the purposes of restorative justice. 10.1. Moving away from the obsession of a justice addressed only to the perpetrator. - 10.2. New paths. - 10.3. Avoiding excessive compassion for the victims of crimes. - 11. A matter of instruments. The creation of restorative justice measures. - 11.1. To reform criminal sanctions and execution of sentences in light of the philosophy of restorative justice. - 11.2. Developing professional training. - 12. Encouraging prospects.

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1. Another approach of justice

Before asking questions about the object ("what?") and the means ("how?") of restorative justice in French law, we must ask a preliminary question: what do we mean by restorative justice? The definitions proposed by doctrine make it possible to outline an approach of justice centred on compensation of the damages caused by a crime, thanks to the legitimate active participation of the offender and the victim, if not of their family members or the civil community.

Restorative justice was born in the Seventies in some Anglo-Saxon countries. It was above all in the United States and Canada that it became notorious thanks to the works of Howard Zehr[1], considered the pioneer of this philosophy[2].

Its objective is the reconstruction of the balance broken among society, the perpetrator of the crime and the victim, allowing each to find solutions within the restorative process for re-establishing themselves after commission of the crime:

- as far as the perpetrator is concerned, this entails helping him to realise the impact of the crime in the life of the victim and for society, and to encourage him to find a remedy for the harmful consequences of his behaviour;

- as far as the victim is concerned, the aim is to support him or her in re-finding stability after the pain caused by the crime;

- as far as civil society is concerned, it entails re-establishing social peace through re-introducing convicts to society and compensating the damages suffered by victims.

Via these three goals, restorative justice aims, on the whole, at "offering those who suffer a crime but also those who are the perpetrators of it and those responsible for the proceedings, a further possibility to prevent the possibility of repeat offences, after the crime, damage and legal action have taken place"[3].

These are the aspects that differentiate restorative justice from punitive justice, centred on the crime and the punishment of the perpetrator, as well as from rehabilitative and re-

[1] H. ZEHR, *The Little Book of Restorative Justice*, Intercourse, 2002.

[2] R. CARIO, *Préface*, in H. ZEHR (ed.), *La justice restaurative. Pour sortir des impasses de la logique punitive*, Genève, 2012, p. 7.

[3] Y. CHARPENEL, *Avant-propos*, in S. JACQUOT (ed.), *La justice réparatrice: quand victimes et coupables échangent pour limiter la récidive*, Paris, 2012, p. 14.

socialising justice, focused on the treatment of the offender and on returning him or her to life in society.

2. Other instruments for guaranteeing justice

In order to achieve its aim, restorative justice prefers "any form of action (collective or individual) the aim of which is compensation of the damages suffered in the event of a crime"[4].

Therefore, any procedure implemented in order to allow the parties in conflict to find a solution to the matters resulting from the crime with the help of an impartial third party can be associated to it. Mediation falls within this context, allowing the victim and the perpetrator of the crime to meet, in common agreement, in the presence of a third party with the task of guaranteeing, in a reassuring context, that discussions take place[5]. Other measures, less known in France, such as family group conferences, sentencing circles or healing circles, truth commissions and reconciliation, or again, prisoner-victim meetings within the prison environment or with the community[6] can be attributed to restorative justice.

3. The absence of official recognition of restorative justice in French law

Restorative justice reached France much more recently than it reached Anglo-Saxon countries, with the support of a part of the doctrine. As we will say later, the legislator still has not officially recognised this alternative form of justice. Unlike some Countries such as Canada, which has had a *Centre de services de justice réparatrice* (CSJR)[7] for more than 20 years, no bodies exist in France officially assigned to promoting and organising restorative justice. Actions carried out in this area are organised above all at local level and supported by recently-

[4] M. JACQOUT, *Justice réparatrice et violence*, in P. DUMOUCHEL (ed.), *Violences, victimes et vengeances*, Paris, 2001, p. 190.

[5] S. JACQUOT, *La justice réparatrice: quand victimes et coupables échangent pour limiter la récidive*, cit., p. 17.

[6] For a presentation of the various measures see R. CARIO, *Justice restaurative. Principes et promesses*, Paris, 2010, p. 107 s.

[7] *http://www.csjr.org*.

founded associations, such as the *Institut Français pour la Justice Restaurative* (IFJR)[8] and the *Association Nationale de la Justice Réparatrice* (ANJR)[9]. Taking inspiration from the Quebec model of prisoner/victim meetings, an experiment of the mechanism was carried out for the first time in France, between March and July 2010, at the *maison centrale de Poissy*[10], arranged by the *Institut National d'Aide aux Victimes et de médiation* (INAVEM)[11], of the *Service pénitentiaire d'insertion et de Probation* (SPIP) *des Yvelines*[12]. The encouraging results of the experiment led to the organisation of a second experience, currently underway within the same prison. In spite of such encouraging actions, official recognition of restorative justice is still a long way off in France, which explains the hope springing from the ventures coming from the European Union.

4. Expectations linked to the development of restorative justice in international and European law

Further to the international texts adopted during recent decades[13], the institutions of the European Union decided to encourage the development of restorative justice, thanks to the strengthening of the respective competences in the sphere of judicial cooperation in criminal matters sanctioned by the Lisbon Treaty. Focused above all on the rights of the victims of crime, art. 82, par. 2, of the Treaty of the functioning of the

[8] *http://www.justicerestaurative.org*.

[9] *http://www.anjr.fr*.

[10] A prison for difficult prisoners, often with long sentences

[11] *http://www.inavem.org*.

[12] Regarding this, see C. ROSSI, *Le modèle québécois des rencontres détenus-victimes*, in *Les Cahiers de la justice*, 2012, p. 107; R. CARIO (ed.), *Les Rencontres Détenus-Victimes: L'humanité retrouvée*, Paris, 2012.

[13] This specifically mentioned the resolutions of the Economic and Social Council of the United Nations no 1999/26 of 28 July 1999 ("Development and implementation of mediation and restorative justice measures within the sphere of criminal justice"), no 2000/14 of 27 July 2000 ("Basic principles about the use of programs of restorative justice in criminal matters") and no 2002/30 ("Basic principles on the use of restorative justice programs in criminal matters"). The Council of Europe also committed itself to restorative justice with resolution no 2 on the social mission of the criminal justice system – Restorative justice adopted during the 26th Conference of European ministers of Justice (Helsinki, 7-8 April 2005).

European Union allows the European Parliament and the EU Council to intervene in the sphere, deliberating through directives, and no longer framework decisions, to encourage member States to review the criminal system on the basis of minimum provisions.

Directive 2012/29/EU which establishes minimum provisions concerning rights, assistance and protection of the victims of crime fully subscribes to this development. Strong in its format of thirty-two articles preceded by a long preamble, the directive gives real substance to the rights of the victims, although it declares that it establishes exclusively minimum provisions[14]. However, how much space exactly does it reserve to restorative justice?

5. The space given to restorative justice in the Directive

If we follow the structure of directive 2012/29/EU of 25 October 2012, none of the five chapters that make it up is expressly dedicated to restorative justice. In actual fact, the latter appears briefly in the body of the directive and specifically: in recital 46 of the preamble, which underlines the interest of the services of restorative justice, including for example victim-perpetrator of the crime mediation, the dialogue extended to family group conferencing and sentencing circles, on condition that such measures offer sufficient guarantees to the victim; in article 2 of the Directive, for the purposes of which restorative justice means "any procedure which allows the victim and the perpetrator of the crime to take an active part, if they freely consent to do so, in resolving matters resulting from the crime with the aid of an impartial third party"; in article 12, which states the right to guarantees in the context of restorative justice services.

[14] Prof. Etienne Verges did not hesitate to define as "a veritable *corpus juris*" directive 2012/29/EU (E. VERGES, *Un* corpus juris *des droits des victimes: le droit européen entre synthèse et innovations. A propos de Directive 2012/29/UE du Parlement européen et du Conseil établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité*, in *RSC,* 2013, p. 121).

6. Approach of the problem

The provisions of the directive invite us to question the compatibility of French law with the text with respect to the efforts started in the field of restorative justice. In this way we will have a chance to appreciate the absorption of restorative justice in French law and to assess the efforts still to be made to agree on a true role with a different idea of criminal justice. From this point of view, a renewal of restorative justice must be promoted in French law.

7. Absorption of restorative justice in French law

If it is true that French law became more accepting of restorative justice in the Nineties, such acceptance remains limited and therefore insufficient.

7.1. A real acceptance: the consolidation of criminal mediation

French law became more accepting of restorative justice directly through the development of alternative forms of solving disputes that led the legislator to launch the criminal mediation procedure. Initially introduced in an experimental way in the Eighties, criminal mediation was institutionalised with law no 93-2 of 4 January 1993[15]. Such a measure allows the Public Prosecution or the mediator assigned to it to confront the perpetrators of a crime with the victims, subject to the latter's consent, in order to reach an understanding about the method of compensation. If the mediation succeeds, the public prosecutor or the mediator and the parties sign a document. This procedure will allow the victim, if the perpetrator commits himself to paying damage compensation, to request its recovery in respect of the payment injunction procedure provided by the civil procedure code. Although article 41-1, 5°, of the French criminal procedure code does not limit the measure to minor crimes, in practice criminal mediation has been reserved to the treatment of micro-crimes. A similar measure, called *réparation pénale*, was established by the law of 4 January 1993 for child

[15] Article 41-1, 5° French criminal procedure code.

criminals[16]. Unlike criminal mediation, this is applicable prior to the criminal action and can provide for the child measures or activities or assistance or restoration in favour of the victim or in the interests of the public at large.

7.2. Poor usage of criminal mediation

The statistics published by the Ministry of Justice demonstrate that particularly limited usage has been made of mediation and criminal restoration measures. In 2009, mediation was used in 1.5% of actions relating to adults, constituting only 4% of alternatives to legal proceedings, while said measures made it possible to respond to about 40% of legal trials (above all under the form of alternative measures to judicial actions (in French law, *rappels à la loi*)[17]. The use of criminal mediation between 2006 and 2010 even shows a negative trend. This observation is even more upsetting if we notice that the measure in most cases is adopted to treat crimes of violence (and not only within the family) and translates itself into a positive result in more than half of them[18]. Surprisingly, however, the legislator decided to restrict its application in the presence on conjugal violence[19]. Criminal restoration applicable to child perpetrators of crimes is still less used than where adults are concerned, since it involved less than 1% of cases in 2009, constituting only 1.6 % of alternatives to judicial proceedings[20].

7.3. Indirect manifestations of acceptance of restorative justice

Other measures can be indicated to highlight the acceptance of restorative justice by French law, although exclusively in an indirect way. Professor Robert Cario

[16] Art. 12-1 of order no 45-174 of February 1945 on child delinquency.
[17] *Annuaire statistique de la Justice*, 2011-2012, p. 109.
[18] *Ibid.*, p. 113.
[19] Law no 2010-769 of 9 July 2010 established a presumption of refusal of criminal mediation if the victim has started proceedings before the judge for family reasons in order to obtain a protection order, in compliance with article 515-9 of the French civil code, in virtue of violence committed by the cohabitant.
[20] *Annuaire statistique de la Justice*, 2011-2012, p. 235.

mentions, as an example, judicial control[21]. This measure can be ordered by the investigating judge or by the *juge des libertés et de la détention* to force the person concerned to subject themselves to obligations such as the provision of a guarantee or the setting up of personal or real guarantees, in order to ensure the effectiveness of the compensation of damages caused by the crime[22]. An original penalty, called *sanction-réparation* was established by law no 2007-297 of 5 March 2007. It consists in the obligation for the convicted person to proceed, within the deadlines and according to the procedures established by the judge, with compensation of the damage caused to the victim[23]. Another example is represented by the waiver of the sentence, a concession of the judge if it appears that requalification of the guilty party has been achieved, that the damage caused has been compensated and that the disturbance created by the crimes has ceased[24]. More recently, the *Direction de l'administration pénitentiaire* implemented *Programmes de Prévention de la Récidive* (PPR), i.e. educational programs designed for certain categories of defendants with the aim of working together on the commission of the crime and on the consequences for the victim and society[25].

If French law has gradually integrated mechanisms of restorative justice, such acceptance does not, however, seem to be sufficient with respect to the possibilities of exploring further within this field.

8. An insufficient acceptance. Intrinsic shortcomings of French law

Numerous observations make it possible to highlight the intrinsic shortcomings of French law in the area of restorative justice. At the moment, restorative justice is envisaged, as such, prior to sentencing, through criminal mediation, while it could

[21] R. CARIO, *Justice restaurative. Principes et promesses*, cit., p. 164.
[22] Article 138, 11° and 15°, of the French criminal procedure code.
[23] Articles 131-8-1 and 131-15-1 of the French criminal code.
[24] Article 132-59 of the French criminal code.
[25] For a presentation see E. BRILLET, *Une nouvelle méthode d'intervention auprès des personnes placées sous main de justice : les programmes de prévention de la récidive (PPR)*, in *Cahiers d'études pénitentiaires et criminologiques*, 2009, n° 31.

also be applied at the end of legal proceedings, such as in the case of family group conferencing and sentencing circles envisaged abroad. Above all, French law does not give sufficient room to an active participation of the perpetrator and the victim of the crime, be it in the form of alternatives to judicial procedures, execution of sentences or reduced sentences. Other than criminal mediation, no possibility is expressly provided by the law to allow the perpetrator and the victim to come into contact, in a direct or indirect way, to find a solution to matters resulting from the crime with the help of an impartial third party[26].

8.1. Shortcomings to be overcome in view of the content of the directive

If French law shows insufficient acceptance of restorative justice, is it, however, incompatible with the directive itself? Regarding this, the doubt is justified, since reading of the provisions of the directive concerning restorative justice leads us to understand that, after all, restorative justice is not highly promoted. This idea in fact appears from the directive where recital (46) of the preamble states that "restorative justice services […] can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation" and that "it should therefore have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm"? The above translates certain indecision with regard to measures of restorative justice since they seem to be pursuable only with regard to the victim of the crime, with the risk of ignoring the indispensable nature of the perpetrator.

Confirmation of this sensation is given by article 12 of the Directive, which speaks about the right to safeguards in the context of restorative justice services (and not the "right to restorative justice") and clearly states that "the restorative justice services are used only if they are in the interest of the victim". The point of view held by the Directive clearly ignores the interests of the perpetrator of the crime, in clear

[26] In this sense, see R. CARIO, *Justice restaurative. Principes et promesses*, cit., p. 171.

contradiction of the object of restorative justice itself, and therefore cannot constitute a veritable reference text on the subject. A certain weakness results from this about the position taken by the Directive on this point.

8.2. A status loci *unsatisfactory*

What has been said above must not lead to satisfaction about the current status of French law in light of European law, since it must not be forgotten that the directive in actual fact speaks only about minimum provisions and that "member states can extend the rights provided by it in order to ensure a higher level of protection"[27]. In consideration of that stated, strong recommendation of a promotion of restorative justice in French law is imposed which must not hesitate in going beyond the minimum provisions established regarding the directive.

9. Renewal of restorative justice in French law

In the face of the shortcomings of French law, it seems necessary to promote a renewal of restorative justice. The renewal must be total, since restorative justice appears to be a matter of ends but also of means.

10. A matter of ends. The search for a balance between the purposes of restorative justice

In order to allow restorative justice to fill a larger space within the French criminal system, a balance must be found between the ends that such a form of alternative justice intends reconciling, which presumes a moving away from the obsession of the treatment of the perpetrators of crime with all means, also avoiding excessive compassion for the victims.

[27] Recital (11) of the preamble of the Directive.

10.1. Moving away from the obsession of a justice addressed only to the perpetrator

Governments and players in the criminal system must stop focusing attention exclusively on the treatment of the perpetrators of crimes, which has led, in recent years, to a systematisation of the criminal response and a rigidity of sentences[28], and also to a multiplication of the means aimed at guaranteeing the supervision of specific categories of perpetrators of crimes at the end of the sentence[29].

Although the responses mentioned above try to placate legitimate concerns, they are, however, poles apart from reparative justice. In fact this form of justice "starts exactly where such provisions reveal their limits, through authorisation to confront the perpetrator of the crime with the person who has been his victim when the facts were committed and who has become his adversary during the trial"[30].

10.2. New paths

In order to give more room to restorative justice, it would be necessary to forfeit the need for a systematic criminal response which reconsiders the choice apparently offered to the magistrates of the public prosecution by the principle of the discretionary power of the criminal action (the current rates of response, over 90%, bring us more to a system of obligatory power than to the discretionary nature of the action) and that finishes by depriving them of the real possibility of adapting, as well as possible, the criminal response to crime situations, in

[28] As proven by the example of the *peines-planchers* [minimum mandatory sentences, NdT] for repeat offences, re-introduced by law no 2007-1198 of 10 August 2007.

[29] Regarding this, it is appropriate to mentioned the registers applicable to certain categories of perpetrators of crime, such as the automated judicial archive of sexual and violent offenders (articles 706-53-1 and subsequent articles of the French criminal procedure code) and the safety measures that constitute judicial supervision (articles 723-29 and subsequent articles of the French criminal procedure code), *surveillance de sûreté* [non-custodial security, NdT] and *rétention de sûreté* [custodial security measures, NdT] (art. 706-53-13 ff. of the French criminal procedure code).

[30] S. JACQUOT, *La justice réparatrice: quand victimes et coupables échangent pour limiter la récidive*, cit., p. 47.

virtue of "excessive judicial power"[31]. Then it is necessary to guarantee the full personality of sentences from the judges, giving said players the means to choose from the wide range of criminal sanctions those apparently the most suited to the individuals being tried, without the constraint of mechanisms that do not consider the specific aspects of each situation and that support the ideology of "*tout carcéral*"[32]. Finally, *post-sententiam* supervisory means must be limited instead of generalising them to contain a presumed crime danger, since they keep the perpetrator of the crime in a custodial situation incompatible with the presumed level of acceptance from restorative justice. The diversity of the proposals aims at repositioning the perpetrator of the crime at the centre of restorative justice proceedings, an indispensable condition for the success of this alternative form of justice.

10.3. Avoiding excessive compassion for the victims of crimes

Restorative justice must not translate into the concentration of attention on the victim or instigate the illusion of a society able to satisfy any claim. The drifts linked to the ideology of the victim have already been denounced in recent years following the deviation of the role manifested by the victim (as an agent of repression), equally bucking the trend of the ideas launched by restorative justice[33]. Instead of associating victims to measures to control and supervise the perpetrator of the crime, more reasonably it would be better to inform victims about the future developments of the procedure and to accompany them in exercising their rights as a civil party. On the other hand, in addition to compensation mechanisms, measures should be developed that associate victims to a process of reconciliation separate from monetary compensation, in order not to prolong the conflict with the offender.

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[31] In this sense, see F. TULKENS (ed.), *Conférence de consensus. Pour une nouvelle politique publique de prévention de la récidive. Principes d'action et méthodes*, Report of the jury of the consent conference presented to the Prime Minister, 2013, p. 16.

[32] *Ibid.,* in particular recommendation 2 entitled «*Abandonner les peines automatiques*».

[33] For this development, see D. SALAS, *La volonté de punir. Essai sur le populisme pénal*, Paris, 2005, p. 286.

11. A matter of instruments. The creation of restorative justice measures

Above all, the creation of new measures of restorative justice such as family group conferencing and sentencing circles to which the directive refers is indispensable, taking inspiration from practices consolidated abroad. It would also be expedient to include the various measures of restorative justice within a wider program conceived specially for the purpose, along the Quebec model which institutionalised a program called *Possibilités de justice riparatrice* in order to give direct or indirect victims of crime the possibility of communicating with the offender[34].

11.1. To reform criminal sanctions and execution of sentences in light of the philosophy of restorative justice

With the intention of promoting the integration of restorative justice measures and services, the criminal sanctions established in French law must be impregnated with this philosophy, giving more room to the reflection of the author on the consequences of the crime for the victim. This coincides exactly with the wish formulated in 2013 by the Jury of the Conference of consent on the prevention of repeat offences concerning the future *contrainte pénale*[35]. This new penalty, which should be applied in the near future to most crimes, is intended to limit the use of imprisonment in order to encourage compensation of the damage caused by the crime and re-integration of the perpetrator subject to the observance of specific obligations or bans. The *contrainte pénale* must guarantee a strengthening of the consideration of the victim and re-socialisation of the perpetrator of the crime and reinstatement of social peace. The aim of restorative justice is to accompany the widest process of recovery for all those who have suffered as a result of the crime"[36]. During the phase of serving sentences, the philosophy of restorative justice must be

[34] *http://www.csc-scc.gc.ca/justice-reparatrice/003005-1000-fra.shtml*.

[35] Suspension of criminal proceedings with putting on probation.

[36] F. TULKENS (ed.), *Conférence de consensus. Pour une nouvelle politique publique de prévention de la récidive. Principes d'action et méthodes*, cit., p. 13.

promoted within the sphere of repeat offence prevention programs. Prisoner-victim meetings must also be encouraged, both in prison and within the community.

11.2. Developing professional training

To end, it is time that a veritable mediation and restoration culture is developed among justice professionals. The application of restorative justice measures cannot be based on the exclusive determination of voluntary operators.

Therefore it is necessary to organise professional training for those who supply assistance and restorative justice services to the victims and to make judges, public prosecutors and lawyers more aware of the needs of the victims, as indicated in article 25 of the Directive, in addition to promoting the teaching of such a philosophy in Universities[37]. These are the ways that will allow restorative justice to establish itself permanently in France.

12. Encouraging prospects

At the same time as this article was written, the draft law on identification of sentences and on the strengthening of the efficacy of criminal sanctions, currently being discussed in Parliament, envisages the inclusion in the criminal procedure code of a general provision dedicated to restorative justice. The hope is that the provision may open up a new path to encouraging prospects for restorative justice in France.

[37] See in this sense P. DELMAS-GOYON (ed.), *Le juge du 21ème siècle. Un citoyen acteur, une équipe de justice*, Report to Justice Ministry, 2013, p. 62-63.

CHAPTER XI

RESTORATIVE JUSTICE EXPERIMENT WITHIN THE ITALIAN JUDICIAL SYSTEM

by Martina Cagossi[*]

TABLE OF CONTENTS: 1. A brief introduction on restorative justice. - 2. The existing problems in introducing mediation into the Italian criminal process. - 2.1. Doubts on the compliance with the Italian Constitution. - 3. Restorative justice cases in the Italian judicial system. - 3.1. Mediation inside the juvenile criminal justice. - 3.2. Attempts at conciliation before the *giudice di pace*. 4. The new Italian probation for adults: the term "mediation" enters for the first time inside the Italian code of criminal procedure.

1. A brief introduction on restorative justice

Traditionally, restorative justice is defined as a theory of justice that is different both from the "classic model" (that focuses on the retributive function of the punishments) and the "modern" one, that aims at preventing crimes and reeducating the guilty[1].

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[1] Among the several international works on the topic, see H. ZEHR, *Changing lenses: a new focus for crime and justice*, Scottdale, 1990; S. MARK UMBREIT, *Mediating Interpersonal Conflicts. A Pathway to Peace*, West Concord, 1995; M. WRIGHT, *Justice for Victims and Offender*, Winchester, 1996; T. F. MARSHALL, *Restorative justice: an overview. Home Office Research Development and Statistics Directorate*, London, 1999; H. ZEHR, *The Little Book of Restorative Justice*, Intercourse, 2002; G. JOHNSTONE (ed.), *A Restorative Justice Reader. Texts, sources, context*, Portland, 2003; A. E. ACORN, *Compulsory Compassion. A critique of restorative justice*, Vancouver, 2004. More recently, E. ZINSSTAG - I. VANFRAECHEM, *Conferencing and restorative justice: international practices and perspectives*, Oxford, 2012; H. ZEHR (ed.), *La justice restaurative. Pour sortir des impasses de la logique punitive*, Geneva, 2012; D.W. VAN NESS - K.H. STRONG, *Restoring justice: an introduction to restorative justice*, Waltham, 2013. Concerning Italy, an important expert on restorative justice is Grazia

According with the restorative justice supporters, the only reaction from the commission of a crime cannot be just the punishment[2], as stated by the ancient Latin dictum *poena est malum passionis quod infligitur propter malum actionis*[3].

There is something more: it is necessary to move further, to overtake the classic dualism "State vs accused person", looking for something more difficult and complex that is the involvement of other subjects.

Therefore, the main purpose[4] of the restorative justice model is to take into consideration the victims and their needs, which cannot be satisfied only with the economic compensation of the damages they have suffered. Of course, the right to compensation is fundamental for a victim but very often, he/she wants to be listened, assisted and involved[5].

Mannozzi: see, in particular, G. MANNOZZI, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, Milan, 2003; EAD., *Collocazione sistematica e potenzialità deflattive della mediazione penale,* in G. DE FRANCESCO - E. VENAFRO (eds.), *Meritevolezza della pena e logiche deflattive*, Turin, 2002, p. 117; EAD. (ed.), *Mediazione e diritto penale. Dalla punizione del reo alla composizione con la vittima*, Milan, 2004; EAD. - G. A. LODIGIANI, *Formare al diritto e alla giustizia: per una autonomia scientifico-didattica della giustizia riparativa in ambito universitario*, in *Riv. it. dir. proc. pen.*, 2014, p. 133. In addition, see A. CERETTI, *Mediazione: una ricognizione filosofica,* in L. PICOTTI (ed.), *La mediazione nel sistema penale minorile,* Padua, 1998; ID., *Mediazione penale e giustizia. Incontrare una norma*, in *Studi in ricordo di Giandomenico Pisapia*, vol. III, Milan, 2000, p. 763; G. DI CHIARA, *Scenari processuali per l'intervento di mediazione: una panoramica sulle fonti*, in *Riv. it. dir. proc. pen.*, 2004, p. 500; G. UBERTIS, *Riconciliazione, processo e mediazione in ambito penale*, *ivi,* 2005, p. 1321; R. ORLANDI, *La mediazione penale tra finalità riconciliative ed esigenze di giustizia*, in *Riv. it. proc*., 2006, p. 1171.

[2] M. WRIGHT, *Justice for Victims and Offender*, cit., p. 112; G. MANNOZZI, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, cit., p. 61.

[3] H. GROTIUS, *De jure belli ac pacis. Libri tres. In quibus ius naturae & Gentium: item iuris publici praecipua explicantur*, Lib. II, Cap. XX, Paris, 1625.

[4] Another fundamental purpose of restorative justice is to allow offenders to understand the real human impact of their behavior and take direct responsibility for seeking to make things right. Besides, during mediative practices the community is often involved, and so Society itself can take considerable advantages from the diffusion of restorative justice.

[5] G. MANNOZZI, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, cit., *passim*; V. PATANÈ, *Ambiti di attuazione di una giustizia conciliativa alternativa a quella penale: la mediazione*, in A. MESTIZ (ed.), *Mediazione penale: chi, dove, come e quando*, Rome, 2004, p. 21.

Welcoming inside a judicial system the opportunity to face the consequences of a crime through the restorative justice instruments means to reevaluate the role of the victim, who can achieve a solution of the conflict together with the offender.

Restorative methods usually facilitate peace and tranquility among opposing parties and try to restore the losses suffered by victims (and sometimes, also by the community) through the dialogue and the cooperation between them and their offenders[6].

2. The existing problems in introducing mediation into the Italian criminal process

The insertion of mediation practices inside the Italian criminal system is very complicated, because the restorative model is quite far (and sometimes even opposing) from the traditional fundaments of our system. In fact, in Italy the victim cannot play a real protagonist role within the criminal proceedings[7]. That is why, even when the Italian lawmakers have adopted tools and methods that usually belong to the restorative model, their purpose has been to pursue efficiency and case deflation, thus confining the victim's role to the damage claims[8], as examined below.

Such a scenario should radically change with the reception of Directive 2012/29/EU (which is due on 16 November 2015),

[6] C. E. PALIERO, *L'autunno del patriarca. Rinnovamento o trasmissione del diritto penale dei codici*, in *Riv. it. dir. proc. pen.*, 1994, p. 1227; C. CESARI, *Le clausole di irrilevanza del fatto nel sistema processuale penale*, Turin, 2005, p. 67.

[7] S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012; L. LUPÁRIA, *L'Europa e una certa idea di vittima (ovvero come una direttiva può mettere in discussione il nostro modello processuale*, in R. MASTROIANNI - D. SAVY (eds.), *L'integrazione europea attraverso il diritto processuale penale*, Napoli, 2013, p. 91 s.

[8] Actually, as correctly observed by the doctrine (M. SCOLETTA, *Mediazione penale e vittime di reato,* in L. LUPÁRIA - T. ARMENTA DEU (eds.), *Linee guida per la tutela processuale delle vittime vulnerabili.* Working paper *sull'attuazione della Decisione quadro 2001/220/GAI in Italia e Spagna*, Milan, 2011, p. 99), compensation is not the purpose of the penal mediation. The fundamental element is instead the spontaneous resolution of the arisen conflict, restauring the equilibrium between offender and victim.

considered by some - and not mistakenly – an authentic European *corpus juris* for crime victims' rights[9].

This supranational law[10] explicitly[11] introduces the right of the victim to access the restorative justice process and to actively participate in it, in order to reduce the risk of secondary victimization arising from criminal proceedings to the greatest possible extent. It is to be hoped that the reception of the Directive into the Italian criminal procedure system will contribute to increase the involvement of the victim in existing and future restorative justice practices. This increased role will also necessarily require equal powers between victim and suspect, the real and only players of the mediative process.

2.1. Doubts on the compliance with the Italian Constitution

Another obstacle undoubtedly present on the road to introduce restorative justice into the Italian judicial system is the constitutional asset of the matter[12], which can - or better yet, must - lead the choices made by Italian lawmakers, even with the reception of the already mentioned Directive 2012/29/EU.

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[9] E. VERGES, *Un* Corpus Juris *des droits des victimes: le droit européen entre synthèse et innovations*, in *Revue de sciences criminelles et de droit pénal comparé*, 2013, p. 121.

[10] With reference to the other and previous supranational regulations on restorative justice instruments, see the Council of Europe Recommendation no R(99) 19, concerning mediation in penal matters; the *Guidelines for a Better Implementation of the Existing Recommendation concerning Mediation in Penal Matters* - i.e. the no R (99) 19 one - issued on 7 December 2007 by the European Commission for the Efficiency of Justice of the European Council; the UN Resolution no 12/2002 on the *Basic principles on the use of ristorative justice programmes in criminal matters*, issued by the *Commission on Crime Prevention and Criminal Justice*. Obviously it has to be mentioned also the Council Framework Decision no 2001/220/JHA, on the standing of victims in criminal proceedings, replaced by Directive 2012/29/EU.

[11] Esp. art. 12 and recital no 46.

[12] On this point, it has to be remembered how similar constitutional principles exist in many other Countries, in Europe and in the world, that have been "braver" regarding restorative justice. Considering the Italian constitution as an insuperable obstacle to the introduction of restorative justice instrument inside our criminal judicial system would be the same as we affirm that "no other judicial system takes care of the equality before the law and of the criminal justice. Honestly, this conclusion is too much" (M. CHIAVARIO, *Processo penale e alternative: spunti di riflessione su un "nuovo" dalle molte facce (non sempre definito)*, in *Riv. dir. proc.*, 2006, p. 411).

First of all there is the doubtful compatibility of mediation with the principle of the mandatory criminal prosecution, stated by article 112 of the Italian Constitution[13], which protects the independence of the public prosecutor as well as the formal equality of all citizens for the criminal law system (article 3, par. 1, of the Constitution)[14]. As such, a mediation preceding the victim complaint, or aimed at its withdrawal, doesn't violate this principle only if it's supervised by a jurisdictional body, controlling the effective lack of relevance of the *notitia criminis* for the penal system. Moreover, it would also be necessary that the criminal action could ordinarily go on in the event that the mediation was unsuccessful, and this failure shouldn't influence the decision at all.

Another important constitutional obstacle in this matter is the risk of diversion of the criminal proceedings, whereas only at the end of the trial the judge can not only identify the culprit and inflict the sentence, but also assess if a crime has actually been committed, following the principle *nullum crimen, nulla poena sine iudicio* (founded in the Constitution upon arts. 27, par. 2, and 112, as well as recognized as a fundamental individual right by the European convention of human rights, art. 6, par. 1, and the International Covenant on Civil and Political Rights, art. 14, par. 1).

For this reason, a mediation practice could not enter into a criminal proceedings if it implied the responsibility of the suspect, because manifesting, even implicitly, such statement before the end of the trial would be in open contrast with the presumption of innocence stated by article 27, par. 2, of the Italian Constitution. In addition, if the mediation process required a preemptive confession by the suspect[15], this would contrast with the principle *nemo tenetur se detegere*, founded upon art. 24, par. 2, of the Constitution and deeply connected to the presumption of innocence.

Finally, looking at what has been called the *original sin of mediation*, it is necessary to shed some light on the difficult

[13] L. LUPÁRIA, *Obbligatorietà e discrezionalità dell'azione penale nel quadro comparativo europeo*, in *Giur. It.,* 2002, p. 1751.

[14] Italian Constitutional Court, 15 February 1991, no 88, in *Giur. cost.*, 1991, p. 59.

[15] L. LUPÁRIA, *La confessione dell'imputato nel sistema processuale penale,* Milan, 2006, *passim*.

relation of this tool with procedural rights[16], with specific regard to the degree of knowledge and usability as evidence by the judge of all that has been said and documented during the mediation process, even more so if the alternative restorative justice process didn't have a successful outcome.

3. Restorative justice cases in the Italian judicial system

Despite the above-mentioned obstacles, there are some mediation tools provided by Italian laws. Significantly enough, the first instances of restorative justice were born in two particular microsystems, which, for their experimental character[17], have a great statistical and systematic impact on the subject matter of this chapter: the juvenile criminal justice[18] and the criminal proceedings before the *giudice di pace*[19].

3.1. Mediation inside the juvenile criminal justice

Juvenile criminal justice was the first, in Italy, to witness the development of significant mediation experiments, due to the peculiar and fundamental needs of the suspects.

According to article 9, par. 2, of Presidential Decree no 448/1988, on the assessment of minors' personality, both the public prosecutor and the judge may acquire information about the minor, even with the help of experts and without procedural constraints.

In this way the availability of the minor to meet the victim, to reconsider his own misconduct and to start a process to take responsibility of his own actions, even through restoration, is screened since the criminal investigations phase. This activity requires that specialized professionals, i.e. the components of

[16] G. MANNOZZI, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, cit., p. 240.

[17] G. DI CHIARA, *Scenari processuali per l'intervento di mediazione: una panoramica sulle fonti*, in *Riv. it. dir. proc. pen*., 2004, p. 500.

[18] Regulated by Legislative Decree no 274 of 28 August 2000. See A. SCALFATI (ed.), *Il giudice di pace. Un nuovo modello di giustizia penale*, Padua, 2001.

[19] Regulated by Presidential Decree no 448 of 22 September 1988. See G. GIOSTRA (ed.), *Il processo penale minorile. Commento al D.P.R. 448/1988*, Milan, 2007.

the Italian Office for Mediation, verify the existence of conditions and resources needed to support and manage a process of mediation with the victim. If this preemptive assessment has positive outcome, victim and suspect, with the consent of both parties, can meet in front of an operator of the Office for Mediation.

Following the assessment conducted by the mentioned art. 9 and if it has positive outcome, the judge has the opportunity to adopt two measures, very important for the matter at hand.

First and foremost, by art. 27 of Pr. Decree no 448/1988, if from the assessments is clear the irrelevance of the misconduct and its occasionality, the judge can, upon request of the prosecutor, deliver a judgment of no grounds to proceed for irrelevance of the misconduct, if the prosecution of the trial could jeopardize the educative needs of the minor. This decision is adopted after hearing the minor, his tutors and the victim.

Furthermore, the judge can, by art. 28 Pr. Decree no 448/1988, order the suspension of the trial if he needs to assess the personality of the minor and, in this case, he assigns the minor to the juvenile services of the administration of justice (also, in cooperation with the local social services) for the observation, treatment and support deemed necessary. With the same decision, the judge can prescribe measures aimed at restoring the consequences of the crime and at reconciling victim and minor. After the period of suspension, if the evaluation has had positive outcome considered the minor's behavior and his personality, the judge declares the dismissal of the case according to art. 29 Pr. Decree no 448/1988.

We are in the presence of a radical form of diversion, able to introduce mediation practices before the very beginning of the trial[20].

3.2. Attempts at conciliation before the giudice di pace

With regard to the criminal proceedings before the Italian *giudice di pace*, the conciliation aspect is deeply rooted in its historic origin and in its *ratio essendi*, and it is clearly expressed by art. 2, par. 2, of Legislative Decree no 274/2000,

[20] V. PATANÈ, *Ambiti di attuazione di una giustizia conciliativa alternativa a quella penale: la mediazione,* cit., p. 33.

where it says that during the trial the *giudice di pace* has to promote, as much as possible, the reconciliation[21] of the parties.

By art. 29, paragraphs 4 and 5, of Leg. Decree no 274/2000, the *giudice di pace*, if the crime is to be prosecuted only upon complaint of the victim, promotes the reconciliation of the parties[22] and, if deemed useful, he can postpone the hearing to this purpose, for a maximum of two months. If necessary, he can also require the mediation of public and private structures locally available. With respect to the constitutional principle of presumption of innocence, the law provides that, if the reconciliation attempt fails, anything said by the parties during the attempt cannot be used for the decision[23]. If, instead, the attempt is successful, the judge certifies the drop of the complaint by the victim and the acceptance of the suspect.

This attempt to reconcile, although important, seems to be actually aimed at making the victim drop the complaint, with the purpose of lightening the courthouses from irrelevant trials more than that of promoting effective mediation[24].

There are two other cases, in the trial before the *giudice di pace*, that allow the use of mediation tools: the acquittal for irrelevance of the misconduct (art. 34 Leg. Decree no 274/2000) and the acquittal following restorative conducts (art. 35). Neither of these cases requires explicitly mediation.

Nevertheless, it is clear that such an activity is necessary, since the judge has to ascertain the victim's interest to go on with the trial (art. 34, paragraph 2) and to evaluate the

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[21] Actually, this concept is very different (and more limited in its significance) from "mediation" (R. ORLANDI, *La mediazione penale tra finalità riconciliative ed esigenze di giustizia*, cit., p. 1171).

[22] With reference to the "ordinary" Italian criminal proceedings, there is a similar provision foreseen in art. 555, par. 3, Italian code of criminal procedure, according to which if the offence is subject to prosecution on the basis of a compliant, the judge shall verify whether the complainant is willing to withdraw the complaint and the accused intends to accept the withdrawal. In case of positive solution of this verification, the judge shall deliver judgment of no prosecution according to art. 469 Italian code of criminal procedure.

[23] L. LUPÁRIA, *La confessione dell'imputato nel sistema processuale penale,* cit., p. 107, nt. 145.

[24] B. BARTOLINI, *Esistono autentiche forme di "diversione" nell'ordinamento processuale italiano? Primi spunti per una riflessione*, in *Diritto penale contemporaneo*, 18 November 2014, p. 8.

possibility to remove the victim's opposition to the acquittal (art. 34, paragraph 3).

With particular regard to the acquittal following restorative conducts (art. 35), if it is clear the intent to avoid the criminal trial or to use it only as an *extrema ratio*, it is also true that this is not a real alternative to the criminal proceedings, since the restoration takes place without any connection with the trial. So much so that by article 35 the restoration is an element that has to be proved before the *giudice di pace*, as a requirement of the acquitting judgment[25].

4. The new Italian probation for adults: the term "mediation" enters for the first time inside the Italian code of criminal procedure.

To conclude, we need to report the recent insertion in the Italian judicial system of the suspension of the trial with 'probation', by Law. no 67 of 28 April 2014, which added to the Criminal procedure code the new title V-*bis*[26], called "Trial suspension with probation" (articles 464-*bis* to 464-*nonies* c.p.p.)[27]. This new institute can be particularly interesting for the purposes at hand, since it represents the first instance of mediation in the ordinary criminal proceedings. The new article 464-*bis,* par. 4, let. *c)* provides that within the program that has

[25] B. BARTOLINI, *Esistono autentiche forme di "diversione" nell'ordinamento processuale italiano? Primi spunti per una riflessione*, cit., p. 9.

[26] Besides, inside the Italian criminal code articles 168-*bis*, 168-*ter* e 168-*quater* have been added, together with the new articles 141-*bis* e 141-*ter* of the Implementing provisions of the Italian criminal procedure code.

[27] For the first comments see M. COLAMUSSI, *Adulti messi alla prova seguendo il paradigma della giustizia riparativa*, in *Processo penale e giustizia*, 6, 2012; F. VIGANÒ, *Sulla proposta legislativa in tema di sospensione del procedimento con messa alla prova*, in *Riv. it. dir. proc. pen.*, 2013, p. 1300. Then, F. GIUNCHEDI, Probation Italian style: *verso una giustizia riparativa*, in *Arch. pen.*, 3, 2014, *www.archiviopenale.it*; A. MARANDOLA, *La messa alla prova dell'imputato adulto: ombre e luci di un nuovo rito speciale per una diversa politica criminale*, in *Dir. pen. proc.*, 2014, p. 674.; B. BERTOLINI, *Esistono autentiche forme di "diversione" nell'ordinamento processuale italiano? Primi spunti per una riflessione*, cit., p. 13.; V. BOVE, *L'istituto della messa alla prova "per gli adulti": indicazioni operative per il giudice e provvedimenti adottabili*, in *Diritto penale contemporaneo*, 27 November 2014.

to be fulfilled so that the probation can have a positive outcome must be included "conducts aimed to promote, where possible, the *mediation* with the victim". The new art. 141-*ter* of the implementing provisions of the Italian criminal procedure code orders the social services belonging to the Italian external office for the execution of the sentence (U.E.P.E.), appointed to watch over the suspect going through the probation during the suspension, to report "specifically about the economical resources of the suspect, about his ability and possibility to perform restorative practices and about the possibility to perform activities of *mediation*".

From these very recent dispositions, it seems that an attempt to pursue a mediation process is a necessary step to access the probation and to obtain, in case of positive outcome, the dismissal. Moreover, it is finally clear the difference between restorative conducts to the benefit of the victim (as mentioned by art. 464-*bis*, let. *b)* Italian code of criminal procedure) and penal mediation (art. 464-*bis,* let. *c*). This distinction has to be greeted positively if the aim is to improve the position of the victim, who is now the bearer of interests not limited to economic aspect anymore.

We need to acknowledge, though, that the probation has been introduced mainly as an answer to the obligations stated by the ECHR decision Torreggiani[28]: to revisit the criminal proceedings and the sentences with the aim to reduce Italian jails overcrowding and, on the other hand, to reduce as much as possible the overload of Italian courts.

Once again, restorative justice seems to be a tool to reach deflation purposes rather than a new model of justice able to resolve social conflicts with a full involvement of the victim.

[28] ECHR, Sect. II, 8 January 2013, *Torreggiani and others v. Italy*, C-53417/09, C-46882/09, C-55400/09, C-57875/09, C-61535/09, C-35315/10 and C-37818/10.

CHAPTER XII

RESTORATIVE JUSTICE IN SPAIN

by Mar Jimeno Bulnes[*]

TABLE OF CONTENTS: 1. Introduction. - 2. Present regulation. - 3. Future proposals. - 4. Concluding remarks.

1. Introduction

At present time there is no a general provision on restorative justice[1] in Spain. A probable argument for it is the enforcement of the principle of legality in Spanish Criminal Law and criminal procedure according to the 'legality principle' enacted by Art. 9(3) Spanish Constitution[2] and Art.1 Act on Criminal Procedure as general rule, which is the ordinary one existing in the European models of criminal procedure[3].

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[1] *Restorative justice is a process, where parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implication for the future.* Definition provided by T.F. MARSHALL, *Restorative justice: an overview*, Home Office Research Development and Statistics Directorate, London, 1999, at 5. This definition is internationally agreed; see J. DOAK, *Victims' rights, human rights and criminal justice. Reconceiving the role of third parties*, Oxford and Portland, 2008, p. 255.

[2] 'The Constitution guarantees the principle of legality'. English version of the Spanish Constitution enacted on December 27, 1978, is available at *http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf*.

[3] See M. JIMENO-BULNES, *American criminal procedure in a European context*, in *Cardozo J. Int'l & Comp. L.*, 2013, v. 21, n. 2, p. 440.

Nevertheless, in Spain as in other European countries, opportunity principles have increasingly been introduced[4], at least as an exceptional rule. In this context some traces of restorative justice can be appreciated, as it shall be further exposed.

As it is well known, the notion of restorative justice, which natural habitat must be placed in the *Common Law* systems, appears in Criminal Law as an alternative to the retributive justice presenting a large number of differences concerning the treatment of offenders, relation with victims and the process of achieving justice itself[5]. Here specific restorative justice services such as the family group conferencing and sentencing circles constitute the usual methods as they are currently employed in the Anglo-Saxon countries[6]. By contrast, *civil law*

[4] See K. WESTEN, *Two rules of legality in Criminal Law*, in *Law and Philosophy 2007*, v. 26, n. 3, p. 229, providing a comparative view of both principles. Also, for a comparative view of the principle of opportunity in Spain, J.C. ORTIZ ÚRCULO, *El principio de oportunidad: naturaleza, ámbito de aplicación y limites,* in V. MORENO CATENA et al. (eds.), *El proceso en el siglo XXI y soluciones alternativas*, Cizur Menor, 2006, p. 115.

[5] Statement contained in D. M. GROMET - J.M. DARLEY, *Political ideology and reactions to crime victims: preferences for restorative and punitive responses,* in *J. Empirical Legal Studies*, 2011, v. 8, n. 4, p. 831. It is considered that the birth of the term 'restorative justice' comes from the International Congress of Criminology held in Budapest in 1993 under the influence of the work written by H. ZEHR, *Changing lenses: a new focus for crime and justice*, Scottdale, 1990, which chapter 10 is precisely titled 'Changing lens'. Between the enormous and current literature see for example D.W. VAN NESS - K.H. STRONG, *Restoring justice: an introduction to restorative justice*, Waltham, 2013, providing origin, definition and principles of restorative justice. In Spain, for example, L.F. GORDILLO SANTANA, *La justicia restaurativa y la mediación penal*, Madrid, 2007; M. MARTINEZ ESCAMILLA - M.P. SÁNCHEZ ÁLVAREZ (eds.), *Justicia restaurativa, mediación penal y penitenciaria: un renovado impulso*, Madrid 2011; and, especially, J. TAMARIT SUMALLA (ed.), *La justicia restaurativa: desarrollo y aplicaciones*, Granada, 2012.

[6] Best and more advanced example are the Family Group Conferences (FGC) in New Zealand instaured under the Children, Young Person and Their Families Act (1989); this model has been transplanted to other Anglo-Saxon countries such as Australia (Wagga model) and UK as well as some countries in continental Europe as it is the specific case of Sweden. See official information provided by government in New Zealand available online at *http://www.cyf.govt.nz/youth-justice/family-group-conferences.html*. In fact, it is argued that origin of conferencing takes place in tribal organizations such as the maorí community in New Zealand. An interesting research to conferencing in Europe is carried out by E. ZINSSTAG - E. TEUNKENS - B. PALI, *Conferencing: a way for restorative justice in Europe,* paper presented at

systems make preference for another different option between the different tools offered by the restorative justice without the involvement of other participants and community in general; this is a system of victim-offender mediation as it is the case of the *Täter Opfer-Ausgleich* (TOA) introduced in German Criminal Code in 1990[7].

All these solutions are contemplated by the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime[8]. In concrete, Article

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European Forum for Restorative Justice, Leuven, 2011, available at *http://www.euforumrj.org/assets/upload/Final_report_conferencing_revised_version_June_2012.pdf*; also E. ZINSSTAG - I. VANFRAECHEM, *Conferencing and restorative justice: international practices and perspectives,* Oxford, 2012. In Spain M. J. GUARDIOLA - M. ALBERTI - C. CASADO - G. SUSANNE, *Conferencing: origen, transferencia and adaptación*, in *La justicia restaurativa: desarrollo y aplicaciones*, cit., p. 244 in relation with New Zealand and Australia; also C. ROMERA ANTÓN, *Conferencias comunitarias y justicia restaurativa*, in M.C. PÉREZ-SALAZAR RESANO - J.C. RÍOS MARTÍN (eds.), *La mediación civil y penal. Un año de experiencia*, *Consejo General del Poder Judicial*, Madrid, 2008, p.189, since the point of view of a mediator.

[7] Section 46 StGB (*Strafgesetzbuch* - German criminal code) joint with section 153*.b)* StPO (*Strafprozeßordnung*- German code of criminal procedure). See B. BANNENBERG, *Victim-offender mediation in Germany,* in *European Forum for victim-offender mediation and restorative justice* (ed.), *Victim-offender mediation in Europe: making restorative justice work,* Leuven, 2000, p. 251 as well as B. BANNENBERG - R. DELATTRE, *Germany*, in D. MIERS - J. WILLEMSENS (eds.), *Mapping restorative justice: developments in 25 European countries*, European Forum for victim-offender mediation and restorative justice, Leuven, 2004, pp.67. In Spain, specific approach to the German model is made by S. BARONA VILAR, *Mediación penal como pieza del sistema de tutela penal en el siglo XXI. Un paso más hacia la resocialización y la justicia restaurativa*, in *Revista de Derecho Penal,* 2009, no 26, p. 30*;* also same author, in general, *Criminal mediation as a restorative instrument for victims: in all cases and for all victims?,* in M. DE HOYOS SANCHO (ed.), *Guarantees and rights of the especially vulnerable victim in the legal framework of the European Union/ Garantías y derechos de las víctimas especialmente vulnerables en el marco jurídico de la Unión Europea*, Valencia, 2013, p.449.

[8] OJ 14.11.2012, L 315, p. 57. At the moment various literature on the topic has been published at least in Spain; see for example M.D. BLÁZQUEZ PEINADO, *La Directiva 2012/29/UE ¿un paso adelante en materia de protección a las víctimas en la Unión Europea?,* in *Revista de Derecho Comunitario Europeo,* 2013, no 46, p.897, A .M. CHOCRÓN GIRÁLDEZ, *La Directiva 2012/29/UE del Parlamento europeo y del Consejo, de 25 de octubre, sobre los derechos, el apoyo y la protección a las víctimas de delitos*, in *Revista Aranzadi Unión Europea*, 2013, no 12, p. 37 and S. OROMÍ I VALL-

12 regulates the 'right' to restorative justice services by victims of crime along European Union; in the meantime, Recital 46 enumerates as restorative justice services previous methods as victim-offender mediation, family group conferencing and sentencing circles[9]. In this context, it is shown as relevant fact the intimate connection between restorative justice and victim in criminal scenario[10] considering that first one presents numerous advantages for second one; for example and mainly, the avoidance of secondary and repeat victimization[11] according to mentioned Article 12, which is supposed to take place with ordinary criminal procedure.

The European rule presents a promising panorama on the topic of restorative justice[12], which shall enforce national regulation due to the compulsory mandate to implement such right to restorative justice before November 16, 2015 (Art.27) taking into account conditions and safeguards there contemplated. Here it shall be analysed the Spanish context at present time as well as future proposals related with restorative justice.

OVERA, *Víctimas de delitos en la Unión Europea. Análisis de la Directiva 2012/29/UE*, in *Revista General de Derecho Procesal,* 2013, no 32, *www.iustel.com*.

[9] See especially K. LAUWART, *Restorative justice in the 2012 EU victims Directive: a right to quality service, but no right to equal access for vitims of crime*, p. 419, despite her critical approach.

[10] See J.B. BANACH-GUTIÉRREZ, *Restorative justice and the status victims in criminal proceedings: the fact and future of victims' rights,* in *International perspectives in victimology*, 2011, vol. 6, no 1, *www. thepressatcsufresno.com*. Also specifically L. CORNAGGIA, *Vittime e giustizia criminale*, in *Riv. it. dir. proc. pen.*, 2013, no 4, p. 1785 under the title of 'reconstructive justice' as well AS J. DOAK, *Victims' rights, human rights and criminal justice: reconceiving the role of third parties,* cit., p. 255 in defence of a victim-centred approach.

[11] See in general U. ORTH, *Secondary victimization of crime victims by criminal proceedings,* in *Social justice research*, 2002, vol.15, no 4, p.313. Also, for a general view of victimization in Spain related to criminal procedure at the time see J. BUSTOS - E. LARRAURI, *Victimología: presente y futuro. Hacia un sistema penal de alternativas,* Barcelona, 1993, p. 77.

[12] See H. J. KERNER, *Establishing new minimum standards on the rights, support and protection of victims of crime (Directive 2012/29/EU): a promising step also for the further development of restorative justice, initiatives and institutions in Europe*, in *Restorative justice: an international journal*, 2013, vol.1, no 3, p. 430. In Spain, J. P. TAMARIT SUMALLA, *El necesario impulso de la justicia restaurativa tras la Directiva europea de 2012*, in *Ars iurs salmanticensis,* 2013, vol.1, p.135.

2. Present regulation

As indicated, at the time there is no provision of any general rule in the content of the present Spanish Criminal Procedure Act (1882) providing mention on restorative justice. For this reason and according to legal perspective, there is no place for mediation either in the context of criminal procedure in Spain by contrast to civil procedure, where the alternative of mediation has been recently introduced as result of the implementation of the European mandate too[13]. Also it has been foreseen that the main reason for this lack of regulation is the enforcement of the legality rule by opposition to opportunity principle, which looks to be present in the promotion of restorative justice. In fact, there are many scholars, who make strong opposition to the introduction of penal mediation in Spain[14] since the strict procedural point of view; by contrast, restorative justice and/or mediation has a large number of defenders coming

[13] Law 5/2012, July 6th, on mediation in civil and commercial matters (Spanish Official Journal or BOE 7.7.2012, no 162, p.49224) implementing Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ 24.5.2008, L 136, p.3. See recent comments of both legislations by F. LÓPEZ SIMÓ - F. GARAU SOBRINO (eds.), *Mediación en materia civil y mercantil. Análisis de la normativa de la UE y española (Directiva 2008/52/CE, Ley 5/2012 y RD 980/2013),* Valencia, 2014. Also in Spanish academia but in English language, for a general and comparative view, see C. ESPLUGUES MOTA - J.L. IGLESIAS BUHIGUES - G. PALAO MORENO (eds.), *Civil and commercial mediation in Europe*, I and II, Cambridge, 2012; in Italian language, A. DE LA OLIVA SANTOS, *La mediazione in materia civile e commerciale in Spagna*, in *Rivista trimestrale di dirtto e procedura civile,* 2012, vol.66, no 2, p.533.

[14] As example, strong criticism by N. CABEZUDO RODRIGUEZ, *El último (y controvertido) credo en materia de política criminal. Justicia restaurative y mediación penal,* in *La Ley Penal*, 2011, no 86. But there are also other Professors of Procedural Law in Spain supporters of penal mediation AS S. BARONA VILAR, *Mediación penal como pieza del sistema de tutela penal en el siglo XXI. Un paso más hacia la resocialización y la justicia restaurativa*, cit., main researcher on the topic; see also EAD., *Mediación penal: un instrumento para la tutela penal*, in *Revista del Poder Judicial*, 2012, n.94, p. 23. As well some practitioners are fond of penal mediation; for example, magistrates such as E. DE URBANO CASTRILLO, *La justicia restaurativa penal* and L. DURBÁN SICILIA, *Mediación, oportunidad y otras propuestas para optimizar la instrucción penal,* both in *La Ley Penal*, 2011, no 86.

from the fields of the Criminal Law and, especially, Criminology[15].

The only exception at the moment is the legislation provided for juvenile criminal justice. In this context, the Spanish Act 5/2000 enacted on 12 January 2000 regulating the criminal liability of minors[16] includes two concrete provisions related to penal mediation; nevertheless this last title is absent and regulation is carried out under the name of 'conciliation' (*conciliación*) or 'reparation' (*reparación*). Essential rule is provided in Art.19; first paragraph makes possible the stay of the criminal proceeding (*sobreseimiento*)[17] by proposal of public prosecutor always taking into account the 'seriousness and circumstances of the facts and minor, particularly the lack of serious violence and/or intimidation' and the presence of any of following requirements: *a)* the minor has been conciliated with victim; *b)* the minor has assumed the compromise to repair the damage caused to the victim or the injured person by the crime; *c)* the minor has been committed to fulfill the educational activity proposed by the technical team in its

[15] Main researchers such as J. M. TAMARIT SUMALLA - E. LARRAURI, *Victimología: presente y futuro. Hacia un sistema penal de alternativas*, cit.. Also see respectively, e.g., V. CERVELLÓ DONDERIS, *Principios y garantías de la mediación penal desde un enfoque resolicalizador y victimológico*, in *Revista Penal*, 2013, n.31, p.22 and M. LOSADA FERNÁNDEZ, *La mediación penal: un complemento a la justicia en la gestión de los problemas derivados del delito*, in *Quadernos de criminología: revista de criminología y ciencias forenses*, 2009, n.7, p.33. Same discussion takes place in another countries; see for example in Italy various studies published in *Studi sulla questione criminale*, 2009, vol.4, n.1.

[16] Published in BOE of 13.1.2000, n.11, p.1422; according to Art.1 (1) minor is considered such person older than 14 years old up to 18. Present Act is complemented by a Ruling enacted by Royal Decree 1774/2004, July 30th (BOE 30.8.2004, n.209, p.30127). As example in scholarship, see general comments by V. GIMENO SENDRA, *El proceso penal de menores*, in *Diario La Ley*, 1 October 2001, n.5386; also generally E. GONZÁLEZ PILLADO (ed.), *Proceso penal de menores*, Valencia, 2009.

[17] It has been called 'conditional stay of proceeding' or 'stay of proceeding by transaction'; see P. GALAIN PALERMO, *Reparations for damages in a penal system that serves the requirements of criminal policy*, in *Guarantees and rights of the especially vulnerable victim in the legal framework of the European Union*, cit., p. 545-546. I prefer the translation of the Spanish institution *sobresemiento* by the English expression 'stay of proceedings' instead of dismissal, which makes also reference to rejection (non estimation on the merits) of criminal action.

report[18]. Same Art.19 (1) Act 5/2000 contemplates a compulsory condition in relation with the typification of the facts, which only can be appreciated as 'less serious crimes' and misdemeanours according to Spanish penal code[19]. Following paragraphs make description of this conciliation and reparation agreements when the minor 'recognizes the damage and apologize to the victim and she accepts his apologies' (conciliation) and 'the commitment of the minor to the victim or injured party to perform certain actions on behalf of those or of the community[20], followed by its effective realization' (reparation). The civil liability is not here included but an

[18] In fact, it has been expressed that present regulation contemplates two optional agreements: a settlement agreement (conciliation) or a repair agreement. See A. RODRIGUEZ ÁLVAREZ, *La mediación en el proceso penal de menores. Una perspectiva procesal*, in R. CASTILLEJO MANZANARES - C. TORRADO TARRÍO (eds.), *La mediación: nuevas realidades, nuevos retos. Análisis en los ámbitos civil y mercantil, penal y de menores, violencia de género, hipotecario y sanitario*, Madrid, 2013, p. 409. Also about both activities, conciliation and reparation, M. A. COBOS GÓMEZ DE LINARES, *La mediación en la Ley Orgánica reguladora de la responsabilidad penal de los menores y su reglamento,* in *Justicia restaurativa, mediación penal y penitenciaria: un renovado impulso,* cit., p. 316, with provision of practical examples at 330 too as well as A. M. SANZ HERMIDA, *La mediación en la justicia de menores*, in N. GONZÁLEZ-CUELLAR SERRANO- A. M. SANZ HERMIDA - JC. ORTIZ PRADILLO (eds.), *Mediación: un método de conflictos. Estudio interdisciplinar*, Madrid, 2010, p. 167. Also in general T. MONTERO HERNANZ, *La justicia restaurativa en la legislación reguladora de la responsabilidad penal de los menores,* in *Diario La Ley*, 20 June 2011, n.7655, providing specific comments on different content of Act 5/2000 in relation with present topic. Last but not least, in relation with penal mediation in Spain see specifically T. ARMENTA DEU - M. SÁNCHEZ MORENO*, La mediazione penale nell' esperienza spagnola,* in T. ARMENTA DEU - L. LUPÁRIA (eds.), *Linee guida per la tutela processuale delle vittime vulnerabili. Working paper sull'attuazione della Decisioe quadro 2001/220/GAI in Italia e Spagna*, Milan, 2011, p.107.

[19] Act 10/1995 enacted on 23 November, 1995, currently amended (last one on 28 May, 2014); see updated version at *www.boe.es/legislacion/codigos*. Also an official English version is provided at *http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublic aci ones.html*. According Art. 13 classification between serious crimes, less serious crimes and misdemeanours is related to classification of penalties contemplated in Art. 33; according to last one, for example, a serious punishment should be always imprisonment more than 5 years.

[20] Such actions on behalf of the community are expressly contemplated as 'measures' (in fact, penalties) to be imposed to the infractor minor according to enumeration provided in Art.7 Act 5/2000. See specifically on this topic T. MONTERO HERNANZ, *Los trabajos comunitarios en la justicia juvenil*, in *Diario La Ley,* 21 October 2009, n.7266.

agreement on it can also takes place as separated settlement[21]. The penal mediation shall be conducted by the technical team, who currently participates in the minor criminal proceeding; this one shall inform to public prosecutor of 'commitments and their compliance' according to Art.19 (3). When conciliation is produced and/or such comittments on reparation are fulfilled the public prosecutor 'shall terminate the investigation and asked the judge to stay the proceeding's file' (*sobreseimiento*); otherwise the file shall be follow up except conciliation or reparation are not possible due to 'causes beyond the control of the minor' according to Arts.19 (4) and (5) Act 5/2000.

The other rule in relation with penal mediation aplied to juvenile criminal justice is contained in Art.27 (3) Act 5/2000 with remission to the previous one regulated in prior Art.19. Here it is provided the possible promotion by the technical team of the concrete activity on reparation or conciliation to be carried out by the minor with 'express indication of the content and purpose of that activity'. As last comment on the topic of penal mediation in criminal procedure for minors, it can be added that both provisions enforcing penal mediation are currently applied and official statistics provided by the Office of the General Attorney show figures in relation with the judicial practice in this context[22]. By opposite, in relation with criminal procedure for adults, the only legislative mention at the moment is negative as far as there is a specific provision in order to prohibit the resource to penal mediation applied to crimes related to gender violence. In this context, present Art.87 *ter* (5) Act on the Judiciary introduced by Act on the Protection Measures against Gender Violence[23] makes explicit exclusion

[21] In relation with civil action to be solved in criminal procedure for minors see F. VALBUENA GONZÁLEZ, *La pieza separada de responsabilidad civil en la Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal del menor*, in *Anuario de Justicia de Menores,* 2003, n.3, p. 243.

[22] See annual reports under the title *Memoria de la Fiscalía General del Estado* available online at *www.fiscal.es* (menu *Documentos*). Last one was presented in September 2013 and compiles data from 2012, where a number of 7.705 proceedings were filed representing an average of 26'03% of the total criminal files for minors' procedure; see *Memoria de la Fiscalía General del Estado,* Madrid, 2013, at 419.

[23] Act 1/2004 enacted on 28 December, 2004 (BOE 29.12.2004, n.313, p.42166) whose Art.44 prescribes, textually: 'mediation is prohibited in all the above cases'. According to same precept modificating prior Art.87 *ter* Act on the Judiciary such cases are the following: 'murder, injury, injury to foetus,

of the employment of the mediation in criminal procedure during the investigative period to be followed up by the specific judges of the investigative created by last law under the title of Judges of the Violence against Women[24]. This measure, celebrated and criticized by Spanish scholars[25], has been

crimes against a person's freedom, against a person's moral integrity, against a person's sexual freedom and inviolability, and any other crime involving violence or intimidation, when it is committed against a person who is or has been his wife or shares or has shared an analogous affective relationship, with or without cohabitation, and those committed against his descendents or those of his spouse or cohabiting partner or against minors or incapacited persons living with him or under the parental authority, guardianship, custody or foster care of his spouse or cohabiting partner, when an act of gender violence has occured'. Main characteristic of this law and its protective measures is that application takes place when victim is a women and author of the crime is a man, what has been calified between Criminal Law academia as a sort of 'Criminal Law author'. Official English version of Act 1/2004 is provided at *http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html*.

[24] See comments on organization and functions in M. JIMENO BULNES, *Jurisdicción y competencia en materia de violencia de género: los Juzgados de Violencia sobre la Mujer. Problemática a la luz de su experiencia*, in *Justicia: Revista de Derecho Procesal*, 2009, n.1-2, p.157; also EAD., *Violencia de género: aspectos orgánicos y competenciales*, in M. DE HOYOS SANCHO (ed.), *Tutela jurisdiccional frente a la violencia de género: aspectos procesales, civiles, penales y laborales*, Valladolid, 2009, p.299. See also in general about the Spanish legislation on the topic of gender violence, eg, M. E. BODELÓN GONZÁLEZ, *Il feminismo dentro e fuori le legge: la legislazione spagnola sulla violenza contre le donne,* in *Studi sulla questione criminale,* 2008, n.2, p.43; in Spain, as example of numerous literature, J. L. GÓMEZ COLOMER, *Violencia de género y proceso,* Valencia, 2006 as well as, more recently, R. SALVADOR CONCEPCIÓN, *Tratamiento de la violencia de género en España. Perspectiva legal. Perspectiva real,* in *Diario La Ley*, 19 November 2013, n.8194, comparing both perspectives, legal and practical.

[25] Between supporters, eg, R. CASTILLEJO MANZANARES, *Mediation with especially vulnerable victims. Gender violence, in Guarantees and rights of the especially vulnerable victim in the legal framework of the European Union,* cit., pp.475-494, at 483 and *Mediación en violencia de género, una solución o un problema*, in *Mediación: un método de conflictos. Estudio interdisciplinar,* cit., p. 200*;* M. J. GUARDIOLA LAGO, *La víctima de violencia de género en el sistema de justicia y la prohibición de la mediación penal,* in *Revista General de Derecho Penal*, 2009, n.12, *www.iustel.com*, p. 19 and E. MARTINEZ GARCÍA*, Mediación penal en los procesos por violencia de género: entre la solución real del conflicto y el "ius puniendi" del Estado*, in *Revista de Derecho Penal*, 2011, n.33, p. 14. See especially on the topic P. ESQUINAS VALVERDE, *Mediación entre víctima y agresor en la violencia de género*, Valencia, 2008, p. 85 with concrete proposals in favour of the instauration of the mediation in this area. Also defence of penal mediation in gender violence crimes is promoted from the judicial practice; see for example C.A. PÉREZ

declared compatible with European rules - at the time Council framework decision 2001/220/JHA[26] - by the European Court of Justice in the famous *Magatte Gueye* case on 15 September 2011, under the preliminary ruling promoted by the Provincial Court of Tarragona[27]. In my view, same reasoning in defence of

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GINÉS, *La mediación penal en el ámbito de la violencia de género "o las ordenes de protección de difícil control y cumplimiento*, in *Diario La Ley*, 7 May 2010, n.7397, and J. L. RODRIGUEZ LAÍNZ, *Mediación penal y violencia de género*, in *Diario La Ley*, 28 January 2011, n. 7557; also J. VILAPLANA RUIZ, *Mediación y violencia de género*, in *Diario La Ley*, 25 June 2014, n.8340 and C. SAÉZ RODRIGUEZ, *La estrategia penal contra la violencia de género en su complicado encaje con la mediación penal,* in *Justicia restaurativa, mediación penal y penitenciaria*, cit., p. 266. In general, J. FERNÁNDEZ NIETO - A.M. SOLÉ RAMON, *El impacto de la mediación en los casos de violencia de género: un enfoque actual práctico,* Valladolid, 2011, with provision of judicial practice in different Spanish regions at 119 and practical examples at 149. Obviously, main supporters are mediators themselves, eg, C. MERINA ORTIZ, M. MÉNDEZ VALDIVIA - R. ALZATE SÁEZ DE HEREDIA, *Respuestas de la mediación familiar en situaciones de violencia de pareja,* in *La mediación: nuevas realidades, nuevos retos*, cit., p.479; especially, V. DOMINGO DE LA FUENTE, *Justicia restaurativa y violencia doméstica: posibilidad, error o acierto*, in *Diario La Ley*, 23 September 2011, n. 7701; the author is at the time President of the Spanish Scientific Association of Restorative Justice (more information at *https://sites.google.com/site/sociedadcientificadejr/comite-cientifico/curriculum-miembros-del-comité*). By contrast, from the procedural point of view, the essential argument against the use of penal mediation in the field of gender violence is precisely the lack of equality between both parties in the criminal procedure as result of the nature of these crimes: the woman-victim and the man-infractor. See specifically F. MARTÍN DIZ, *Mediación en materia de violencia de género: análisis y argumentos*, in *Tutela jurisdiccional frente a la violencia de género*, cit., p. 682.

[26] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ 22.3.2001, L 82, p.1. See at the time, for example, comments by B. VIDAL FERNÁNDEZ, *The standing of the victim in criminal proceedings throughout the European Union*, in M. DE HOYOS SANCHO (ed.), *Criminal proceedings in the European Union: essential safeguards/ El proceso penal en la Unión Europea: garantías esenciales*, Valladolid, 2008, pp.201-223 (Spanish version at 207-229).

[27] ECJ, joined cases C-483/09 and C-1/10. The ECJ hereby ruled: "1. Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as not precluding the mandatory imposition of an injunction to stay away for a minimum period, provided for as an ancillary penalty by the criminal law of a Member State, on persons who commit crimes of violence within the family, even when the victims of those crimes oppose the application of such a penalty. 2. Article 10(1) of Framework Decision 2001/220 must be interpreted as permitting Member States, having regard to the particular category of offences committed within the family, to exclude

such prohibition of mediation in this area can be also employed according to present European regulation under Art.12 (2) Directive 2012/29/EU[28].

Nevertheless, despite of this present restrictive regulation, it has been introduced since time ago practical experiences as a sort of 'pilot projects' on behalf of penal mediation in several Spanish regions and/or provinces. First experiences on penal mediation started around 1985 in some Spanish local jurisdictions such as Valencia[29] without any specific legislative support thanks to the relationship existing at the time between the Judges of the Investigative and the public services offered by the (then) new Offices of Victims Assistance Crimes (*Oficinas de Atención a las Víctimas de Delitos*) created by the

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recourse to mediation in all criminal proceedings relating to such offences". See comments on this case-law by R.J.A. MCGUIGG, *Domestic violence and the ECJ: joined cases C-483/09 and C-1/10 "Magatte Gueye and Valentin Salmeron Sanchez"*, in *European Public Law,* 2012, vol.18, n.4, p. 645. Also about present case and the topic of gender violence worldwide see R. LAMONT, *Beating domestic violence? Assessing the EU's contribution to tackling violence against women*, in *Common Market Law Review,* 2013, vol. 50, n.6, p. 1787.

[28] Textually, 'Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including the establishment of procedures or guidelines on the conditions for such referral'. The Spanish version of *appropriate* is translated as "*si procede"*. Also general prescriptions enounced by Recital 46 Directive 2012/29/EU can here be taken into account, eg, 'primary consideration of the interests and needs of the victim', 'nature and severity of the crime' and, especially, 'power imbalances, which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim'. See specifically M. P. MARTÍN RÍOS, *La exclusión de la mediacion como manifestacion de las no-drop policies en violencia de género: Análisis de la cuestión a la luz de la Directiva 2012/29/UE*, in *Diario La Ley*, 5 February 2013, n. 8016. Same justification was employed by this author in relation with prior European regulation under Council Framework Decision 2001/220/JHA; see M. P. MARTÍN RÍOS, *Víctima y justicia penal,* Barcelona, 2012, p. 406. Also in relation with the application of Directive 2012/29/UE to victims of gender violence in Spain F.M. GUTIÉRREZ ROMERO, *Las buenas prácticas para las víctimas de violencia de género: especial referencia a la Directiva 2012/29/UE del Parlamento europeo y del Consejo de 25 de octubre de 2012,* in *Diario La Ley,* 10 January 2014, n. 8226; the author is at the present time Judge of the Violence against Women in Seville.

[29] See mention of different pilot experiences in S. BARONA VILAR, *Mediación penal como pieza del sistema de tutela penal en el siglo XXI. Un paso más hacia la resocialización y la justicia restaurativa*, cit., p. 28.

Spanish Ministry of Justice[30]. With the enforcement of the present Criminal Code in 1995, which Art.21 (5) provides a minimum legislative support[31], practical experiences on penal mediation increased and spread overall in Spain. Since 2000, promotion by public institutions such as the General Council of the Judiciary Branch and local private institutions -besides the provincial bars in some cases- enhanced penal mediation especially in the context of the investigative period carried out by the judges of the investigative once started the criminal procedure (*intra*-procedure mediation)[32]. Also another pilot

[30] They exist in all Spanish provinces and generally are located at the courthouse. See more information available online at *http://www.mjusticia.gob.es/cs/Satellite/es/1288774766880/EstructuraOrganica.html*.

[31] Textually, according to English official version prior indicated, the convict having compensated the victim for damages caused or having lessened the effects thereof, at some phase of the procedure and prior to the trial taking place. This regulation on the reparation of the damage is included between the circumstances that mitigate the criminal liability. See comments on the topic with new proposals by J.M. TAMARIT SUMALLA, *La reparación a la víctima en el derecho Penal (Estudio y crítica de las nuevas tendencias político-criminales),* Fundació Jaume Callís, Barcelona 1994, still under the old Criminal Code enacted on 1973.

[32] See comments on different experiences along whole Spain by E. GÓMEZ-SEGADE GONZÁLEZ - E. PÉREZ MARCOS, *La mediación en el proceso penal español: hacia una realidad más efectiva*, in *La mediación: nuevas realidades, nuevos retos. Análisis en los ámbitos civil y mercantil, penal y de menores, violencia de género, hipotecario y sanitario*, cit., p. 1998. Also in general J.C. RÍOS MARTÍN - E. PASCUAL RODRIGUEZ - A. BIBIANO GUILLÉN - J.L. SEGOVIA BERNABÉ, *La mediación penal y penitenciaria. Experiencias de diálogo en el sistema penal para la reducción de la violencia y el sufriiento humano*, Madrid, 2008, with inclusion of several protocoles on penal mediation at different stages of the criminal procedure: during the investigative period, during the trial, during the enforcement of the sentence and during the imprisonment term. At present time, a map of Spanish courthouses, who offer services on penal mediation can be found at *http://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Juzgados_que_ofrecen_mediacion/Juzgados_que_ofrecen_mediacion_Penal*. As concrete experiences it can be exposed, for example, such one carried out in Catalonia, where in 2000 the Departement of Justice of the regional government created the first Service on Penal Mediation with delegations in all Catalonian provinces; also a prior pilot experience started in this Autonomous Community in 1998 as well as in Basque Country. See R.M. FREIRE PÉREZ, *La mediación penal y penitenciaria en España*, in F. GORJÓN GÓMEZ - A. LÓPEZ PELAÉZ (eds.), *Estado del arte de la mediación,* Cizur Menor, 2013, p. 364. Also mediation services were introduced in minor provinces. For example, the Provincial (Appeal) Court of Alicante in 2003 enacted a protocole in order to iniciate a mediation procedure before starting the trial with the signature of a

experiences *post-sententiam* started in order to substitute the enforcement of the imposed penalty, either in courthouse or in the prison environment since 2005; in this last context, examples can be found in different Spanish prisons (Zaragoza, Madrid III, Nanclares de Oca, Málaga)[33]. But the presence of penal mediation as alternative to the trial in criminal procedure considered in general is still symbolic in Spain.

3. Future proposals

Different panorama results according to new proposals on regulation of criminal procedure in general and, specifically, on

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mediation agreement with inclusion of a repair plan; see V. MAGRO SERVET - P. CUÉLLAR OTÓN - C. HERNÁNDEZ RAMOS, *La experiencia de la mediación penal en la Audiencia Provincial de Alicante*, in *Mediación: un método de conflictos. Estudio interdisciplinar,* cit., p. 115. It is interesting the case in La Rioja starting a pilot project in 2000 with support of the Office of Victims Assistance Crimes besides another experiences in more populated cities such as Seville and Zaragoza. Last, I must make mention of the relevant work carried out in my home place by the Association for Peace Mediation of Conflicts in Burgos (*Asociación de Mediación para la Pacificación de Conflictos de Burgos* – AMEPAX) created in 2006 under the leadership of Virgina Domingo de La Fuente. (*https://sites.google.com/site/justiciarestaurativaamepax/home*). According to last report redacted in 2012 a total of 118 cases have been solved along 6 years in Burgos by AMEPAX; mostly of the crimes involved were menaces, injuries and insults.

[33] See generally M. J. GUARDIOLA LAGO, *La mediación autor-víctima en los centros penitenciarios: una polémica cuestión,* in *La mediación: nuevas realidades, nuevos retos. Análisis en los ámbitos civil y mercantil, penal y de menores, violencia de género, hipotecario y sanitario*, cit., p. 247, and *Desarrollo y aplicaciones de la justicia restaurativa en prisión*, in *La justicia restaurativa: desarrollo y aplicaciones*, cit., p.183 providing examples in Spain and abroad. Also practical experiences from mediators themselves such as F. LOZANO ESPINA - L. LOZANO PÉREZ, *Mediación penitenciaria: pasado, presente y ¿futuro?*, in *La justicia restaurativa: desarrollo y aplicaciones*, cit., p.273. Specific comments on experiences in Madrid area aree provided by B. SÁNCHEZ ÁLVAREZ, *Cuestiones relevantes de Derecho sustantivo y procesal de la incorporación de la mediación a la jurisdicción penal de adultos en la fase de mediación. La mediación penitenciaria,* in *La mediación civil y penal. Un año de experiencia*, cit., p. 227. Also E. PASCUAL RODERÍGUEZ, *La experiencia práctica de la mediación penal en Madrid*, in *Justicia restaurativa, mediación penal y penitenciaria. Un renovado impulso*, cit., p. 361, in this case providing the point of view of a private institution, which helps on mediation proceedings as it is the Association for Peace Mediation of Conflicts in Madrid, whom the author belongs.

protection of victims of crime. At the moment, the Spanish Minister of Justice has launched two different drafts related to both topics, which result nowadays is uncertain, especially in the first case. Nevertheless, both of them contemplate the penal mediation as the method chosen between those ones included in restorative justice according to the schema provided in *Civil Law* countries as enounced and, more important, as alternative to the criminal procedure itself.

First, the Draft on the Criminal Procedure Code (*Borrador de Código Procesal Penal*), published online on 25 February, 2013[34]. Here it is included a specific regulation under the title of Penal Mediation in Articles 143-146 in order to enforce the so-called principle of opportunity in the Spanish criminal procedure[35] as it also takes place in other European models according to prior indication. First article provides a definition of such penal mediation proceeding as 'a method of resolving the conflict between the defendant and the victim free and voluntarily assumed by both in which a third party intervenes to help in order to reach an agreement'. Mediator can be an individual (professional) or institution but no regulation on this authority is contemplated as far as express remission to regulation on civil mediation is indicated[36]. The

[34] Still available at official website provided by the Spanish Minister of Justice: *http://www.mjusticia.gob.es/cs/Satellite/es/1215197775106/Medios/1288778173060/Detalle.html*. See general and recent comments on this draft and development by F. MORALES PRAT, *El proceso de reforma de la Ley de Enjuiciamiento Criminal: un largo y curvo camino*, in *Revista de Derecho y proceso penal,* 2014, nº 33, p.13. Also in general on criminal procedure reform in Spain published abroad, J. BURGOS LADRÓN DE GUEVARA, *Amministrazione della giustizia nella Spagna del secolo XXI,* in *Archivio nella nuova procedura penale*, 2010, n.4, p. 390.

[35] See specifically criticism by J.M. CHOZAS ALONSO, *Otro avance de la "justicia penal negociada": la conformidad y la mediación en el borrador de Código Procesal Penal de 2013*, in *Diario La Ley*, 18 July 2013, n.8129; author criticizes how here the 'conflict' in criminal justice, where is present the public interest and *ius puniendi,* is dealt as a sort of 'private' conflict. Also spectical on the incorporation of penal mediation and restorative justice in the future criminal procedure according to present draft A. ARMENGOT VILAPLANA, *La incorporación de la mediación en el proceso penal español*, in *La Ley Penal*, 2014, n.106.

[36] That is Law 5/2012, July 6th, on mediation in civil and commercial matters, prior enounced, which Arts.11-15 configure the statute of mediatior; according to Art.11 (2) mediator must possess an official universitary degree or superior proffesional background besides specific education on mediation

intermediate person in order to communicate to the victim the resource to mediation proceeding once announced the willingness by offender shall be the public prosecutor or the indicated Office of Victims Assistance Crimes. Also public prosecutor has the option to postpone the investigative measures once announced the existence of a mediation proceeding. Last, as further characteristics, it is here enounced the secrecy and free-of-charge of such mediation proceeding. Nevertheless, no provision of other requirements such as nature of crimes, proceeding and appropriate effects of penal mediation itself are explicited, neither in articulated text nor between its recitals[37].

Second, the Bill on the Standing of Victims of Crime (*Anteproyecto de Ley Orgánica del Estatuto de la Víctima del Delito*) announced on 25 October, 2013[38], which has been already presented to Council of Ministers and reported by the General Council of the Judiciary Branch[39]. Concrete regulation is provided in Article 15 under the general title of 'Restorative justice services' although only mention of penal mediation is included. In this context it is contemplated the right to access to

there indicated. See specifically I. ÁLVAREZ SACRISTÁN, *El mediador en asuntos civiles y mercantiles*, in *Diario La Ley*, 9 June 2014, n. 8328; also P. ORTUÑO MUÑOZ, *Actuación del mediador*, in R. CASTILLEJO MANZANARES - C. ALONSO SALGADO - A. RODRIGUEZ ÁLVAREZ (eds.), *Comentarios a la Ley 5/2012, de mediación en asuntos civiles y mercantiles,* Valencia, 2014, p. 157 providing comments on Art.13 related to the funcions to be carried out by the mediator. General comments on the Spanish law on civil mediation by S. BARONA VILAR, *Mediación en asuntos civiles y mercantiles en España tras la aprobación de la Ley 5/2012, de 6 de julio*, Valencia, 2013, at 225 in relation with the mediatior as well as A. BONET NAVARRO (ed.), *Proceso civil y mediación. Su análisis en la Ley 5/20912, de mediación en asuntos civiles y mercantiles,* Cizur Menor, 2013.

[37] Despite extensive explanation of penal mediation is included in p.7 with mention to implementation of Directive 2012/29/UE; also its definition as 'restorative penal mediation' as specific method of restorative justice is explicited.

[38] *http://www.mjusticia.gob.es/cs/Satellite/es/1215198252237/ALegislativa_P/1288774452773/Detalle.html*. See general comments by J. LEAL MEDINA, *Normativa presente y de futuro. Derechos en el proceso penal y en las leyes extraprocesales. Especial atención al Anteproyecto de Ley Orgánica del Estatuto de la víctima del delito*, in *Diario La Ley*, 7 April 2014, n.8287 and J.L. MANZANARES SAMANIEGO, *Estatuto de la víctima. Comentario a su regulación procesal penal*, in *Diario La Ley*, 10 July 2014, n.8351.

[39] Report presented on 31 January, 2014, available at official website *http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Consejo_General_del_Poder_Judicial/Actividad_del_CGPJ/Informes*.

such restorative justice services (in fact penal mediation) by victims 'in order to obtain adequate material and moral compensation for the damage resulting from the offense'. Specific requirements are here contemplated such as 'a) the offender acknowledges the facts; b) the victim consented, having received full information; c) the mediation process does not pose a risk to the safety of the victim; d) is not prohibited by law for the crime committed. Also secrecy but no gratuity[40] is provided and, as it is textually explicited, 'the victim can withdraw his or her consent to participate in the mediation proceeding at any time'.

4. Concluding remarks

As it has been here exposed, at present time regulation in Spain on restorative justice and/or penal mediation is still minority. Nevertheless, legal panorama shall have to change as result of the implementation of the Directive 2012/29/UE, which it is presumed to take place under the announced Bill on the Standing of Victims of Crime and which includes mention to restorative justice as well as to penal mediation as prior indicated. In concrete, resource to restorative justice shall be expressly done to penal mediation only (at least at the moment and following mentioned draft) in general for criminal procedure. Such regulation shall be added to present one; then, explicitly, to positive one existing in relation to criminal procedure for minors and negative one provided in the context of gender violence, which references in both cases has taken place.

Finally and only by way of example, some recommendations as a sort of best practices in the context of restorative justice and/or penal mediation can here enumerated in order to be taken into account in a further legal regulation in Spain on the topic. Recommendations here exposed are related with the most difficult questions to be solved in relation with the development of restorative justice in general and penal

[40] See criticism in General Council of the Judiciary Branch's report at 40: neither officiality nor gratuity of penal mediation proceeding is foreseen. Also it is reported the absence of regulation on proceeding and concrete effects of penal mediation in criminal procedure.

mediation in the context of criminal procedure in concrete as they have been discussed in Spanish academia[41].

1) Determination of the specific catalogue of crimes and offences to be derived to mediation proceeding as long as there is still discussion between scholars if most serious crimes should be included or excluded. Also there is a general debate if any provision of list of crimes should be done or by contrast, restorative justice and/or penal mediation should be possible for all criminal infractions[42].

2) Regulation on the statute of the mediator as well as specific functions of this one in the context of the mediation proceeding to be carried out in criminal procedure. A strict control of capabilities of the mediator as well as specific training should be desirable joint with the requirement of official registration in order to professionalize the role of the mediatior[43].

3) Careful regulation of requirements and characteristics on penal mediation in order to avoid collision with fundamental rights. Specific problematic is caused by the present requirement on 'acknowledgement of the basic facts of the case' as it is contemplated in Art.12 (1) (c) Directive 2012/29/UE and its relationship with the fundamental right with the presumption of innocence[44].

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[41] See also another specific recommendations proposed as best practices in M. SCOLETTA - T. ARMENTA DEU - M. SÁNCHEZ MORENO, *Linee di attuazione raccomandate, in Linee guida per la tutela processuale dell vittime vulnerabili. Working paper sull'attuazione della Decisione quadro 2001/220/GAI in Italia e Spagna*, cit., p. 110.

[42] See comments on both questions for example in S. BARONA VILAR, *Mediación penal como pieza del sistema de tutela penal en el siglo XXI*, cit., p. 45.

[43] At the moment specific training and registration is provided for civil mediators as well as specific training on civil mediation is provided by Spanish universities. See as example provisions in Castile and Leon in the context of family mediation under Law 1/2006, April 6th, on family mediation in Castile and leon (BOE 3.5.2006, n.105, p.17034); official registration is required and the list is currently updated being available at the official website of the regional government at *http://servicios.jcyl.es/reports/rwservlet?medi&report=MEDIlistadoMediadores&C_PROV_ID=47*. My home university in Burgos offers current training under a Programme on Family Mediation in order to become expert; information for next academic course 2014/2015 is available online at *http://limbo.ubu.es/campusvirtual/catalogo/index.asp* (menu *Oferta Formativa, Estudios propios, Experto universitario, Mediación familiar).*

[44] See R. CASTILLEJO MANZANARES, *El nuevo proceso penal. La mediación,* cit., p. 89; also specifically M. J. SANDE MAYO, *Mediacion penal*

4) Last, provision of any other methods of restorative justice more than penal mediation could be also contemplated in Spanish legislation in the context of criminal justice. In concrete, resources enumerated by Recital 46 of Directive 2012/29/UE such as family group conferencing and sentencing circles could be also provided in order to expand the enforcement of restorative justice in the criminal context in Spain[45].

versus presunción de inocencia, in *La mediación: nuevas realidades, nuevos retos. Análisis en los ámbitos civil y mercantil, penal y de menores, violencia de género, hipotecario y sanitario,* cit., p. 229.

[45] See specifically J.M. TAMARIT SUMALLA, *El necesario impulso de la Justicia restaurativa tras la Directiva europea de 2012*, cit., p. 155. At the moment some practice on conferencing is taking place in Spanish prisons under the title of 'restorative encounters' (*encuentros restaurativos*) between victims and old members of the Basque terrorist organization ETA; see press news at *http://politica.elpais.com/politica/2013/10/24/actualidad/1382644334_666886.html*. First experience took place in Nanclares de Oca prison under the mediation of the lawyer Esther Pascual Rodriguez, who published the book *Los ojos del otro: encuentros restaurativos entre víctimas y ex miembros de ETA*, Sal Terrae, Santander, 2013. Nevertheless and despite of the name, the experience should be included under the context of penal mediation.

CHAPTER XIII

COMPARATIVE REMARKS

by Michele Caianiello[*]

TABLE OF CONTENTS: 1. Common Points and Differences. – 2. At the Root of the Problem?

1. Common Points and Differences

The contributions in the section dedicated to restorative justice show some interesting common points, which are worth reflecting on, even though shortly. The first common aspect refers to the lack of an institutional body conceived with the aim to foster and administer restorative justice or, in Italian, the '*giustizia senza spada*' (justice without sword)[1]. A comparison of the three analysed systems highlighted that the French legal system is the one that has developed practices targeted to fostering mediation between the conflicting parties since longer (as a matter of fact they started during mid 80s); however, no national bodies are actually here in charge of implementing the above, and only some good practices were developed at local level. One quite considerable difference, instead, relates to the introduction of a general clause regarding *restorative justice* into the regulatory framework of the respective legal orders.

The only Country among the three that did it was France back in 1993 (by introducing art. 41-1 in the Code of criminal procedure). Italy and Spain, on the contrary, have no general provisions to acknowledge full dignity to this form of controversy settlement: Spain introduced a form of reparation in the field of juvenile justice, which however applies even though

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[1] From the famous definition by M. G. MANNOZZI, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, Milan, 2003.

the victim does not consent to it, while mediation in its strictest sense is mentioned only once in the system and with a negative meaning, as the prohibition to implement it for some specific types of crimes (specifically for sex-related offences).

The question is more articulated in Italy. Here mediation practices have developed, as known, within the field of juvenile justice; however no explicit reference is made to the term 'mediation' (if ever required, mention is made to 'composition with the harmed party' and to 'putting right the wrongs' – as in art. 28 of Presidential Decree no 448 of 1988)[2]. Specifically, the most interesting concrete solutions were those started since the investigation phase, stemming from a provision (art. 9 of Presidential Decree no 448 of 1988) that only allows for the public prosecution and the judge to gather information on the personality of the youngster who is subject to investigation[3].

The turning point - at least in theory - took place with the assignation of the criminal authority to the Justice of the Peace, a neighbourhood jurisdictional body whose task, since inception, has been to foster the composition between the parties. The provisions ruling this authority, however, are not unambiguous, considering that the concept of restorative justice is never explicitly provided for, while the term 'mediation' is mentioned only in art. 29, par. 4 of Legislative Decree no 274 of 2000, with reference to some specialized bodies (where it is instead restated that the judge's task is to foster composition: but this is a different and more limited concept compared to that implied in mediation[4]). In the end, as regards ordinary justice, the term in question was introduced for the first time following the adoption of Law no 67 of 2014, in art. 464-*bis*, par. 2, let. *c)*

[2] Theoretically, each of these concepts has a different meaning, that can only approximately (risking misunderstanding) be associated with mediation. On this subject, see R. ORLANDI, *La mediazione penale tra finalità riconciliative ed esigenze di giustizia*, in *Riv. dir. proc*., 2006, p. 1171, nt. 1 (a contribution later published also in R. KOSTORIS (ed.), *Accertamento del fatto, alternative al processo, alternative nel processo*, Urbino Conference Proceedings, 23rd-24th September 2005, Milan, 2007, p. 165).

[3] On this issue see V. PATANÈ, *Mediazione penale*, in *Enc. dir*., *Annali* II, t. 1, 2008, p. 572, particularly p. 585; S. RENZETTI, *La mediazione nel microsistema penale minorile*, in *Riv. dir. proc*., 2014, p. 642.

[4] See R. ORLANDI, *La mediazione penale tra finalità riconciliative ed esigenze di giustizia*, cit., p. 1171. See also M. G.. MANNOZZI, *La mediazione nell'ordinamento giuridico italiano: uno sguardo d'insieme*, in M. G.. MANNOZZI (ed.), *Mediazione e diritto penale. Dalla punizione del reo alla composizione con la vittima*, Milan, 2004, p. 9.

of the Italian code of criminal procedure (as well as in art. 141-*ter*, par. 3, of the implementing provisions in the Italian code of criminal procedure), in a context that however seems to leave limited room for the development of real restorative justice as conceived in the doctrine[5] (and well before established by the practices started as of the 70s in the Anglo-American legal world[6]).

In addition to those mentioned above one more common point is the limited use of similar forms of administration for criminal cases. Independently upon the rules regulating the exercise of the legal action, it is the principle of legality particularly in processes - however also substantially even though higher flexibility is to be detected herein - that induces the systems to resort to mediation forms in a number of extremely limited cases. On this point, the most surprising data are the French ones, where, even though a general provision exists concerning *justice réparatrice*, similar instruments are sporadically used in a range from 1.5% of cases for ordinary justice to 1% only as regards juvenile justice. The limited use of restorative justice forms in Italy and Spain is less surprising: here the system seems to expressly limit the activity of mediation bodies to peripheral fields.

2. At the root of the problem?

The impression drawn from the joint reading of national reports is that they have a common approach to the issue of restorative justice, whose concrete result leads to a limited use of a similar alternative methodology to settle controversies. Before trying to understand the causes for this limited use of restorative justice, it is worth underlining how - pursuant to what effectively highlighted by some scholars - mediation is 'something different' compared to criminal justice, and we thus

[5] On this issue, see the recent essay by M. G. MANNOZZI - G. A. LODIGIANI, *Formare al diritto e alla giustizia: per una autonomia scientifico-didattica della giustizia riparativa in ambito universitario*, in *Riv. it. dir. proc. pen*., 2014, p. 133.

[6] Please refer to the wonderful essay by A. ACORN, *Compulsory Compassion. A Critique of Restorative Justice*, UBC Press, 2004, p. 27, 46 and the following.

have the possibility to imagine a 'different' criminal law[7]. In the development of this practice at the beginning of its existence, a different vision is given of the State and of its functions: more specifically, a desire is seen in the community to regain possession of the spaces for civil cohabitation, by managing them and subtracting them from the rule of the law and of the state institutions. It is not a case that in those same years new forms of cohabitation were experimented both in the family - broadly speaking - and in the society.

From this point of view, the ideas at the root of this phenomenon are somehow revolutionary[8], and they can remind of some phenomena for the direct and immediate management – by the social consortium of belonging – of the crimes committed by one of its members (as the *gacaca*[9] tribunals of African origin, sometimes studied as a possible alternative modality for the management of conflicts compared to the institution of international criminal courts), or of the 'sin', if we think about the phenomenon of public confession in front of the community typical of the first Christians at the dawn of the church. Not by chance it was thus highlighted how appropriate it is to define mediation as a 'practice', to oppose it to the concept of proceedings or procedures: the former is administered by the community, and therefore it aims at excluding the State's authoritative intervention (that only acknowledges the outcome of the same); the latter is instead managed directly by the state institutions, following a traditional view of western public law (and of procedural law specifically). If we consider this hints as references, it is clear how, with the introduction of the mediation alternative, the national legislator - definitely in Italy but, following the outcomes from the contributions to this research, in France and Spain as well - was mostly pursuing the goal to use restorative justice for deflationary, efficiency purposes and not so much

[7]Therefore, quoting Radbruch ('not a different criminal law, but something different from criminal law'), C. PALIERO, Report on the issue *La mediazione penale tra finalità riconciliative ed esigenze di giustizia*, in *Accertamento del fatto, alternative al processo, alternative nel processo*, cit., p. 111.

[8] J. FAGET, *I 'ragionevoli compromessi' della mediazione penale*, in *Studi sulla questione criminale*, 2009, p. 62.

[9] Please see: M. VOGLIOTTI, *Quale giustizia per il genocidio? La soluzione «Gacaca» in Ruanda*, in *Legisl. pen*., 2003, p. 294.

that to try and start new self-administered ways for the administration of conflicts in the community.

As a matter of fact, paradoxically, mediation best worked where it is not explicitly mentioned (the juvenile justice system), at least in Italy. The same EU legislator seems to lack an autonomous perspective, given that they seem to use restorative justice to protect a specific party, the victim, instead of repairing – through alternative methods to settle the conflict – the harm made to the social fabric by the crime and restarting dialogue among those who were its protagonists, both passively and actively[10]. The same efficiency and deflationary intent seems to lay at the basis of the probation reform introduced with the Law no 67 of 2014, upon which, since its first conception, authoritative doubts had been expressed as regards the consistency with the constitutional principles[11], later confirmed following its enforcement[12].

The concept of mediation – mentioned in both art. 464-*bis*, par. 2, let. *c* of the Italian code of criminal procedure and art. 141-*ter*, par. 3 of the implementing provisions of the Italian code of criminal procedure – seems to be used here more as an excuse than as an assumption for work to be concretely referred to. The whole new testing seems destined to the exclusive administration of the state institutions (the public prosecution and the judge, as regards the starting and the end of the situation; the national probation service as concerns the organization and the control of the re-socialization path for the defendant who aspires to being admitted to this special ritual form): what is not to be seen - at least considering the theoretical regulatory provisions - is the real involvement of people to start a new dialogue, that is actually the essential goal, the *raison d'être* justifying mediation as opposed to the traditional administration of the criminal justice.

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[10] As Jacques Faget correctly observes: 'Don't we sometimes say that the victim is the first one to report to the police?' in *I 'ragionevoli compromessi'*, cit., p. 59.

[11] To this purposes, please see: F. VIGANÒ, *Sulla proposta legislativa in tema di sospensione del procedimento con messa alla prova*, in *Riv. it. dir. proc. pen*., 2013, p. 1302-1303; F. CAPRIOLI, *Due iniziative di riforma nel segno della deflazione: la sospensione del procedimento con messa alla prova dell'imputato maggiorenne e l'archiviazione per particolare tenuità del fatto*, in *Cass. pen*., 2012, p. 7.

[12] R. ORLANDI, *Procedimenti speciali*, in G. CONSO - V. GREVI - M. BARGIS (eds.), *Compendio di procedura penale*, Padua, 2014, p.746.

Substantially, to use the words of one of the major experts on this phenomenon, Jacques Faget, the typical approach of 'technocratic cynicism' clearly dominates at national level[13]: a 'derived' (e.g. incidental) procedure is introduced into the ordinary code, in order to close a number of pending cases in a quicker way (and maybe to solve the problem of prison overcrowding in Italy as well). It is clear that a similar method is destined to fail if we think about the diversity in the context and in the conception that marked its inception in its original idea. One more issue that is common to the perspectives in different countries is that of the difficulty to harmonize mediation with the constitutional principles of criminal proceedings: particularly, with the principal of legality, the presumption of innocence and the right to remain silent (in its interpretation as *nemo tenetur se detegere*)[14].

The impression you have is that restorative justice may be better applied where that peculiar part of public law represented by the trial is more flexible; on the contrary, it is extremely difficult to introduce forms of restorative justice in systems characterized by a generally strict approach to the administration of criminal cases. Specifically, attention is paid to the availability of the private people's rights, and of the defendant's ones mostly: it is clear how each mediation practice aimed at the settlement of a controversy may easily find its place within those systems where even the most essential individual protections are available. In other words, mediation best works where - as concerns the principles first - a wider negotiating room is made available for the parties.

Of course, in saying this I am not at all stating that a bunch of essential rights characterised by pure flexibility and negotiability is to be preferred to that already acknowledged in our democracies[15]: however it is to be recognized, in my

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[13] J. FAGET, *La médiation. Essai de politique pénale*, Paris, 1997, p. 206; R. ORLANDI, *La mediazione penale*, cit., p. 1175.

[14] G. UBERTIS, *Riconciliazione, processo e mediazione in ambito penale*, in *Riv. it. dir. proc. pen*., 2005, p. 1321 (later in *Accertamento del fatto, alternative al processo, alternative nel processo*, cit., p. 143, particularly pages 148 to 150); R. ORLANDI, *La mediazione*, cit., pages 1183 to 1184.

[15] For all, on the dangers connected with a prevalently contractual management of rights and guarantees in the criminal trial, M. NOBILI, *Nuovi modelli e connessioni: processo - teoria dello Stato - epistemologia*, in *Studi in ricordo di Giandomenico Pisapia*, Milan, vol. II, 2000, p. 479. See A. CAMON, *Accordi processuali e giustizia penale: la prova patteggiata*, in *Riv.*

opinion, that this is one of the most important points of stress, which is difficult to overcome, if you really want to open up some room for mediation to a wider extent.

dir. proc., 2008, p. 77, as for the risks linked to an uncontrolled use of a contractual practice at evidential level.

SECTION 2

GENDER-BASED VIOLENCE

CHAPTER XIV

THE FRENCH MEASURES FOR THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE*

*by Julie Alix**

TABLE OF CONTENTS: 1. Introduction. – 2. The fundaments of the measures. - 2.1. The sociological context. - 2.2. The juridical context. - 3. The content of the protection provision in French law. - 3.1. Protection via restrainment. - 3.2. Protection through the deprivation of freedom.

1. Introduction

In dedicating chapter IV to the protection of victims of crime, Directive 25 October 2012, establishing minimum standards on rights, support and protection of victims of crime, highlights a new class of obligations of Member States towards the latter, i.e. the guarantee of protection measures. In French law, the protection of victims is a recent concern and the individuals who benefit from the provision which to date is certainly more efficacious are victims of domestic violence.

Throughout the Directive, obligations are indicated generally and do not specifically concern the protection of victims of domestic violence. However, article 22, par. 3, identifies victims of gender-based violence and of violence in a close-relationship as potentially having specific protection needs. The specific protection needs of victims of domestic violence have been at the centre of juridical interest for several years. Over the years and throughout reforms, a veritable

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protection measure was defined in French law for victims of domestic violence. Regarding this, it is important to understand its fundaments (I), before illustrating the content (II).

2. The fundaments of the measures

The recent interest of the legislator for the matter of the protection of victims of domestic violence can be attributed to the needs of a specific sociological and juridical context (since these are naturally linked).

2.1. The sociological context

From the beginning of the years 2000, numerous studies have been dedicated to domestic violence or violence against women in France[1], and recently a study at European level was carried out by the Agency of fundamental rights[2]. Although characterised by different approaches and methods[3], the studies highlight the impact of domestic violence, even in the presence of a high "obscure number". According to the French National Observatory of delinquency and criminal responses[4], 174 individuals were killed in 2012[5] by a spouse or former spouse,

[1] The first large-scale survey carried out on the topic is the *Enquête sur les violences faites aux femmes* (ENVEFF), of 2000. This was followed by the surveys *Contexte de sexualité en France* of 2006 and the surveys on victimisation carried out by INSEE *Enquêtes permanentes sur les conditions de vie des menage* (EPCVM), substituted in 2007 by the surveys *Cadre de vie et sécurité*. Currently, INED (French National Institute of Demographic Studies, NdT), entitled *Violences et rapports de genre: contextes et conséquences des violences subies par les femmes et par les hommes* (VIRAGE), the results of which are expected in 2015.

[2] *Violences à l'égard des femmes. Une enquête à l'échelle de l'Union européenne*, 5 March 2014, *http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance_fr_0.pdf*.

[3] The Union's survey is based on a representative sample and refers exclusively to violence against women, while the ONRDP [French National Observatory of delinquence and criminal responses, NdT] records all acts of violence involving couples.

[4] Annual report 2013.

[5] 148 women and 26 men. According to studies, men who commit murder do so within the sphere of an "appropriation study", while domestic murders committed by women, on the other hand, can be attributed to a "preservation strategy" (V. RAFFIN, *L'homicide conjugal, état des*

35,454 acts of non-fatal violence were recorded in 2012 by the police services and 107,130 reports of users and individuals registered in the "domestic disputes" list were collected. At Union level, it is calculated that 13 million women between the age of 18 and 74 suffered physical domestic violence during the 12 months before the survey and 3.3 million were victims of sexual violence. In addition to the numerical importance of the phenomenon, which justifies the particular attention paid by the institutions to acts of domestic violence, a further specific aspect of such delinquency is limited to the context of the commission of violence, which takes place within the family (the family as a protective shell but also as a potential lead weight). The specific context of commission in fact leads to two types of behaviour. On the part of the victim, an attitude of shame, even of guilt, and of reserve: reports of such violence are therefore widely underestimated with respect to the reality of inflicted violence[6]. On the part of the perpetrator, violence attributable to a daily relationship and to a context of tension, often profoundly rooted, offers fertile ground for escalation.

The professionals record an often very rapid development of actions. Regarding this, a magistrate in the Public Prosecution remembers the case of a man to whom a prevention measure had been applied (in French law *rappel à la loi*, NdT] for minor acts of violence and who, a few months later, killed his partner. Such elements therefore justify specific protection needs for victims. We must add to the remarks above (another concomitant element) the absolute refusal, by management and public opinion, of violence within the couple and, in particular, of violence in general, in a period of equality, more or less confirmed, between the sexes. Therefore we come to the juridical context.

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connaissances et projet de recherche en région PACA, in *Etudes et travaux de l'ORDCS*, April 2012, n. 3, p. 11: *http://ordcs.mmsh.univ-aix.fr /publications/Documents/Publication_v2_VR.pdf*).

[6] According to the study, *Atteintes personnelles et opinions sur la sécurité déclarées par les hommes et les femmes interrogés lors des enquêtes "Cadre de vie et sécurité" INSEE – ORDP* (*Synthèses et Références*, March 2013, n° 1), 9.3% of women between 18 and 75 years of age who declared themselves victims of domestic violence between 2007 and 2011 started that they had reported it to the authorities: *http://www.inhesj.fr/sites/default/files/syntheses_references_mars_2013-1.pdf*.

2.2. The juridical context

In recent years, the juridical corpus in its struggle against domestic violence has become significantly enriched.

Until 2011, the Inter-American Convention for the prevention, sanction and elimination of violence against women (*Convenzione di Belém do Pará*) of 1994 was the only binding international agreement that explicitly banned violence against women. In Europe, the Council of Europe recently concerned itself with the matter and on 12 April 2011 the 12 April 2011 the Convention of the Council of Europe on preventing and combating violence against women and domestic violence (Istanbul Convention[7]) was signed. The aim of the Convention is to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence"[8]. To this end the content of the Convention is extremely dense (structured in 81 articles) and introduces, for Member States, obligations of prevention, protection and assistance for victims, as well as the repression of acts of violence against women, whether they be "physical, sexual, psychological or economic violence"[9], including, specifically, threats, forced marriages or abortions, sexual molestation or mutilation. Again in 2011, on 13 December, the directive on the *European protection order*[10] was adopted. Based on the principle of reciprocal recognition of convictions and judicial decisions, the directive allows the judicial authority of a member State to issue a European protection order, aimed at maintaining and continuing to guarantee the protection offered to a person from acts of criminal significance of another person, within the State of issue, in each other member State[11].

[7] On 10 July 2014, the Convention was signed by thirty-six States and ratified by thirteen, including France, that ratified it on 4 July 2014. The Convention came into force in the States on 1st August 2014.

[8] Art. 1 *a)*.

[9] Art. 3 *b)*.

[10] Directive 2011/99/EU of the European Parliament and the Council of 13 December 2011 on the European protection order.

[11] Art. 1 of the above-mentioned Directive: "This directive establishes provisions that allow the judicial authority or equivalent of a Member state, in which a measure of protection has been adopted aimed at protecting a person from criminal actions of another person such that the life, physical or psychological wellbeing, dignity, personal freedom or sexual wellbeing of that person are put in danger, to issue an order of European protection to allow the competent authority of another member State to continue protecting the

At supra-national level, the influence of the jurisprudence of the European Court of human rights on the action of States concerning fighting domestic violence cannot be ignored. In actual fact, according to procedures that are by now classical[12], the European Court imposes on member States, above all if it is a matter of protecting the life, dignity and safety of individuals against inhuman or degrading treatment, or privacy, positive obligations to prevent and repress actions in breach of said fundamental rights.

In particular, the Court developed an important specific jurisprudence for protecting the victims of domestic violence from 2007-2008[13]. There are numerous elements of the jurisprudence of the Court worthy of examination. Above all, States must promote and apply efficiently a device designed to repress domestic violence and *to protect victims.* The positive obligation refers not only to protection against acts in breach of the right to life but also to safety, susceptible to being considered inhuman or degrading treatment (regarding this, the Court considers that the anxiety caused by the fear of new acts of violence can be considered inhuman treatment)[14].

Later, starting from the *Opuz v. Turkey* sentence of 9 June 2009[15], the Court condemned States that had not fulfilled the obligation of protection, not only in breach of articles 2 and 3 of the Convention but also for breach of article 14 (ban on discrimination), associated to articles 2 and 3 of the Convention, if it should believe that the violence suffered by women was based on sex.

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person within such a member States, following a criminal act or a presumed criminal act, in compliance with the national law of the emitting State". The Directive has not yet been transposed into French law (it will however be absorbed on 11 January 2015).

[12] G. GIUDICELLI-DELAGE - S. MANACORDA - J. TRICOT (eds.), *Devoir de punir? Le système pénal face à la protection internationale du droit à la vie*, Paris, 2013.

[13] See specifically the document on the topic *Violence à l'égard des femmes*, available at the address *http://www.echr.coe.int/Documents/FS_Violence_Woman_FRA.pdf.*

[14] ECHR, 28 May 2013, *Eremia and o. v. République de Moldova*, C-3564/11. In this sentence, the Court condemns, for breaching article 8, the Moldavian authorities that did not prevent daughters from being present during acts of violence against their mother.

[15] ECHR, C-33401/02. The solution was recently confirmed by ECHR, 28 May 2013, *Eremia and o. v. République de Moldova*, C-3564/11, cit.

So, this is therefore more a matter of an international obligation, rather than of context, for States, to protect victims of domestic violence. The directive of 25 October 2012 is the successful result of an already well-constructed measure, through a general clause (article 18), on the basis of "Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of, emotional and psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members". The directive here introduces a distinction between protection against physical violence and protection against psychological violence and lists, in article 19 and subsequent articles, protection measures against psychological violence caused by criminal proceedings: the right to the absence of contact between the victim and the perpetrator of the crime (art. 19), the right of victims to protection during criminal investigations (art. 20), the right to protection of privacy (art. 21). Victims with specific needs (such as victims of domestic violence, where this is established by an individual assessment) are entitled to special measures during criminal investigations and the judicial trial, above all in pointlessly painful interviews[16].

In particular, all interviews of victims of violence in close relationships, if the victim so wishes, are conducted by a person of the same sex, provided that the course of the criminal proceedings will not be prejudiced (art. 23, par. 2, let. *d*).

For several years, fighting against domestic violence has been one of the most important policies in French law. The first law specifically reserved to the matter is the law of 4 April which strengthens the prevention and repression of violence within the couple or against minors, followed by the law of 9 July 2010 on acts of violence aimed specifically against women, violence within the couple and the repercussions of the latter on children[17]. Specifically this is a veritable targeted law, in that it acts on multiple, civil and criminal provisions, susceptible to

[16] Art. 23, par. 2 and 3.

[17] Law no 2010-769 of 9 July 2010 on acts of violence specifically against women, acts of violence within the couple and the repercussions of these on children, in *JORF* – no 0158, 10 July 2010 p. 12762.

contribute to the prevention, protection and repression of violence within the couple.

The law of 5th August 2013, which brings French law in line with the international commitments of France, criminalised the attempt to interrupt pregnancy without the consent of the woman[18] to make French law conform with the Istanbul Convention[19].

The draft law on equality between men and women under examination in Parliament[20] proposes to further strengthen, specifically extending it to all French territory, the tele--protection of specific victims of domestic violence[21], or further limiting the use of mediation concerning domestic violence, if explicitly requested by the victim[22].

However, the measure of protection of victims of domestic violence is not reduced to ad hoc mechanisms. French law, and

[18] Art. 223-11 French criminal code.

[19] Art. 41.

[20] *http://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000027654910&type=general*.

[21] Chapter III (articles from 7 to 17) contains measures against violence and the breaches of dignity. These include the strengthening of the measure of the order of protection established via the law of 9 July 2010 (article 7); termination, unless requested otherwise by the victim, of recourse to criminal mediation in cases of violence committed within the couple (article 8); affirmation of the principle of removing the violent spouse from the home of the couple (article 9); generalisation of tele-protection of the victims (article 10); the possibility for the Prosecutor of the Republic to ask the perpetrator of the crime to follow, at his own expense, a sensitisation program concerning preventing and fighting sexist violence (article 15).

[22] Draft of art. 41-1, paragraph 5: "If the perpetrator of violence is the spouse or former spouse of the victim, or the partner or former partner within the sphere of a civil partnership, the cohabitant or former cohabitant, the mediation procedure is started exclusively following the explicit request of the victim. In such a case, the perpetrator of violence shall also be subject to the application of a prevention measure [in French law, *rappel à la loi,* NdT], in compliance with paragraph 1 of this article. If, following the mediation action between the perpetrator of the violence and the victim, new acts of violence are inflicted by the spouse or former spouse of the victim, or by the partner or former partner within the sphere of a civil partnership, or by the cohabitant or former cohabitant, it is no longer possible to proceed further with mediation, in this case, unless particular circumstances exist, the Prosecutor of the Republic shall apply the procedure of criminal composition or shall launch criminal proceedings". According to the magistrate Edouard Durand, mediation must "as a principle, be excluded from the context of domestic violence. This procedure would lead to a face to face, by hypothesis unfair, between the perpetrator and the victim" (*Violences conjugales et parentalité*, Paris, 2013 p. 33).

above all criminal law, offers generous pertinent instruments for the protection of victims of domestic violence.

3. The content of the protection provision in French law

First of all it must be pointed out that the French provision for the protection of victims of crime within the couple does not make any official distinction based on the sex of the victim and is not based on gender protection[23], but on the dignity and equality of individuals. Also, although the provision is, in fact almost exclusively destined to women, it also applies to male victims of domestic violence. Equally, the provision is applicable irrespective of the nature of the "conjugal" – matrimonial, civil partnership, cohabitation link, and of the fact that the perpetrator is the current or former spouse of the victim[24].

A last clarification, the established measures apply theoretically both to the victims of physical and psychological acts of violence since French law does not make any distinction between the two[25]. However, due to their very nature, certain measures are above all destined to be applied to situations of physical threats in order to protect individual safety or, in a more current version, to prevent serious attempts at the life or physical safety of the victim. Currently the protection of victims envisages first and foremost restrainment of the perpetrator. In fact the preventive dimension of the law is involved. However, if prevention should fail, the repressive dimension takes over and restrainment is replaced with the deprivation of freedom. In both cases, protection translates into restrainment and therefore, in a certain way, into elimination[26].

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[23] However the law is struggling to assume such a position: the law of 9 July 2010 is on acts of violence specifically aimed at women, acts of violence within the sphere of the couple and the repercussions of these on children.

[24] This is one of the main contributions of the law of 4 April 2006, i.e. the having taken into consideration the emotional dimension of the relationship between the perpetrator and the victim. The present or passed "conjugal" link in the *lato sensu*, therefore represents an aggravating factor for numerous crimes in breach of the right to life or the safety of the person as well as for crimes of a sexual nature.

[25] Art. 222-14-3 French criminal code states that "the acts of violence provided by the criminal code are repressed irrespective of their nature, including therein acts of psychological violence".

[26] The protection of victims increasingly also involves obligations of a therapeutical nature to which the perpetrator may be subjected, within the

3.1. Protection via restrainment

The essential protection measure against domestic violence resides in restrainment of the perpetrator with regard to the victim, through banning the perpetrator from going to the home of the victim and from meeting or even establishing contacts with the same. In French law the ban can be attributed to a wide range of provisions, of a criminal and extra-criminal nature.

The law of 9 July 2010 in fact offered the judge for family actions the right to provide a protection order[27] to the probable victim of domestic violence susceptible to compromising safety. The order may entail any kind of restrainment (ban on receiving, meeting or coming into contact with the designated persons) as well as a ban on carrying arms associated to the dispossession of arms order[28].

The protection order is an emergency procedure[29] in response to a situation of danger. Its particular aspect is to be found in its being adopted by the judge on the basis of proof produced by the parties and discussed in their presence, where "serious grounds for considering probable the commission of presumed violence and the danger to which the victim is exposed" exist. Therefore, the judge is not obliged to verify the truth of violence, since its probability is sufficient. Consequently, reports, recordings, testimonies or medical certificates can constitute sufficient elements for establishing the probability of acts of violence. Some authors[30] are critical of

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sphere of a preventive judicial control or an obligation to associate a social-judicial treatment with a care order. The draft law for equality between men and women also envisages the application of a new measure of making individuals responsible for preventing and combatting violence within the couple and sexist violence, which may be proposed as an alternative to criminal proceedings, a criminal composition measure, obligation of suspended or accessory sentence (article 15).

[27] Art. 511-9 s. of the French civil code.

[28] In addition to injunctions, the order can specifically deliberate on the residence of the spouses, on the exercise of parental power or on provisional admission to legal aid. On the other hand, the judge cannot order that a film of a scantily-dressed victim cannot be broadcast on internet, since the law does not provide for such a power: X. LABBÉE*, Obs. sous CA Douai, 23 février 2012*, in *AJ Famille*, 2012 p. 502.

[29] The informative report on the coming into force of law no 2010-769 of 9 July 2010, delivered in 2012 to the National Assembly acknowledged an average issue deadline of 26 days.

[30] E. BAZIN, *Violences familiales*, in *Rép. proc. civ.*, Dalloz, n° 47.

the hybrid position of the judge, half civil and half criminal, and that, from a procedural point of view, he is limited to the role of a referee of the documentation, since he does not have any power of even summary ascertainment. The order is currently issued for a duration of four months (the draft law for equality between men and women proposes to extend it to six), renewable in the presence of divorce proceedings or when a request for personal separation is underway. On the other hand, there is no order for criminal proceedings to be underway to establish that violence actual exists. The protection order is a veritable safety measure, irrespective of any guilt but re-attributable to a situation of danger, without a punitive vocation although it is perceived differently.

Measures to retrain the spouse established in a criminal context can equally be considered safety measures. Such measures must be decided during any stage of the criminal proceedings and also irrespective of any criminal action. In fact, restrainment of the violent spouse may entail dismissal of the case without going any further[31] or also the obligation ordered within the sphere of a measure alternative to actions of criminal composition[32].

In the phase prior to sentencing, the ban on meeting the victim may constitute the obligation of a judicial control during investigations[33] and may be accompanied by an order to live outside the conjugal home and a ban on approaching the home[34]. Moreover, the ban on meeting the victim is a modality of the sentence, imposed as an obligation within the sphere of a social-judicial treatment[35] or of a suspended sentence[36]. It can assume the form of an accessory sentence[37], susceptible to being pronounced by the relevant judge and to being carried out

[31] Art. 41-1 6° French code of criminal procedure.

[32] Art. 41-2 French code of criminal procedure. The ban on meeting, receiving or coming into contact with the victim can be imposed for a maximum duration of six months.

[33] Or pending the hearing for pronouncing the sentence, when the defendant is convened by a formal notice and a *juge des libertés et de la détention* has ordered that the perpetrator should be subjected to judicial surveillance (art. 394 French code of criminal procedure).

[34] Art. 138 9° and 17° French code of criminal procedure. The victim is informed of the measure and the consequences of a possible breach.

[35] Art. 131-36-2 French criminal code.

[36] Art. 132-45 13° e 19° French criminal code.

[37] Which widely exceeds the sphere of the fight against domestic violence, since, on the other hand, it was conceived specially for this purpose.

both *in substitution* of imprisonment[38] and *in addition* to the end of the period of imprisonment.

At the end of the criminal path, it is still possible to impose restrainment as a part of alternative measures to imprisonment (conditional release[39], electronic surveillance[40], or early release in application of reductions in sentence[41]). Article 712-16-2 of the criminal procedure code also establishes a more general power in favour of courts applying the sentence: "If there is a risk that the convicted person may approach the victim (…) and with respect to the nature of the facts (….) such a meeting must be avoided, the application of sentence courts complete any decision that entails temporary or final termination of imprisonment with a ban on establishing contact with the victim or the plaintiff and, if necessary, of approaching the home or the place of work is the responsibility of the courts that apply the sentence". Therefore French law allows the Judiciary to establish a sort of *cordon sanitaire* around the victim of domestic violence. The efficacy of protection of the victim through physical restrainment of the perpetrator of violence is guaranteed by proteiform control mechanisms aimed at allowing a rapid reaction. Control is exercised by the police authorities since the persons in possession of a restraining order decided in the criminal sphere are registered in the wanted list[42]. However, control is above all exercised by the victims themselves. Above all, the victim is informed of the bans to which the perpetrator is subjected and has the right to warn the judicial authority of any breach by the perpetrator of his obligations. Following this, the law of 9 July 2010 established a tele-protection device that was experimented in some courts[43] and which is being introduced into general use[44]: the *Téléphone portable Grand Danger* (TGD). As the name indicates, this is an emergency mobile phone, fitted with a pre-programmed call button directly connected to professional operators. The mobile phone can be handed over by the Prosecutor of the Republic to

[38] Art. 131-6-14° French criminal code: since as an alternative to imprisonment, the ban cannot exceed three years.

[39] Art. 731 French code of criminal procedure.

[40] Art. 723-10 French code of criminal procedure.

[41] Art. 721-2 French code of criminal procedure.

[42] Art. 230-19 French code of criminal procedure.

[43] In the French departments of *Seine Saint-Denis* and *Bas-Rhin.*

[44] Draft law for equality between men and women, article 8.

a woman considered to be particularly exposed to a serious risk of domestic violence[45]; in actual fact, the priority of the measure is to prevent domestic homicides. In the event of danger, the call is immediately put through to a telephone operator (a private supplier who is in possession of all the victim's information) which, after assessing the situation of danger, contacts the police services or the *gendarmerie* via a direct dedicated line so that they may intervene immediately (within an average of ten minutes within the area of jurisdiction of Tribunal de grande instance of Bobigny[46]). Within the jurisdiction of the Court of Bobigny, or the pilot jurisdiction of application of the measure, between 2009 and 2013 one hundred and nine women benefited from the device and, in 2013 thirty-two were provided with an active telephone. Six were in possession of an emergency mobile phone pending the release from prison of their aggressor[47].

The described devices had a dual purpose: to reassure the victim and above all to rapidly identify breaches of orders. In fact the breaches allow the judicial authorities to adopt response measures and specifically to proceed with imprisoning the violent spouse. Restrainment and the deprivation of freedom are

[45] The draft law for equality between men and women in the version adopted in its first reading by the national assembly envisages the introduction of an article 41-3 in the French criminal procedure code in justification of said power of the prosecution: After article 41-3 of the criminal code, article 41-3-1 is included which states the following: "Art. 41-3-1. – Where there is a serious risk of threats to a victim of violence by the spouse, cohabitant or civil partner, the Prosecutor of the Republic may assign to the victim for a renewable duration of six months and subject to the explicit consent of the victim, a tele-protection device which allows the victim to alert the public authorities. With the consent of the victim, the device can, if necessary, allow the same to change location when the alarm is activated. The tele-protection device can only be allocated if the victim and the perpetrator of violence are not cohabiting and if the latter is subject to a judicial restraining order banning contact with the victim within the sphere of a protection order, alternative measures to criminal actions, criminal composition, judicial control, house arrest with electronic surveillance, conviction, alternative measures to imprisonment or safety measures. This article also applies if the perpetrator of violence is a former spouse or cohabitant of the victim, or any civil partner, and when there is a serious risk of threats for a victim of rape."

[46] Informative report reported by the delegation of the national Assembly for the rights of women on the draft law for equality between men and women.

[47] *www.seine-saint-denis.fr/Telephone-portable-d-alerte.html*.

in fact complementary in protecting victims of domestic violence.

3.2. Protection through the deprivation of freedom

Such a complementary nature is not expressed chronologically or gradually.

Consequently, imprisonment established *in order to protect the victim* may precede restrainment (this is preventive detention). The measures in question are chosen when they specifically constitute the only way of preventing the person from putting pressure on the victim[48]. Imprisonment[49], aggravated in such a context[50] or house arrest[51], declaration of which *ab initio* is proof that the authorities consider the restraining order to be insufficient, at least initially, are applied again. Deprivation of freedom, either under the form of preventive detention or home arrest, therefore makes it possible to eliminate the risk of a meeting between the victim and the aggressor.

If it should *follow* the breach of a restraining order, deprivation of freedom has an irregular nature.

Sometimes it assumes the form of the withdrawal of a favourable measure (judicial control, measures alternative to detention) and the judge may decide immediately for imprisonment[52]. In other cases of sentences given for independent incrimination (for example, the breach of a

[48] Art. 62-2 e 144 French code of criminal procedure.

[49] Which systematically occurred when the crime produced a result (violence, molestation within the couple) or (threats, attempt of voluntary interruption of pregnancy – a new form of attempted crime occurred introduced with the law of 5 August 2013.

[50] The commission of acts of violence against a spouse or former spouse is an aggravating circumstance: art. 132-80 French criminal code and, e.g., 222-8 6°, 222-10 6°, 222-12 6°, 222-13 6°, 222-24 11°, 222-28 7° of the same code.

[51] The conditions for house arrest with the application of a mobile electronic surveillance device can no longer be handled within the context of domestic violence, since it is sufficient that such a measure be pronounced for the perpetrator to be given a sentence of five years of imprisonment and not seven, in compliance with art. 142-12-1 French code of criminal procedure and 131-36-12-1 French criminal code.

[52] Art. 141-2 during the instruction phase, art. 712-16 3° ff. during the execution of the sentence phase.

protection order is a crime punished with a maximum sentence of two years of imprisonment[53]). It is also interesting to note that, with law of 12 December 2005 which provided the taking into consideration of the interests of the victim and actual protection of society as a function of the sentence, the judge certainly has the option of giving a sentence that deprives the perpetrator of his freedom with aims that are more protective than punitive, although the distinction between the two is totally artificial.

At the end of this discussion, it can be stated therefore that the French criminal police in its fight against domestic violence is decidedly oriented towards protection of victims, at the price of heavy restrictions of the freedom of the perpetrators and often also of the suspects. Does the French provision comply with the obligations introduced by the European directive? Paradoxically, it is only silent on the points raised by the directive of 25 October 2012 for the protection of victims with specific needs: i.e., in particular, it fails to assess the needs and, if necessary, to avoid in the measure the possible increase in interviews of the victim, or again to order that interviews with the victim of domestic violence should be carried out by a person of the same sex, and if the victim so wishes, that the person should always be the same one and in suitable places.

However, the reason for this could be found in the fact that French law tackles cases of major urgency, i.e. situation where there is a danger for physical safety, while the directive, which at times introduces provisions which are above all symbolic, mainly governs situations of psychological violence susceptible to being introduced by the procedure. Concerning these aspects, an amendment must certainly be made in the margin of the criminal procedure code.

[53] Art. 227-4-2 French criminal code.

CHAPTER XV

VICTIMS OF DOMESTIC VIOLENCE IN THE ITALIAN JUDICIAL SYSTEM

by Silvia Allegrezza[*] *and Stefania Martelli*[**]

TABLE OF CONTENTS: 1. Cultural barriers and contemporary difficulties towards a criminal victim-centric policy? - 2. Criminal protection of the victim: analysis of the amendments made to essential criminal law. - 3. The framework of amendments to procedural criminal law.

1. Cultural barriers and contemporary difficulties towards a criminal victim-centric policy?

The wave of domestic violence and criminal episodes against women in Italy seems to be relentless. The increase in violence is rooted in the culture of male violence over women, in that machismo, which represents an indestructible constant of the collective conscience, currently is undeniably in decline.

Added to this is the rampant frustration of the male condition due to the economic crisis, which seems to have pushed some men to venting their violence against their wives, partners, fiancées and, horror of all horrors, against their children. These factors are at the basis of the disconcerting episodes reported every day in the news[1]. How does the criminal regulatory system react in the face of such phenomena?

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[1] G. LUSARDI, *Femminicidio, l'antico volto del dominio maschile*, Correggio, 2013; P. VINCIGUERRA - E. IACOBELLI, *Femminicidio: capire, educare, cambiare*, Bologna, 2013; L. GAROFANO - R. DIAZ, *I labirinti del male: femminicidio,* stalking *e violenza sulle donne: che cosa sono, come difendersi*, Formigine, 2014.

Until a few decades or so ago, Italian criminal legislation was considerably late in opposing and punishing domestic and gender-related violence. Especially with reference to violence against women, the original version of the Italian criminal code of 1930 envisaged certain kinds of crimes which, far from protecting women, placed them on a level of inferiority compared with men[2]. An example of this would be the crimes of concubinage and adultery which punished the unfaithful wife in a more severe manner than the husband guilty of the same conduct (art. 559 and 560 Italian criminal code). The constitutional Court recognised criminal equality among spouses only in 1969, declaring unconstitutional the discriminatory profiles inherent in such provisions[3]. Similarly, the crime of rape was considered a crime against public morality, so that any forced marriage between the victim and the rapist cancelled the criminal significance of the rape. And again: at least until the Seventies, domestic violence was considered *secundum naturam* and minimized as considered as blows and injuries. It was only in 1996 that the legislature turned his attention to the criminal discipline defining sexual violence as a crime against the person, irrespective of where it takes place[4].

Further regulatory flaws concerning the protection of the victim are still to be found: *in primis* the lack of a constitutional statue concerning the rights of the victim, a shortcoming the negative effects of which are reflected especially on the trial level. To this we can add the adoption of an Anglo-Saxon-inspired procedural system, which animates the trial with the three fundamental aspects of the judge-public prosecutor-defendant, recognising a subordinate role to the victim, as a mere party, without the power to exercise a private criminal action[5].

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[2] F. BASILE, *Violenza sulle donne: modi, e limiti, dell'intervento penale*, in *Diritto penale contemporaneo*, 11 December 2013.

[3] Italian Constitutional Court, 3 December 1969, n. 147.

[4] Law 15.2.1996 no 66; law 15.2.1996 no 66; see, for a comment, A. CADOPPI, *Commentario delle norme contro la violenza sessuale*, Padua, 2002; M. VIRGILIO (ed.), *Diritto penale sul corpo delle donne: le proposte parlamentari contro la violenza sessuale*, in *Critica del diritto*, 1995, p. 196.

[5] See S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012.

Pressure to conform to international Conventions, acts adopted within the European Union, the jurisprudence of the European Court of Human Rights[6], the succession of events of very serious ferocity against women and the resulting social alarm that came from them has forced the legislature to change direction. In harmony with the provisions at supra-national level, the victims of domestic violence, particularly women and children, have now assumed the rank of "super-victim" in the Italian legal system. The legislature has chosen to utilize the issuance of urgent decrees as the legislative instrument, supporting it with the need to protect in *primis* public safety, jeopardised by the proliferation of criminal domestic episodes. The most recent legislation is not moved primarily by the fundamental rights of women or vulnerable members of the family, but by the need to combat a veritable social scourge. The viewpoint of public safety seems to justify the utilisation of the issuance of urgent decrees, an instrument of which the Italian legislature has often abused and which sometimes has produced hurried fruits that have not been thought out enough.

The absence of a precise statute for the victim reflects the approach taken by the Italian legislator and it represents a weakness of the reforms: it was indeed preferred to extend the already existing procedural instruments or to introduce new ones in the proceedings aimed at ascertaining crimes considered to be the expression of gender-related violence (for example,

[6] See: the Council Framework Decision of 15 March 2001, relating to the position of the victim in criminal proceedings (2001/220/JHA); the Convention of the Council of Europe on preventing and combatting violence against women and domestic violence of 11 May 2011 (the so-called Istanbul Convention, which came into force on 1 August 2014 and was ratified by Italy with law 27 June 2013, no 77); the Convention of the Council of Europe for the protection of children against exploitation and sexual abuse (the so-called Lanzarote Convention) of 25 October 2007 (v. *supra*, S. MARTELLI, Section I, Chapter III); the Directive of the European Parliament and the Council of the European Union which introduces minimum provisions concerning the rights, assistance and protection of victims of crime and which substitutes Framework Decision 2001/220/JHA (2012/29/EU); the ECHR jurisprudence which, on more than one occasion, has interpreted the art. 8 of the European convention on human rights in the sense that the States should not only have negative obligations (ban on arbitrary interference that breaches privacy), but also positive ones, specifically for what regards protection of physical and psychological safety and the self-determination of the person in the family context (ECHR, 4 December 2003, *M. C. v. Bulgaria*; ECHR, 31 May 2007, *Controvà v. Slovenia*, ECHR, 12 June 2008*, Bevacqua v. Bulgaria*). See S. ALLEGREZZA, Section I, Chapter I.

stalking) or crimes that are a warning bell for them (cruelty against family members and cohabitants), rather than deciding to define the concept of "victim of gender-related violence" with the simultaneous recognition of new prerogatives for it, also of a procedural nature, that could leave out of consideration the specific crime committed against it. The impression is, therefore, that of a hurried, rather timid intervention, especially if compared with the one adopted in Spain, certainly more thought-out, articulated and far-reaching[7]. It is however a positive datum: Italy now complies with international obligations by the modification of its own substantive and formal system. It does so by moving in three directions: strengthening the sanction system, guaranteeing the victim protection from the risk of new acts of violence and protecting the victim, as far as possible, from the possible collateral effects of criminal justice. Reference is made in particular to the substantive and formal provisions contained in legislative decree 14 August 2013, no 93 (converted into law 15 October 2013, n. 119, the so-called "law against the murder of women"), with which urgent provisions were introduced concerning safety and in order to combat gender-related violence.

The title of the law is, however, misleading. If we go into details, we see that only certain provisions are exclusively applicable to the female gender or, more generically, to those who suffer violence because they belong to a given gender[8] (see, for example, the aggravating factor relating to the victim's pregnancy), while in general the law refers in a wider sense to the "person", without further declensions of gender.

2. Criminal protection of the victim: analysis of the amendments made to essential criminal law

On the level of substantive criminal law, the Italian criminal code (from now on, c.p.) contains numerous cases that sanction domestic violence: from cruelty within the family (art. 572 c.p.) to acts of persecution (the so-called *stalking*, art. 612-

[7] So S. ALLEGREZZA, presentation at the workshop "*La modifica delle norme di contrasto della violenza di genere contro le donne*", University of Bologna, 8 October 2014.

[8] D. DONATI, *La violenza contro le donne*, in *Quest. giust.*, 16 December 2013, p. 6.

bis c.p.), as well as the classical cases of homicide, injury and sexual violence. The new provisions introduced by law no 119 of 2013 intervene only on some of such crimes, in this way creating an initial and huge perplexity: with the intention of strengthening protection against domestic or gender-related violence, the paradox of offering more immediate and effective instruments in the case of stalking than what happens in the case of attempted murder of a partner was created[9]. Going into the details of the most recent amendments, an initial intervention concerns the introduction of a new aggravating circumstance. In compliance with art. 61 no 11 c.p. (already present in the criminal code before the reform in question came into force), the sentence is increased if the crime is committed abusing domestic relations. The "new" article 61 no 11-*quinquies* c.p. adds a further common aggravating circumstance, providing an increase in the sentence "for having, in non-culpable crimes against life and individual safety, against personal freedom and in the crimes mentioned in article 572, committed the fact in the presence or to the detriment of a person under eighteen years of age or against a pregnant woman". This phenomenon takes the name of "assisted violence" and tends to protect the child forced to witness acts of domestic violence (see, in this sense, similar indications of protection contained in the Preamble of the Istanbul Convention).

The contents of certain crimes are then redefined, including sexual violence, stalking and domestic cruelty[10]. In particular, the applicative profiles are expanded and the aggravated sentences when such crimes take place within an amorous relationship, also irrespective of cohabitation or a current or previous bond of matrimony. The existence of a sentimental bond is significant as a "potentially criminogenic situation, which fosters disinhibition towards violent actions 'induced' by distort perceptions of reality, due to emotional components that originate from such a relationship"[11]. The worsening of sanctions, however, produces poor general-preventive effects if they are not accompanied by the certainty of the sentence. And, as we know, this is the real Achilles heel of Italian criminal

[9] Cfr. *infra*, § 3.

[10] See in particular, articles 609 *ter,* n. 5, 5 *ter* and 5 *quater*, 572 and 612-*bis* of the Italian criminal code.

[11] F. BASILE, *ibidem*.

justice. It remains to be seen if the renewed internal system of sanctions satisfies the international obligations to which Italy is subject. In general the picture is positive; however the persistent absence of a criminal provision that punishes the so-called forced marriages, as required by art. 37 of the Istanbul Convention must be pointed out. There are various internal cases connected to this in some way: inducement to marriage through deception (art. 558 c.p.), the consensual abduction of children (art. 573 c.p.), the abduction of persons of unsound mind (art. 574 c.p.), the abduction or holding of children abroad (art. 574-*bis* c.p.), acts carried out under duress (art. 610 c.p.) kidnapping (art. 605 c.p.). However, none of them seems to fully satisfy the protection required at international level. A cultural change would be needed which abandons the idea of marriage as a panacea of violence and which is directed towards a new multi-cultural vision of society[12].

We can also see a partial shortcoming with reference to the practices of female genital mutilation, the active exercise of which is sanctioned by art. 583-*bis* c.p. The cases of inducement or the supply of means for such practices, cases for which the above-mentioned Convention also requires criminalisation, remain "uncovered". Other cases – forced abortion or forced sterilisation – are prohibited by the Italian legal system but whether they can be prosecuted in criminal terms depends on the wish of the victim, while international laws require official prosecutability or the irrevocability of the action. Another interesting supra-national indication – again on the substantive level – which perhaps would have deserved greater consideration by the legislature is that contained in art. 42 of the Istanbul Convention, which asks member States to guarantee that in criminal proceedings arising as a result of crimes falling within the sphere of application of the same Convention, "the usages, habits and customs, religion, traditions or so-called "honour" cannot be adopted as an excuse to justify such acts".

A similar opportunity was offered to the national legislature to take an official position on the configurability of

[12] G. BATTARINO, *Note sull'attuazione in ambito penale della convenzione di Istanbul sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, in *Diritto penale contemporaneo*, 2 October 2013, p.9.

the so-called "*cultural defences*", which received a small percentage of attention in the jurisprudential sphere.

Interventions dedicated to prevention were much more innovative and, hopefully, effective.

Specifically, art. 5 of law no 119 of 2013, outlines an "extraordinary plan against sexual and gender-related violence". In line with initiatives coming from Europe, the provision aims both at improving training and information and increasing the so-called service rights, i.e. those services that provide assistance and protection to victims, as well as promoting the recovery and assistance of responsible subjects.

3. The framework of amendments to procedural criminal law

The most substantial– and for some aspects sensational – result of the so-called law against female murder is all of a procedural nature: in fact, it was the standard code of procedure which was effected the most by such a regulatory intervention, which however, from this particular point of view, seems to take inspiration not so much from the Istanbul Convention as from Directive 2012/29/EU of the European Parliament and the Council, adopted on 25 October 2012.

The procedural innovations introduced through law 119/2013, if compared with the contents of the just mentioned Directive, without a doubt represent a light wind of change, capable of revealing a figure which until now has remained very much in the shadow: the person injured by the crime. This is a path of change which started several years ago in Europe and these measures require to the Member States to de adopted and applied in conformity to EU law. This is especially true where – as happens in the Italian legal system – there is a widespread procedural-criminal culture traditionally used to consider the criminal trial as a match between the public prosecution and the defendant, within which the injured persons can assume the role of mere spectators or, at the most, if they join proceedings as civil claimants, of rowdy supporters (as we know, always rather unpopular with the protagonists of the match).

In plain terms, the message that emerges from the analysis of the procedural reforms introduced with law 119/2103, even in their disorganized and fragmentary nature, is to be found in

the fact that they can be attributed to a decidedly more mature and linear path traced at European level, which aspires also to granting the simple victim (i.e. the victim who does not intend introducing economic claims into the criminal trial) the capacity of procedural "party", aware, informed and conscious of his or her own rights and capable of managing and exercising them, in and outside the trial.

Let us examine, if even just briefly, which impulses Italian law has – to date – absorbed from the supra-national legislative fabric.

The "new" information obligations benefitting the injured person appear to be decidedly revolutionary. Above all, art. 101 Italian code of criminal procedure (from now on, c.p.p.): now provides that injured persons, up to the time they obtain news of the crime, must be informed by the public prosecutor or by the judicial police of their right to appoint a lawyer and of the possibility to access legal aid provided by the State. Such an innovation, greeted as sensational, in actual fact, represents only a small step if compared to articles 3, 4 and 5 of the Directive, which list a substantial sequence of rights that must be guaranteed for the victim, from the time of first contact with "a competent authority". Further notification obligations were also introduced – always in favour of the injured person – towards the end of the preliminary investigations: on one hand, the new art. 408 c.p.p. provides for the "official" serving of the request for dismissal made concerning crimes committed with violence to the person, irrespective of the formal existence of a request from the injured person (as we know, an essential condition – in most cases – so that serving of the notice in question must be ordered), with subsequent increase in the deadline for raising objections from ten to twenty days. On the other hand, notice ex art. 415 *bis* c.p.p. (until now it represents an exclusive prerogative of the injured person) must now also be served on the defending council of the injured person (or, in his absence, of the injured person himself and his defence council) if the crimes of so-called stalking (art. 612 *bis* c.p.) or acts of cruelty (art. 572 c.p.) are being prosecuted. While, in the first case, the innovation does not appear to be particularly noteworthy, except for the interpretation problems that may arise from the tangible demarcation of the criminal perimeter to which the expression "crimes committed with violence to persons" refers, the second new legislative aspect deserves some further

thought. In fact, it was asked if the described transformation made in art. 415 *bis* c.p.p. opens the floodgates for an obligation to discover the investigation material – with connected options such as, for example, the filing of briefs and the request to the public prosecutor for further investigations – also in favour of the victim of the crime. The current formulation of the provision (which in paragraphs 2, 3, 4 and 5 continues to refer exclusively to the defendant and his defence council), and also the European rationale that inspires the reform (which would seem to promote only informing the injured person "on the status of proceedings"[13]) would seem to be in favour of a negative reply to the question asked. Serving notice of the conclusion of preliminary investigations on the victim, therefore, would have the sole purpose of informing him about the progress of the proceedings and the findings of the prosecution, without offering the victim – at least for the time being – specific rights to speak and therefore, the rights to a fair trial.

A further doubt remains in the background, i.e. if the omitted serving of notice (also) on the injured person may cancel the subsequent request for the committal for trial, for the purposes and effects of art. 416 c.p.p.[14].

A further innovation, small from the internal point of view but decidedly more striking in European terms, is the new paragraph 4 *quater* of art. 498 c.p.p., which gives the judge the power to adopt protected interviewing procedures (for the crimes mentioned in the previous paragraph 3 *ter*, i.e. those of a sexual nature understood generally) also regarding the injured adult, if such a person should appear to be "particularly vulnerable", and taking into account the type of crime being prosecuted. Such a provision is a clear indication of how European inputs are absorbed: although departing from the by now outmoded terminology ("particularly vulnerable victims" was the expression used by the old Framework Decision 2001/220/GAI, now substituted, within the Directive of 2012, with that of the "victim with specific protection needs"), the totally supra-national indication is in this way accepted to

[13] See Recital no 26 of Directive 2012/29/EU, and art. 6 of the same Directive.

[14] P. DE MARTINO, *Le innovazioni introdotte nel codice di rito dal decreto legge sulla violenza di genere, alla luce della Direttiva 2012/29/UE*, in *Diritto penale contemporaneo*, 8 October 2013, p. 7.

assign the judging body the task of assessing individually and positively this type of victim (without legislative predeterminations in this sense) "to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings ... due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation" (art. 22 Directive); such an assessment must be made – again according to that provided by the Directive – taking into account the personal characteristics of the victim, the type, nature and circumstances of the crime; only minors, in such a sphere, are presumed *ex lege* since they belong to the "victimological category" in question, in this way exonerating the judge from the obligation of assessing their characteristics.

This feeble innovative aspects (reserved only to the procedures for hearing witnesses during the trial), however could be enormously improved by the Italian legislature by borrowing from the Directive the special measures indicated in art. 23: such as, for example, of interviews of injured parties in special rooms or rooms adapted for the purpose, of interviews carried out by trained personnel and possibly of the same sex as the victim, of the measures to avoid visual contact between victims and perpetrators of the crime and measures to allow remote questioning or questioning of the victim in private.

A more important aspect of law 119/2013, and perhaps its most impressive, is to be found in the introduction of the injured person – an absolutely new occurrence in the Italian criminal procedural tradition – also within the personal protective circuit that may be triggered within the procedural path of the defendant. The new art. 299 c.p.p., in fact, provides that in proceedings involving crimes committed with violence to the person, the measures that revoke or modify *in melius* the protection order against the defendant should be served immediately on the injured person (or his council). This first part seems to implement an indication coming from Europe, according to which "Member States guarantee the victim the possibility of being informed, without undue delay, of the release or escape from prison of the person in pre-trial custody, tried or sentenced concerning the victim" (art. 6, par. 5, Directive; see also consideration n. 32 of the same Directive and art. 56, par. 1, letter *b* of the Istanbul Convention). The reason behind such a provision is clear: to allow the victim to

take every precaution or measure to protect himself from any repeat conduct on the part of the defendant, so that he is not faced directly with the fact that the same has been released from prison (criminal actions typified by conduct such as stalking or cruelty).

In the innovative heat of the moment (and in the urgency of the internal issue of decrees), however, the Italian legislature did not stop there. In fact it also envisaged that the request for substitution or repeal of protection measures should be served at the same time, by the applicant and under penalty of non-admissibility, on the council of the injured person (or failing this, on the victim), who, within the two days following service, may present briefs. After such a deadline has elapsed, the judge may decide on the protection motion.

Such a regime represents a sure overruling compared with the supra-national provisions, which, as we have already stated, do not arrive at such a penetrating involvement of the injured person in the protection procedure, limiting itself to asking for information in the event of release from prison for merely protective purposes and for the protection of person safety[15].

Thus, although wanting to silence certain doubts that internal legislation caused (for example: for the purposes of the non-admissibility of the request for repeal or substitution of the protection measure underway, must we take into consideration the mere sending or serving of the notice on the injured party?), it must certainly be shown how the needs for information and protection of the injured person, drafted in this way, in the specific protection situation, risk to collide – even illegitimately sacrificing it – with the right to liberty of the person under investigation/the defendant, that is guaranteed at constitutional level[16].

[15] On the topic see also H. BELLUTA, *Revoca o sostituzione di misura cautelare e limiti al coinvolgimento della vittima*, in *Diritto penale contemporaneo*, 28 November 2013.

[16] R.A. RUGGIERO (*La tutela processuale della violenza di genere*, in *Cass. pen*., 2014, p. 2357) maintains that «it would probably be expedient to provide *de iure condendo* (as, moreover, is done, in a different context, with the person undergoing investigations) that the injured party, at the time he is informed of the possibility of appointing a defence council, should be invited to elect a domicile for receiving all notifications relating to the trial (with the obligation, on his part, of indicating a place in which he can easily receive the documents, and of communicating any variations). In this way, the effectiveness of serving the notice of repeal or substitution of protection to the

The rapid procedural roundup above must conclude with mention of a new protective measure, provided by art. 384 *bis* c.p.p., which provides for urgent removal from the family home, in fulfilment of that specifically required by art. 52 of the Istanbul Convention; to this may further be added the hypothesis of immediate judgement provided by par. 5 of art. 449 c.p.p.

Finally, a consideration of a general-systematic nature remains: law no 119 of 2013 certainly – from the Italian point of view – represents a step forward along the (European) road leading to a wider protection of victims of crime and, in this sense, constitutes a sort of "pilot-project" which, taking inspiration from supranational provisions, elevates the level of protection of the victim via procedural measures, even if only in relation to a small slice of crimes. Directive 2012/29/EU (with the peculiar binding nature of this type of source), on the contrary, provides for a much more penetrating and above all far-reaching, involvement of the injured person, i.e. detached from the type of crime being prosecuted and spread over the procedural phase and over the trial in a narrow sense.

The strengthening of the role of the victim which actually comes from the Directive (but which must certainly happen much more forcefully in the immediate future[17]), to which the culture and the tradition of the Italian criminal trial are certainly hostile, must not necessarily be greeted with prejudice or suspicion. What we may, on the other hand, be able to overcome in this way, in the internal legal system, is what we may define as "the paradox of the civil claimant". In the current state of affairs, the crime victim is very often obliged to join proceedings as a civil claimant within the criminal proceedings not because he really aspires to economic restoration, but only in order to be able to be heard during the trial, to be a "party" to it in all effects. This, however, exposes him collaterally to doubts and inferences about his own credibility, very frequently

injured diligent person would be guaranteed and at the same time there would be greater control of the times involved in the procedure. The result of this would be that if it should not be possible to service the notice, for example due failure to notify a change of domicile, the request would in any case be considered admissible»; see on the point also H. BELLUTA, *Revoca o sostituzione di misura cautelare e limiti al coinvolgimento della vittima*, cit.

[17] See also in this sense, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, implementation of which is envisaged by 11 January 2015.

assessed with extreme timidity on the strength of the pleas of a civil-law type of which he is the bearer (just think about all the jurisprudence regarding assessment of the evidence of the civil claimant, certainly able to support alone a conviction but only following the result of a very strict control of the intrinsic and extrinsic reliability of the declarative contribution – similar to that required, for other figures, by art. 192, paragraphs 3 and 4, c.p.p. – necessary precisely in light of the economic interests that the civil claimant typically claims).

In this sense, very probably, attributing to the crime victim an autonomous role, which allows him to be given a hearing, of being informed and participating knowingly in the criminal proceedings without linking his fate to any requests for compensation, would allow the injured person/civil claimant to come out of the *cul-de-sac* in which he often finds himself trapped.

CHAPTER XVI

GENDER VIOLENCE AND CRIMINAL JUSTICE IN SPAIN

by Carmen Requejo Conde[*]

TABLE OF CONTENTS: 1. Introduction. - 2. Treatment of victims of domestic violence in the Spanish penal code. - 3. Victims of domestic violence in the draft of an organic law modifying the Spanish penal code. - 4. Protection of gender violence's victims in 2012 EU Directive and in the Spanish draft of a legal Statute of crimes victims.

1. Introduction

The Spanish legal system has, through the provisions in European Directives, remarkably and outstandingly reinforced the role of victims in their participation in the criminal process and the recognition of their rights, especially concerning those victims who are particularly vulnerable, and the victims of certain crimes, particularly the victims of domestic violence. The following pages describe the situation of these victims of domestic violence in the Spanish penal code, in its Draft reform of 2013, and in other procedural norms.

2. Treatment of victims of domestic violence in the Spanish penal code

The Spanish penal legislator has been granting increasing protection for victims of domestic violence with the successive reforms of the Spanish penal code, since the Organic Law 10/1995 of 23 November and its subsequent amendments. First, the Organic Law 11/2003 has specific measures relating to public safety, domestic violence and the social integration of

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foreigners. After, the Organic Law 15/2003 modifies the Organic Law 10/1995. Then, there has been the Organic Law 1/2004 of Comprehensive Protection Measures against Gender-based Violence. These laws brought the following changes.

The crime of domestic violence ceased to be considered a crime of injury and was categorized as a crime against the moral integrity of the person. This means recognizing as a legal right the victims' dignity or self-esteem, their psychophysical well-being and their right to be treated as people and not be reified. Along with this, there has been a progressive broadening in the meaning of the victim of the crime of domestic violence, not being limited only to the spouse and the children that they have together, but including other members of the family unit with which they coexist, persons under guardianship, custody or foster care, other people protected by the nuclear family, as well as especially vulnerable people who are subject to guardianship or custody in public or private centers. The peculiarity is that they are all protected by the same criminal sanction.

Moreover, criminal offences of injury, coercion and threats in the family would become crimes, but there are differences:

a) in the norm that typifies the offence of slight injuries in the family, the protection of the wife, ex-wife, or the person who is or has been connected by a similar relationship, with or without cohabitation, and of an especially vulnerable person living with the abuser, would be reinforced, increasing the penalty (up to six months in prison). There are thus three levels of protection. First, for the wife or partner, present or previous, with or without cohabitation, and for especially vulnerable people whenever there is cohabitation with their abuser (aggravating circumstance of art. 153.3). Second, other relatives mentioned in art. 173.2 - parents, siblings, etc. - if they are living with the abuser (basic type of art. 153.2). Third, other relatives not included in art. 173.2, or when there is no cohabitation (art. 617, punished by a fine or permanent traceability);

b) the rule also includes mild threats against the wife, the ex-wife, or the person who is or has been linked by a similar relationship, with or without cohabitation, and an especially vulnerable person living with the aggressor, as well as mild threats against other family members provided a weapon or dangerous instrument is used against them. Otherwise, a slight

threat without a weapon or dangerous object will only be an offence, although it will be prosecuted ex officio and punished by community service or permanent traceability and never by a fine. There are also various levels of protection in this case. First, for the wife or the partner, present o previous, with or without cohabitation, and an especially vulnerable person whenever living with the aggressor (aggravating circumstance of art. 171.4). Second, concerning other relatives mentioned in art. 173.2 - parents, siblings, etc. - if living with the aggressor and a weapon or a dangerous instrument is used against them (basic type of art. 171.5). Third, these same relatives if a weapon or a dangerous instrument is not used against them, or relatives who do not live together. In both these last two cases it is a minor offence of art. 620, but the former is prosecuted ex officio and never punished by a fine, and the latter is prosecuted at the request of the victim and punished by a fine[1];

c) in coercion, only mild coercion against the wife, ex-wife, or person who is or has been linked by a similar relationship, with or without cohabitation, and against an especially vulnerable person living with the aggressor is a crime in art. 172.2. When there is mild coercion against other members of the family, mentioned in art. 173.2, this is then a minor breach of art. 620, and is prosecuted ex officio and punished by community service or permanent traceability;

d) if the injuries, threats or coercion are serious, only the injuries reinforce - by the provision of a specific aggravation - the wife, ex-wife, or person who is or has been connected by similar relationship, with or without cohabitation, and an especially vulnerable person who lives with the offender (art. 148.4 and 5). But the Spanish penal code does not provide a greater protection of these victims when a threat or serious coercion is committed against them, not even, which is stranger, when more serious habitual abuse or more serious crimes (murder) are committed;

e) only for the wife, ex-wife, or person who is or has been linked by a similar relationship is cohabitation not required to appreciate the aggravation or the type of crime in question. An

[1] Thereby, a mild threat against the women is punished by imprisonment for up to six months, but a mild threat with a weapon against a minor daughter by the father, if he lives with her, is only punished with imprisonment of up to three months, and if he does not even live with her, this is only punished as a mild infraction.

especially vulnerable person, as with other relatives, must live with the abuser. Thereby, if the male spouse slightly injures the woman this constitutes an aggravated crime of minor injury, but this is not the case if a father slightly injures his young daughter when he does not live with her[2]:

f) similarly, to consider the husband to be an especially vulnerable person with respect to his wife (or husband), he must prove his vulnerability and his coexistence with this person, as *per se* he does not enjoy the reinforced protection of the wife with respect to the man[3].

The protection of victims of domestic violence also meant the promulgation of other dispositions.

In primis, a special protection for foreign victims, illegally in Spain, by the Organic Law 10/2011, of 27 July, amending arts 31.*a* and 59.*a* of the Organic Law no 4, of 11 January 2000.

This concerns the rights and freedoms of foreigners in Spain and their social integration, in relation to the rights of foreigners and against gender violence and human trafficking. There is a period of recovery and reflection during which the expulsion proceedings are suspended until the criminal proceedings are substantiated. There is an application for residence and work permits and the protection of the victims, their children and families of origin in the case of victims of human trafficking. There is also residence and work authorization in the case of the issuance of an order of protection in their favor for victims of gender violence.

The Organic Law no 1 of 28 December 2004, on integrated protection measures against gender violence, and rights in health, legal aid, labor rights and social security, public officials, access to public housing and nursing homes.

The profile of a victim of domestic violence is a person who the Spanish legislature has considered to be in need of

[2] As if there is cohabitation, the person can be considered to be a particularly vulnerable victim. But if she/he does not live with this person, she/he would be excluded from the norm of art. 153, if living with minors and the rest of the relatives is required, this constituting only a minor offence (coexistence is required by a Circular of the State Attorney, 1/2008).

[3] *A sensu contrario* there are judgments that do not apply the aggravated subtype to women victims when there is a reciprocal aggression between the spouses or a balance in the situation, or a minor injury caused in a particular case is not demonstrative or patrimony of a sexist attitude, especially because art. 148 permits the establishing of the penalty based on the risk caused or the result produced.

specific protection, due to the nature or status of the victim or the nature of the crime committed against her. In view of this, the victim of domestic violence is treated in the Spanish penal code based on different parameters:

a) as a vulnerable person worthy of a statute of a specific victim. This applies to gender violence or domestic violence of art. 173.2 ("who is or was a spouse or person who is or has been linked to him by similar relationship, with or without cohabitation, or descendants, ascendants or siblings by nature, adoption or affinity, his own or the spouse's or partner's, or minors or disabled who live with him, or who are subject to the authority, guardianship, foster care or custody de facto of the spouse or cohabitant, or person covered in any other relationship for which she is integrated into the core of the family life, as well as the people whose particular vulnerability is subject to custody or care in public or private centers"), or mild coercion in the family. Since 2004 this constitutes a crime when it is directed at "a particularly vulnerable person living with the author". This equates *ex iure iuris* to the wife, ex-wife, partner or ex-partner of the perpetrator (art. 172.2, par. 2);

b) a victim of domestic violence is also worthy of increased protection through the provision of a specific aggravation of the crime. This is the case of minor injuries or threats against one who "is or has been the wife or woman who is or has been linked to the author by a similar relationship, with or without cohabitation" or "a particularly vulnerable person living with the author" -arts 148.4 and 5, 153.1 and 171.4)[4].

In crimes of domestic violence, when aiming to justify the increased punishment imposed on the offender against a woman or an especially vulnerable person living with him, the legislator

[4] The penalty varies from prison up to six months, or disqualification for the exercise of parental authority, guardianship, foster care or custody up to five years in art. 153.1, and prison up to three months and disqualification of parental rights for up to three years in art. 153.2. In cases of severe injury, imprisonment is for five years, and up to three years for the basic type. In mild threats it is required regarding other family members that there is the use of weapons, that the act constitutes a crime and is not a minor offence of threats (art. 171.5). The sentence ranges from imprisonment of up to six months or disqualification for the exercise of parental authority, guardianship, foster care or custody for up to five years in art. 171.4 to imprisonment for up to three months and the disqualification of parental rights for up to three years in art. 171.5.

refers to the "the manifestation of discrimination, inequality, and the power relationship of men over women". That is the abuse of authority, a sexist attitude, and discrimination against women[5].This of course does not always or almost never occurs in mild and isolated attacks.

The person who is weak because of age -a minor or an elderly person – who is a victim of gender violence has a profile which makes her/him susceptible to aggression from close third parties. Exploiting vulnerability due to age, being minors or elderly, sometimes linked to illness and/or disability, is a clear example of domestic violence: a minor victim of abuse by parents, a minor victim of gender violence by her/his partner or ex-partner - although the triggering factor of vulnerability is here more gender-based than age-based - or elderly or disabled victims of abuse or neglect by their families. But it is women who are definitely the clear example of gender-based discrimination in the crime of violence, as well as those in which it is in effect the abuse of power, discrimination or the sexist attitude of the aggressor which is the motive in continuously committed crimes. Cultural and religious reasons underlie this form of power. In spite of the efforts made over the years in favor of gender equality by many social groups, this does not seem to have been overcome in recent generations or, which is worse, given the each year's figures concerning crimes of gender violence, in new generations.

The male gender is also the target of partner violence, but at times this is more psychic than physical abuse and linked to situations of illness or a special situation. In addition, being related, living together and bonding in human relationships are often a source of conflict that leads to a distancing, a break up, and sometimes the positioning of the victim in a situation of vulnerability. The degree of trust acquired with the relationship and the non-acceptance of the break up by one

[5] The aggravating circumstance of abuse of superiority (art. 22.2) is of an objectively aggravating nature, based on physical superiority with respect to age, gender or illness, which requires knowledge of the situation and an attitude of undue influence by the author. The aggravation of discrimination (art. 22.4), which is more subjective in nature, requires the offender to feel superior and to act in a way that shows an attitude of hatred, xenophobia, misogyny, or discrimination in general, and not only in the particular case with regard to the victim. This requires that the aggressor knows the features of the victim and that this is what motivates the crime.

who still suffers emotional dependence on the other are the major triggers of abuse. The Spanish penal code included as a victim of domestic violence non-cohabiting couples, even in past relationships - considering the previous partners as active subjects of the crime of abuse. Kinship is thereby inherent in domestic abuse, although not intrinsic to it. In addition, the Spanish penal code considers other circumstances of vulnerability by reason of the situation, marginalization, poverty, origin, or pregnancy. Origin is undoubtedly a factor that is increasingly more related to the discrimination of people who, being immigrants, become perfect target of abuse and exploitation. Aware of this, the legislature has strengthened the protection of immigrants who are victims of domestic violence, abuse and sexual or labor exploitation, setting up a system of welfare benefits and support for illegal foreign victims in this situation[6].

Marginalization and destitution due to economic factors are also other reasons which - as an initiatory factor or a continuity factor - influence the victim's vulnerability. This occurs with the elderly. Their care and family assistance often lead to the administration and management of their assets in return, at times unfairly or fraudulently. This also takes place with women who, having few economic resources, are dependent on

[6] The Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, provides in art.31a, paragraph two, that foreign women victims of domestic violence who are in an illegal situation and who denounce their aggressors shall have the sanctioning administrative procedures for being illegally in Spain suspended pending the outcome of criminal proceedings. It also states that foreign women who are in an illegal situation may apply for a work and residence permit due to exceptional circumstances. This approval will not be resolved until the end of the criminal proceedings, without prejudice to the competent authorities being able to grant a provisional approval in the meantime. The same article also establishes that when the concluded criminal proceedings could not deduce the situation of domestic violence, the sanctioning administrative procedures originally suspended will continue. However, the fact that a foreign woman who is in an illegal situation denounces her aggressor and administrative proceedings are opened which may result in expulsion, discourages foreign women from denouncing. Therefore, in order to protect them, it was necessary to establish more favorable conditions for immigrant women to dare denounce their aggressors. It was necessary to prioritize the protection of these women's rights to physical and moral integrity, when they suffer from situations of domestic violence, and their right to effective legal protection, facing a penalty for being in an illegal situation.

their spouse. This situation often prevents them from escaping from the abuse that they suffer[7].

A strengthening of the protection of victims of domestic violence led the legislature to include as victims of this crime not only the spouse, partner, past relationships, or family members, but also "the persons who due to their particular vulnerability are subject to custody or care in public or private centers" (arts 173.2, 153 and 148, relating to offences of mild injuries and serious injuries; art. 171.4 and 172.2 in the crimes of mild threats and coercion). The mention of "particularly vulnerable victims residing with the offender" has helped to forestall the question of unconstitutionality set forth against these norms for infringement of the principle of equality and positive discrimination against males, especially in crimes such as mild injuries, mild threats or mild coercion. It does not have to mean an expression of hatred, abuse of authority, a sexist attitude or discrimination of men against women. On the contrary, it would make more sense in more serious offences, such as habitual abuse or even crimes against life that sometimes result in abuse. Special aggravation is not however considered in these crimes. The abuse of power that these victims are subject to led to the United Nations Organization (UNO) General Assembly to dictate Resolution 40/34 of 29 November 1985, with the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power[8].

In addition, if the particular vulnerability of the wife, ex-wife, girlfriend or ex-girlfriend, is presupposed and does not even require living together, a particularly vulnerable person must prove this vulnerability and live with her attacker to be a victim of abuse who receives reinforced protection. Thus, authoritative voices understand that children, the elderly, sick and the disabled should be included under this designation of especially vulnerable persons, the vulnerability having been

[7] D. MORILLAS FERNÁNDEZ, *Víctimas especialmente vulnerables y Ley Orgánica 1/2004*, in M. J. JIMÉNEZ DÍAZ (ed.), *La Ley integral: un estudio multidisciplinar*, Madrid, 2009, p. 333.

[8] More specifically, we must mention the interim protection order for the victim of domestic violence (art. 544-*b* Criminal Procedure Law), the controversial exemption from the obligation to testify at the hearing of the victim of domestic violence against her attacker due to kinship (art. 416 Criminal Procedure Law), and pre-constituted evidence (art. 777 Criminal Procedure Law).

proved[9]. But this difference remains with the Draft penal code reform of 2013, though tempered by minor breaches becoming attenuated crimes.

3. Victims of domestic violence in the draft of an organic law modifying the Spanish penal code

One of the great innovations of the reform of the Spanish penal code by the draft of an organic law of 2013 is the abolition of minor offences. These minor infractions became civil or administrative illegal acts or attenuated subtypes of crimes. In this sense, the minor infractions of coercion, threats and insults and harassment committed against any of the persons referred to in art. 173.2 (in the family) will be made crimes, and is worded as following:

a) a paragraph 7 is added to art. 171. This will replace the last paragraph of art. 620.2. This paragraph is as follows: "when the injured party is one of the persons referred to in art. 173.2, the penalty will be permanent traceability for five to thirty days, always in a different place of residence and away from the victim's place of residence, or work for the benefit of the community for five to thirty days, or a fine of one to four months, the latter only in cases in which the circumstances stated in par. 2 of art. 84 concur. In these cases the complaint referred to in the preceding paragraph of this Article shall not be required". Thus, the limits of the punishments of permanent traceability and working for the benefit of the community are increased, and a new optional penalty of a fine is incorporated, applicable only when the spouses or partners do not have

[9] Also, for example, if a man has a serious illness that prevents him from moving easily and is hit by his spouse and this causes him injury under art. 153. The judges appreciated the special vulnerability of domestic abuse in babies abused by their parents, such as a newborn whose mother hit her severely, causing serious injury (Decision of the Provincial Court of Albacete of 2010 or Decision of the Provincial Court of Girona of 2005, qualifying events as a conceptual concurrence between crimes of art.153 - minor injuries - and art. 152 in relation to art. 149- serious injury through negligence); or a three-months-old daughter (Decision of the Provincial Court of Asturias of 2011). Also an elderly person with cognitive impairment who was hit by a geriatric employee, who lifted her brusquely from the bed and reacted to her slapping him by grabbing hold of her neck and kicking her in the stomach (decision of the Provincial Court of Almeria of 2007).

economic relations arising from a marital relationship, cohabitation or filiation, or the existence of descendants in common;

b) the same applies to mild coercion. A paragraph 3 is added to art. 172. Minor constraints to household members become attenuated subtypes of crimes. In this case greater protection is offered to family ascendants, descendants or siblings. They are hence different from spouses or relationships, past or present, or an especially vulnerable person cohabiting with the offender. Until of the future law's entry into force, they will exclusively be the only victims of the crime of mild family coercion;

c) finally, a paragraph 4 is added to art. 173, to incorporate a similar section to the previous paragraph, related to mild injuries or mild harassment. Art. 208 has also been modified. This will determine that "only defamations that, by their nature, effects and circumstances are taken as being a serious public concept, without prejudice to paragraph 4 of art. 173, shall constitute a crime".

In this line of protecting victims of domestic violence and those generally vulnerable, the offence of harassment will also change for example. This, when severe, repeated and persistent, as a form of coercion - although violence is not used, there is a constant persecution or surveillance of the victim- will be considered the aggravating factor of special vulnerability (with the old wording) due to "*reason of age, illness or situation*". In addition, the situation of vulnerability is defined as that in which the victim has no real or acceptable alternative but to submit to the abuse, and the concept will be nuanced and will include the gestational status of the woman. Concerning penalties, the Organic Law 5/2010 had introduced a non-custodial measure, called probation (art. 106), for very serious crimes such as terrorism and attacks on sexual freedom, through a *numerus clausus* system (arts 192 and 579), and the fulfilment of obligations among which was included participating in workshops and training programs related to the nature of the offence, similar to those that exist for the carrying out of community work (art. 49). So, the Draft of an organic law modifying the Spanish penal code of 2013 extends the probation measure to many other crimes, specifically crimes of domestic violence or trafficking (arts 153, 173 and 177a). It even initially created, in one version, the deprivation of liberty

measure - called safe custody - (art. 101) for sexual offences and those against very personal legal interests. This lasts ten years, and is served in a special establishment, with an individualized treatment and a plan of reintegration once the sentence and the probation measure has been completed.

With the Draft of an organic law of 2013, the probation measure will be optional for the crime of domestic violence. Art. 173.2 states in its last paragraph that "a measure of probation may also be imposed". An important innovation in this project is the imposition of the controversial permanent prison for especially serious murders. Art. 140 includes the murder of young people under sixteen and other particularly vulnerable persons "by reason of age, illness, or physical or mental disability". Currently, the jurisprudence considers the death of defenseless people to be murder qualified by treachery *per se*. Some doctrinal sectors understand that the death of defenseless people is not always treacherous, because in murder qualified by treachery it is necessary to pursue a purpose and not only "take advantage" of the means of eliminating and not just lessening or weakening victim's defense[10]. This jurisprudential position seems to be losing weight with the wording of art. 140 in the Draft of an organic law of the Spanish penal code of 2013, as treachery and "victim under sixteen years of age, or especially vulnerable person because of age, illness, or physical or mental disability" are not equivalent concepts. One does not entail the other - one being an element of the offence and another being an aggravation of it - if there has been a purpose which has pursued these means that have eliminated the victim's defense.

[10] With abuse of superiority (Decision of the Supreme Court of 2010), the defense of the victim is not entirely eliminated, in spite of there being medial or personal superiority between the author and the victim (e.g., the aggressor is armed or uses his body as a weapon, being disproportionally stronger physically or it concerns the number of attackers), but rather it is a question of a "weakened" defense, insofar as the author has "facilitated" the crime (art. 22.2).

4. Protection of gender violence's victims in 2012 EU Directive and in the Spanish draft of a legal Statute of crimes victims

A "Statute of victims in criminal proceedings" was initially contemplated in section XX of the Preamble of the Draft reform of the criminal procedure act of 2012 (arts 65-74)[11]. Later there would be the "procedural status of victim" foreseen in the Proposition of the body of the Text of the Criminal Procedure. This was prepared by the Institutional Committee created with the Resolution of the Council of Ministers of March 2, 2013 (criminal procedure code), in arts 59 -68[12]. The purpose of these reforms was to establish a welfare legal regime of greater protection for victims, and especially particularly vulnerable victims, either by nature (minors, the disabled), or by the seriousness of the crime committed against them (gender violence, terrorism, human trafficking, sexual exploitation, discrimination). Art. 22 of the Directive 2012/29/EU, entitled "individual assessment of victims to identify their special protection needs", urged Member States to ensure the carrying out of a timely and individual assessment of the victim in order to provide her with special protection in the criminal proceedings, avoiding secondary victimization, intimidation or retaliation. This special evaluation will take into account in assessing the victim the following criteria: *a)* personal characteristics, with special attention to disabled victims and minors *b)* the type or nature of the offence *c)* the circumstances of the fact. Specifically: *i)* crimes of particular seriousness; *ii)* hate crimes or discrimination related to the victim's personal characteristics; *iii)* victims having a dependent relationship with

[11] This established that "*particularly vulnerable victims*" for the purposes of this Act are those who, due to the special characteristics of the crime and their unique personal circumstances, need to adapt their intervention in the procedure to their particular situation. In all events, victims have this condition when, due to reasons of age, illness or disability, they cannot be directly subjected to the cross-examination of the parties (art. 68). Art. 67 underscores minors and the disabled.

[12] As for "particularly vulnerable victims", art. 61 provides that people who because of age, illness, disability or a peculiar situation may suffer adverse effects of relevance for their involvement in any procedural action will be considered especially vulnerable. The judicial police, the prosecution and the courts will adapt the form of the act and, using expert judgment, will take the necessary measures to prevent or reduce as far as possible these effects.

the offender *d)* and, in particular, all victims of terrorist offences, organized crime, trafficking, gender violence, sexual exploitation, and hate crimes and discrimination.

This was to more strongly guarantee the rights of particularly vulnerable victims to the immediate protection of their life, integrity, liberty, honor, privacy or any other right infringed or threatened by the crime. The victim who is particularly vulnerable "because of age, illness, disability or a special situation" will have the support of services and restorative justice, with the utmost respect for the essence of the right of defense, and protected from secondary or repeated victimization - with victims of gender-based violence- due to gender discrimination and violence being committed within a personal relationship. Under this community mandate, the Draft organic law of the Statute of Victims of Crime, of March 26, 2014 (art. 23) has provided for the "individual assessment of victims in order to determine their special protection"[13].

Previously, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, made in Istanbul in 2011, and ratified by Spain in 2014, recognised the "historical imbalance between women and men" that led to gender-based domination and discrimination and violence - violence which can also affect men, and children as witnesses - and that this should include all violence, "physical, sexual, psychological or economic" (art. 5). Violence could in no case be justified by invoking "culture, custom, religion, tradition or so-called 'honor'" (art. 42). Sanctions should be "effective, proportionate and dissuasive"

[13] Stating that "the determining of which protective measures regulated in the following articles should be taken to prevent significant harm to the victim that otherwise may arise in the process will be made after an assessment of their particular circumstances. 2. This assessment will give special consideration to: *a)* The personal characteristics of the victim and in particular: 1º. If she is a disabled person or if there is a relationship of dependency between the victim and the alleged perpetrator. 2º. If she is a minor or victims in need of special protection. *b)* The nature of the offence and the severity of the harm caused to the victim, as well as the risk of re-offending. For these purposes, the need for the protection of victims of the following crimes will be particularly assessed: (...) 3º. Crimes committed against a spouse or a person who is or has been linked to the author by a similar relationship, with or without cohabitation, or against descendants, ascendants or siblings by nature, adoption or affinity, of their own or of the spouse or partner". This thus includes a victim of domestic violence as a victim in need of special protection.

through implementing measures "the monitoring or surveillance of the person convicted " or "the loss of his/her rights of parental authority if the minor's best interests - which may include the victim's safety - cannot be guaranteed in any other way" (Art. 45). Moreover, aggravations of a crime are those committed "against a spouse or partner, present or past, in accordance with domestic law, by a family member, a person residing with the victim or a person who abuses their authority" or that the crime is committed "repeatedly ", or against a person "who is vulnerable" or "in the presence of a minor" (art. 46).

Finally, a new step in strengthening the protection of victims of domestic violence has come from the Organic Law no 1/2014. This law has changed in Spain the organic law of the Judiciary (Art. 23.4l). It extends the principle of universal justice to the prosecution of offences under that Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 2011. This concerns the prevention of and fight against violence against women and domestic violence when the procedure is directed at a Spanish person or a foreigner whose habitual residence is in Spain. It also refers to crimes against a Spanish victim or a victim whose habitual residence is in Spain, if the author of the crime also lives in Spain.

CHAPTER XVII

COMPARATIVE REMARKS

by Luca Lupária[*]

TABLE OF CONTENTS: 1. Gender-related violence: a laboratory for protection of the victim or a factor of imbalance for the criminal system? - 2. Points of contact and distances that cannot be filled among European models in light of the comparative analysis. - 3. Concluding remarks.

1. Gender-related violence: a laboratory for protection of the victim or a factor of imbalance for the criminal system?

The ground of domestic violence truly appears to be an essential laboratory for every reflection on protection measures and the powers of impulse of the victim in the different criminal justice systems. In fact comparative analyses show that the sector over the years has constituted the cutting-edge front for experimenting procedural instruments for safeguarding the person injured by a crime but, is, at the same time, a clear example of how the delicate balances of the procedural (and substantive) system can be dangerously overthrown by legislations with an excessive "victim-centric" matrix, incapable of reconciling the protection needs of the passive subject with the fundamental prerogatives of the accused[1].

It is not easy to compare the three legal systems under examination, especially because of the clear lack of symmetry in the organicity of the legislation and in the level of awareness,

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[1] G. GIUDICELLI-DELAGE - C. LAZERGES (eds.), *La victime sur la scène pénal en Europe*, Paris, 2008; L. LUPARIA, *La victime dans le procès pénal italien à la lumière du récent scénario européen*, in *Revue pénitentiaire et de droit pénal*, 2014, p. 615; D. PASTOR, *La vìctima y los delicados equilibrios del proceso penal: una reflexion comparada,* in *Diritto penale contemporaneo*, 1 December 2014.

in the respective criminal policies, of the importance of the criminal phenomenon. If Spain presents itself as a highly advanced model, equipped with a structured corpus of special provisions introduced starting from law no 10 of 1995 and the object of various additions up to the current time, France and Italy have only recently (respectively in 2006 and 2013) started, with determination, along the road of a strengthened protection for victims of crime committed in the domestic sphere[2].

To this we can add a diversity of approach proven by the centrality of the protection given to the figure of the women in Spain – around whom appears to be constructed the entire system of provisions on *violencia de género* – which is in contrast to the French choice of explicitly applying special measures in an undifferentiated manner to men and women victims of domestic violence, without resorting to protection on the basis of belonging to a specific gender. Certainly, awareness of the enormous number of crimes perpetrated against women forces even Countries that would intend maintaining an "equal" approach, centered on the concept of the person and of family relations, to often refer to the paradigms of "female homicide", of "gender-related" violence or violence "specifically aimed against women[3].

A further aspect to be taken into consideration concerns the fact that the most recent amendments made to the three systems do not appear to be attributable exclusively to the boost made

[2] R. A. RUGGIERO, *La tutela processuale della violenza di genere*, in *Cass. pen.,* 2014, p. 2356.

[3] See French law of 9 July 2010 no 769, on which J. ALIX, *The French measures for the protection of victims of domestic violence* in *this volume*. On the other hand, regarding Italy, in the recital to law decree of 15 August 2013 no 93, in justification of the recourse to the issue of urgent decrees, we read that the succession of very grave cruelty against women and the consequent social alarm deriving from it make necessary urgent actions aimed at worsening, for dissuasive purposes, the punitive treatment of the perpetrators of such facts, introducing, in specific cases, prevention measures aimed at the anticipated protection of women and all victims of domestic violence". Again, regarding that measures, various representatives of the Government have used the definition of "law against female homicide" although none of its provisions concerns the killing of women "because they are women" (see F. BASILE, *Violenza sulle donne: modi, e limiti, dell'intervento penale*, in *Diritto penale contemporaneo*, 11 December 2013, p. 5). As we know, according to the definition given by art. 3, let. *d)*, of the Istanbul Convention, "violence against women based on gender" means «any violence directed against a woman because she is a woman, or that strikes women in a disproportionate manner».

by Directive no 29/2012[4]. Many of the regulatory amendments must in fact be attributed to indications coming from a mosaic of international texts composed, to say the least, by the Lanzarote (2007) and the Istanbul (2011) Conventions, by the Directive on the European protection order (2011/99/EU)[5], by the Directive related to compensation to crime victims (2004/80/CE) and by regulation no 606/2013 on mutual recognition of protection measures in civil matters.

Finally, with the emotional charge that it generates in society (and which has allowed governments, such as the Italian one, to act with the instrument of the issue of urgent decrees[6]), the topic in question becomes a sort of picklock for forcedly introducing rights and guarantees for the victim in systems which, by tradition, are less mindful of the figure of the injured person. It is not a coincidence that with Italian law on "female homicide" it was possible to introduce, even though only for a limited category of crimes, measures for the injured party that were not taken into consideration before this time: we refer for example to the obligation, for the public prosecution and the judicial police, to inform the victims of their right to appoint a defence council and to access free legal aid (art. 101, par. 1, Italian code of criminal procedure); to the serving *ex officio* of the notice of the request for dismissal for crimes committed with violence against the person (art. 408, par. 3-*bis*), where normally such serving is only ordered subject to an explicit request; to the serving of the notice of conclusion of preliminary investigations when crimes of domestic cruelty and stalking are being prosecuted (art. 415-*bis*, par. 1).

[4] See P. BEAUVAIS, *Nouvelle directive sur les droits de la victime*, in *Revue trimestrielle de droit européen*, 2013, p. 807; S. OROMI VALL-LLOVERA, *Víctimas de delitos en la Unión Europea. Análisis de la Directiva 2012/29/UE* in *Rev. Gen. Der. Procesal*, 2013, no 31, p. 2.

[5] T. JIMÉNEZ BECERRIL - C. ROMERO LOPEZ, *The European Protection Order*, in *Eucrim*, 2011, 2, p. 76.

[6] It highlights the application difficulties and the shortcomings deriving from regulatory measures dictated by a certain "precipitation" of the legislator, E. LO MONTE, *Repetita (non) iuvant: una riflessione 'a caldo' sulle disposizioni penali di cui al recente d.l. n. 93/13, con. in l. n. 119/13, in tema di 'femminicidio'*, in *Diritto penale contemporaneo*, 12 December 2013, p. 1.

2. Points of contact and distances that cannot be filled among European models in light of the comparative analysis

Having mentioned these rapid premises, we must abandon the restricted labyrinth of details and national peculiarities attempting to privilege a visual corner with a wider horizon that allows us to reach conclusions that can be used on the comparative level.

From an initial point of view, we can see a generalised harshening of sanctions for existing criminal cases and a widespread introduction of new figures of crime with statutory treatment of considerable severity. In the various systems, a dangerous "symbolic" use of the criminal instrument (understood, incorrectly, as a salvific device compared to social dynamics that would require an approach on the cultural level and actions that can be appreciate in the medium term) seems, in fact, come into play. The spread of true or presumed social alarms, as we know, has increased in recent years, throughout Europe, the intervention of criminal law, causing, most times, a de-legitimisation of the same criminal response[7], due to the collateral effects on the architecture of the system and to the loss of balance in measuring the criminal sanction.

A second reflection, on the other hand, is made from a purely procedural point of view. If the protection instruments granted to the victim of domestic violence, even with the differences found, appear to respond to the same logics in the examined legal systems, the powers of impulse of the criminal action are very different from each other and are often linked to essentially incompatible procedural ideologies[8]. In a sort of descending *climax*, in terms of the robustness of the assigned rights, we may start off from a system, the Spanish one, that allows the injured person a direct exercise of the action through the *acusador particular*[9] mechanism; going on then to the

[7] E. MUSCO, *L'illusione penalistica*, Milan, 2004, p. 60.

[8] T. ARMENTA DEU, *La víctima como excusa: su posición en los sistemas procesales en relación con el ejercicio exclusivo de la acción penal y el procedimiento de menores*, in *El Derecho procesal español del siglo XX a golpe de tango; Juan Montero Aroca,* Liber Amicorum *en homenaje y para celebrar su LXX cumpleaños*, Valencia, 2012, p. 930.

[9] M. D. FERNÁNDEZ FUSTES, *La intervención de la víctima en el proceso penal (especial referencia a la acción penal)*, Valencia, 2004.

French model, in which the criminal action can be "launched" by the victim through the *constitution de partie civile par voie d'action*; and finally arriving at the Italian experience, in which any form of impact of the injured party on the activation of the criminal prosecution[10] is, in fact, precluded.

Coming to the third point, i.e. that of the right to protection guaranteed by art. 18 of the Directive, a distinction must be made between physical protection measures and measures of protection from secondary and repeat victimisation. From the first point of view, we can state that the measure that has taken root the most in recent years, is the so-called restraining order, imposed by the civil or criminal judge.

In the criminal law sphere the French protection which provides for the possibility of issuing this measure at any phase, from the preliminary investigation phase to the judgement up to procedural recurrences, only apparently less crucial, of dismissal and execution of the sentence (we are thinking of the time when the decision is made for measures alternative to imprisonment), appear to be particularly strong. A very wide approach compared to the Italian one, where numerous areas not covered by protection can be found along the various phases of criminal proceedings.

As far as Spain is concerned, starting from law no 1/2004 (*Ley Orgánica de protección de victimas de violencia de género),* the order of removal (*orden de alejamiento*) and the protection order (*orden de protección*) have become firm instruments and, above all, linked to the precise obligations of providing continuous information to the victim (on the procedural situation of the accused, on the significance and validity of precautionary measures adopted regarding the victim, on the penitentiary situation[11]).

A formulation that re-echoes in some solutions adopted in Italy, where, however, information flows for the victim are still limited, above all during the penitentiary execution phase (in

[10] M. CAIANIELLO, *Poteri dei privati nell'esercizio dell'azione penale*, Turin, 2003.

[11] J. BURGOS LADRON DE GUEVARA (ed.), *La violencia de género. Aspectos penales y procesales*, Granada, 2007, espec. p. 165; A. M. SANZ HERMIDA, *Víctima de delitos: derechos, protección y asistencia*, Madrid, 2009; T. ARMENTA DEU, *Audizione della vittima e diritto alla prova*, in T. ARMENTA DEU - L. LUPÁRIA (eds.), *Linee guida per la tutela processuale delle vittime vulnerabili.* Working paper *sull'attuazione della Decisione quadro 2001/220/GAI in Italia e Spagna*, Milan, 2011, p. 37.

spite of the precise indications of the Directive) and there has not been a full awareness of the complex relationships between vulnerability, rights of communication and the right of waiver of the victims. It must be said, however, that the Italian model has recently reached the point of granting a right of dialogue, by the victim, concerning the measures of repeal or amendment of precautionary measures in a favourable sense for the accused[12]. A breach, not agreed by everyone, of that which has always been considered a "prohibited area" for the victim.

Concerning the question of physical protection, we must not forget the importance, in the scientific debate, that good practices deserve, developed starting from circumscribed virtuous practices, such as, for example, the French experiment of the so-called *telephone grand danger* shows.

Finally, we cannot examine in detail the area of the prevention or mitigation of secondary victimisation. National relations however show the attention of the three criminal processes analysed for the forms of anticipation of the hearing of the victim of domestic violence and for protected interviewing procedures. In this case, the mechanism of the giving of evidence in the Italian system[13] is without a doubt an extremely interesting case[14], which may result in dynamics of imitation by other legislators[15].

[12] For a comment on the new article 299 Italian code of criminal procedure, see in doctrine G. SEPE, *Violenza di genere e consultazione della persona offesa nelle vicende estintive delle misure cautelari*, in *Diritto penale contemporaneo*, 9 July 2014.

[13] Concerning which, the Court of Justice expressed itself, as we know, in the fundamental Pupino case (ECJ, Grand Chamber, 16 June 2005, *Pupino*, C-105/03) and in other subsequent judgements.

[14] M. SIMONATO, *Deposizione della vittima e giustizia penale*, Padua, 2014.

[15] See H. BELLUTA - L. LUPÁRIA, *El testimonio de la victima vulnerable en el proceso penal italiano*, in T. ARMENTA DEU (ed.), *La victima menor de edad. Un estudio comparado Europa-América,* Madrid, 2010, p. 367, esp. p. 369. It is however to be hoped that a change will be made to the use of this procedural instrument, above all in light of the examination of vulnerability, required by the EU Directive in terms of individual assessment. See S. RECCHIONE, *Il dichiarante vulnerabile fa (disordinatamente) ingresso nel nostro ordinamento: il nuovo comma 5* ter *dell'art. 398 c.p.p.*, in *Diritto penale contemporaneo*, 14 April 2014.

3. Concluding remarks

The European vision of a victim who is aware of his own rights, protected from the effect of secondary victimisation and from the risk of violent actions by the defendant, therefore can only stimulate further steps forward in the European models. What, however, we must avoid at all costs are "wild" reactions to the supra-national requests and an excessive loss of balance in the system towards the passive subject.

The collateral effects of the misrepresentation of the entire substantive and procedural structure connected to an excessive valorisation of the victim to the detriment of the person undergoing criminal prosecution are well known. However, here we want to place the accent on the risks of challenging the very concept of the sanction, forced to suffer the effects of a "privatisation" dynamic, where the punishment essentially assumes the profiles of mere restoration for the victim.

This inclination to allow the level of the state sanction to overlap that of the private interests of the victim started, above all, to appear in Europe, in the very field of the protection of ill-treated women. This was demonstrated by the Spanish case of *Gueye and Sànchez* which gave rise to a preliminary question before the Court of Justice[16]. In this matter, a Spanish court sentenced a man for domestic cruelty against his partner and, at the same time, issued, against him, an order banning him from approaching the victim. Sometime after the sentence, however, the perpetrator of the crime returned to live with the victim in accordance with the wishes of the woman, with the result that the man was sentenced a second time, this time for having breached the imposed measure.

The Court had to come to a decision on the compatibility, with regard to European sources[17], of an obligatory adoption of removal measures in the case in which the victims themselves oppose it. The unusual nature of the matter in this way risked re-opening a breach in the traditional conception of the sentence, as this type of sanction could appear to be given almost exclusively in protection of the ill-treated family member. However, the Luxembourg Judges correctly clarified that, as far as the legislation of the Union aims at guaranteeing

[16] ECJ, 15 September 2011, *Gueye and Salmerón Sánchez*, C-483/09 and C-1/10.

[17] In that case, the Framework Decision 2001/220/JHA.

that the victim may take part in the criminal proceedings in an adequate way, this does not imply that an obligatory removal measure cannot be pronounced against her or her wish: the right for injured persons to be heard and to be taken into due consideration by the judge cannot change into giving them the power to directly condition the punitive right of the State, almost as if the sanctions were put directly into their hands.

SECTION 3

VICTIMS PARTICULARLY VULNERABLE

CHAPTER XVIII

VICTIMS WITH SPECIAL NEEDS (NAMELY CHILDREN) IN FRENCH LEGAL SYSTEM

by Sabrina Delattre[*]

TABLE OF CONTENTS: 1. Foreword. - 2. Aspects in which France has good grades. - 2.1. French provisions in compliance with the Directive. - 2.2. French provisions providing additional protection compared to the "minimum standards" of the Directive. - 3. Aspects requiring changes or improvements to implement the Directive. - 3.1. Limited scope of application of French regulatory framework. - 3.2. Towards child-friendly judicial proceedings? - 4. Conclusion: good practices.

1. Foreword

French law on child victims in criminal proceedings seems to be ahead of time compared to European Union legislation. It is a layered structure, often created in the aftermath of especially dreadful events. For instance, terrorist attacks in Paris in 1995 resulted in considerable improvements in the individual assessment and medical and psychological assistance to victims of that kind of attack, and to victims of crime in general. Without a doubt, as far as child victims are concerned, the *Outreau trial*, stretching from 2000 to 2006, has been the most significant one. Often described as a judicial disaster, the erroneous conviction of seven people for rape and sexual assault led the public opinion to forget that four people were

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confirmed guilty and that fifteen children were actually victims of rape and sexual assault. In addition to this, in the image depicted by the media, it looked as though those children had lied and made up stories before psychiatrists and the investigative judge. Notwithstanding this, the case uncovered the ambivalence of the French judicial system in dealing with child victims of crime, in spite of the fact that its regulatory framework appears to be rather in step with the times[1].

Moving in chronological order, it can be noted that French law has begun to be increasingly more active on the matter since 1989 with the creation of a hotline for child abuses (toll-free number 119)[2]. French law on child victims was fostered in first place by the ratification of the International Convention on the Rights of the Child and Adolescent signed in New York and by its gradual implementation. As a matter of fact, some dedicated laws entered into force, such as a number of exceptions to limitation periods for some offences. Furthermore, in order to allow minors to file complaints and claims for damages when in possession of their full capacity, some reforms aimed at extending time limits were adopted, so as to enable minors to submit their cases once they have reached adulthood and are less vulnerable, especially if offences were committed within a restricted circle of friends and family members. In practice, the limitation period begins to run only when the minor reaches the age of majority, that is to say that up to eighteen years are added to the ordinary limitation period. Those reforms had a remarkable impact mostly because they were immediately enforced, also in relation to crimes committed a long time earlier[3].

French law is based on two decrees issued after the Second World War: the first one on child offenders and the second one concerning scenarios with minors in danger[4]. The basic idea was that, in practice, there is no clear distinction between these two types of minors and that the juvenile judge, who has jurisdiction

[1] For further information on the *Outreau* trial, see the series of articles in the annual paper *Essais de philosophie pénale et de criminologie*, Institut de Criminologie de Paris, *La cohérence des châtiments*, Paris, 2012, pp. 105-163.

[2] Art. 71, *loi n° 89-487 du 10 juillet 1989, relative à la prévention des mauvais traitements à l'égard des mineurs*, JORF 14 July 1989, p. 8869.

[3] E. DREYER, *Droit pénal général*, Paris, 2010, p. 1016.

[4] *Ordonnance n° 45-174 du 2 février 1945 relative à l'enfance délinquante*, *Ordonnance n° 58-1301 du 23 décembre 1958 relative à la protection de l'enfance et de l'adolescence en danger*.

over both cases, may apply the provisions only in the interests of minors. In the last decades, this two-pillar system lost solidity and the two categories of minors have drifted apart[5]. Especially after 1989, the French legal system on child victims of crime has been formed by and has featured several other decrees, laws, regulations and circular letters. This wide set of provisions is a strength, but also a weakness, as it causes a regulatory fragmentation among the various text sources and, at the same time, a fragmentation among different branches of law. As far as child victims of crime are concerned, French law is divided into criminal law, which is applicable when a minor is a victim of a criminal offence, private/civil law, which grants the juvenile judge[6] with jurisdiction to rule in case of child abuse, and administrative law, given that in France a large portion of child protection falls within the control of regional administration (*Conseil général* through *l'aide sociale à l'enfance*).

Besides the fragmentation affecting the regulatory framework specifically dedicated to child victims of crime, there are some provisions to be taken into account with reference to the contents of Directive 2012/29/EU, although they do not deal with minors specifically. For instance, the limitations on the publication of proceedings involving minors as victims are not provided for minors only: indeed, article 306 of the *Code de procédure pénale* concerns closed-door hearings in favour of victims in general, and only refers to minors if they are offenders.

To further increase confusion, article 388-1 of the *Code civil*, which recognises the right of the minor to be heard in all judicial proceedings concerning him/her: it could be assumed that this article only applies to private and civil proceedings, as it is contained in the *Code civil*, but its wording is so general that, by extension, it also applies to criminal proceedings.[7] It

[5] S. DELATTRE, *La France: le déclin d'un droit modèle?*, in C. LAZERGES - G. GIUDICELLI-DELAGE (eds.), *La minorité à contre-sens*, Paris, 2014, p. 389.

[6] Art. 375 *Code civil*, amended by *Loi n° 2007-293 du 5 mars 2007 réformant la protection de l'enfance* JORF 6 March 2007, p. 4215. (free translation) «If the health, safety or morality of a non-emancipated minor are in danger, or if his/her education or physical, emotional, intellectual and social development conditions are being seriously jeopardised, the judge may order educational support measures».

[7] Art. 388-1 *Code civil*, extract (free translation): «In all proceedings concerning him/her, a minor who is in a position to form a judgement of his/her own may [...] be heard by the judge or, if this is in his/her interests, by

appears as though legislators, in order to incorporate some provisions from the International Convention on the Rights of the Child and Adolescent signed in New York in 1989, have approved a number of incoherent decrees, rather than a consistent and understandable system. In order to implement the Directive, the French system will definitely have to deal with this unfortunate fragmentation and lack of clarity: they are against the spirit of the Directive, which aims at establishing a general status for child victims of crime.

This paper is divided into three main sections: as far as the provisions contained in the Directive are concerned, France can be said to already have good grades (2). However, changes or improvements are required in connection with some aspects, especially due to the fact that French provisions mostly refer to offences with a sexual background (3). To conclude, some of the good practices adopted by France will be highlighted (4).

2. Aspects in which France has good grades

This section deals with the aspects in which France has good grades and already meets the Directive's requirements in relation to child victims of crime (2.1) or even outdoes its goals (2.2).

2.1. French provisions in compliance with the Directive

Some of the French provisions are perfectly in line with the Directive. Article 21 of the supranational text is aimed at safeguarding the right to protection of privacy: «Member States shall ensure that competent authorities may take all lawful measures to prevent public dissemination of any information that could lead to the identification of a child victim».

As already mentioned in the foreword, in France the publication of criminal proceedings is limited by the *Code de procédure pénale*.

Moreover, an old law, amended in 2000, punishes the dissemination with any means of information concerning the

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the person appointed by the judge [...]. Such an interview is a right when a minor applies for it [...] (The minor) may be heard alone, in the presence of a lawyer or of a person of his/her choice...».

identity or allowing to identify a minor in different situations: when a minor has run away from his/her parents' or custodian's house; when a minor has been abandoned in the cases provided in articles 227-1 and 227-2 of the *Code pénal* (crime of child abandonment); when a minor committed suicide; and finally when a minor was a victim of crime. The dissemination of information is punished with a fine up to 15,000 €[8].

In 2000, two other laws were issued, improving the treatment of child victims in France.

The first one established a Children's Ombudsman, who is in charge of promoting and ensuring the protection of minors and take action if he/she becomes aware in any way of individual cases in which those rights have been violated[9].

Without a doubt, the Ombudsman complies with the content of article 22 of the Directive, which encourages to offer specific protection to victims, especially «due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation»[10].

On the other hand, the second law aimed at making prevention and identification of child abuses more effective, and above all improved training to teachers in French schools[11]. In fact, both laws are based on the idea that the child victim of crime needs more attention. Furthermore, since 1998, a child victim is entitled to a treatment that is adequate to his/her condition and specific needs during the proceedings.

For instance, in the *Code pénal* it is stated that if a minor is a victim of repeated sexual abuses, hearings are to be recorded, so as to prevent the child from re-experiencing those episodes a number of times[12]. That obligation complies with article 24,

[8] Art. 39 *bis*, *loi du 29 juillet 1881 sur la liberté de la presse*, amended by art. 3 of *Ordonnance n° 2000-916 du 19 septembre 2000.*

[9] *Loi n° 2000-196 du 6 mars 2000 instituant un Défenseur des enfants*, JORF *7 March 2000,* pp. 3536-3537.

[10] As we shall later explain, the Children's Ombudsman was incorporated into the new role of the Defender of Rights, established in 2008 and active since 2011.

[11] *Loi n° 2000-197 du 6 mars 2000 visant à renforcer le rôle de l'école dans la prévention et la détection des faits de mauvais traitements à enfants*, JORF 7 March 2000, p. 3537.

[12] *Loi n° 98-468 du 17 juin 1998 relative à la prévention et à la répression des infractions sexuelles ainsi qu'à la protection des mineurs***,** JORF 18 June 1998, p. 9255.

paragraph 1, letter *a)* of the Directive, but its scope of application is more restricted, as it only refers to sexual abuse.

2.2. French provisions providing additional protection compared to the "minimum standards" of the Directive

Those who have dealt with this matter believe that the Directive should not require a significant reform of French provisions[13]. Indeed, some of them exceed the goals of the Directive. One of the main issues for child victims of crime is that most of the offences are committed within a restricted group of friends and family members; as a consequence, the minor should be entitled to the possibility and the right to receive representation and advice from a neutral person. Article 24, paragraph 1, letter b) of the Directive establishes that «in criminal investigations and proceedings [...] competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim [...]».

As far as the representation of child victims of crime is concerned, France not only complies with this requirement, but has even gone one step further: as a matter of fact, the Directive seems to limit representation to a conflict of interest between the parents and the minor; on the other hand, in France, the scope of application of representation is wider, pursuant to articles 706-50 ff. of the French criminal procedure code, establishing that the investigative judge or the Public Prosecutor (depending on the stage of proceedings) may appoint a special representative not only in the event of a conflict of interest, but whenever it is believed that, in the context of a criminal proceeding involving a child victim, the legal representatives of the latter (i.e. his/her parents) could fail to duly comply with

[13] P. BEAUVAIS, *Nouvelle directive sur les droits des victimes (Directive 2012/29/UE),* in *Revue Trimestrielle de droit européen,* 2013, p. 805; E. VERGES, *Un* corpus juris *des droits des victimes: le droit européen entre synthèse et innovations. À propos de la Directive 2012/29/UE du Parlement européen et du Conseil établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité*, in *Revue de science criminelle et de droit pénal comparé*, 2013, n. 1, p. 121.

their role. The special representative is in charge of helping the child victim of crime throughout the whole proceedings, particularly for their final purpose, as he/she has the duty to explain to the minor the meaning of the final decision and help him/her to seek and obtain compensation of damages. The special representative is different from a lawyer (appointed by the representative), since within the regulatory framework he/she is not only a legal representative, but is also understood as a person helping the child to get through difficult times[14].

3. Aspects requiring changes or improvements to implement the Directive

The relative modernity of the French regulatory framework must not hide its deficiencies. Most of the French provisions apply to offences with a sexual background, while the Directive seems to have a broader scope of application (3.1). The issue of how child-friendly judicial proceedings could look emerges from this apparent limit (3.2).

3.1. Limited scope of application of French regulatory framework

In protecting child victims of crime, attention mainly focused on sexual abuses, offences with a sexual background and child pornography, in accordance with the provisions of Directive of the European Parliament and of the Council of 13 December 2011, on combating the sexual abuse and sexual exploitation of children and child pornography[15]. Compared to 2011 Directive, 2012 Directive is wider as it does not make a distinction between categories of minors, while it applies whenever a child is a victim of crime. Victims with specific needs form a rather flexible category, comprising minors as well as victims showing «particular vulnerability». Moreover, in the Directive, the specific provisions for child victims apply

[14] L. NASTORG, *L'administrateur* ad hoc *et la parole de l'enfant dans la procédure pénale: pratique d'un administrateur* ad hoc, in *Actualités juridiques pénal,* 2014, n. 1, p. 16.

[15] Directive 2011/92/EU, Official Gazette of the European Union, L 335 of 17.12.2011.

to all offences. On the other hand, article 706-47 of the *Code de procédure pénale* exhaustively lists the offences for which a specific procedure for child victims of crime is to be adopted: homicide of a child preceded by rape or acts of torture and barbarity; sexual assaults and acts of sexual violence against a child; child trafficking and so forth. Offences without a sexual background are the most serious ones: murder preceded by acts of torture and barbarity, acts of torture and barbarity and repeated murder. In those cases, a child victim of crime: may be subject to individual assessment (art. 706-48); in certain conditions, may avail him/herself of a special representative (art. 706-50 and 706-51); has the right to be assisted by a lawyer, whose assistance is sometimes mandatory (art. 706-51-1); and finally, in the event of an interview, must be recorded (art. 706-52), with the opportunity to receive advice from a psychologist or physician specialised in childhood and adolescence (art. 706-53). These national provisions roughly comply with article 24 of the Directive, but unlike it they do not apply to all proceedings where a minor is a victim of crime.

3.2. Towards child-friendly judicial proceedings?

It would be sufficient to apply the above-said regulatory framework to all criminal proceedings involving a minor as victim of crime, regardless of their type. This would be a simple reform, as it would only entail amending article 706-47 of the *Code de procédure pénale*: instead of exhaustively listing offences, a more general wording should be used. The heading of the corresponding section in the Code, *Procedures for offences with a sexual background and protection of child victims of crime* could be slightly modified, eliminating any reference to offences with a sexual background.

In France, the establishment of a procedure designed for minors mainly focused on offences with a sexual background for several reasons, among which some rather sordid newspaper headlines triggering the Parliament's reaction and resulting in inadequate provisions. The main weakness of French provisions consists in their limited scope of application, which prevents them from being enforced in all proceedings involving a child victim. However, the question is whether expanding the scope of current provisions would be relevant, feasible on a technical

level and useful. For instance, in practice, how is it possible to be sure that the interview of a child victim of crime is actually recorded, given the fact that technical problems could arise at any time? Essentially, the philosophy beyond the Directive is to improve the status of victims. France should not limit the special treatment of child victims of crime, as set forth in articles 706-47 ff. of the *Code de procédure pénale*, but what other offences should be included?

Furthermore, the Directive seems to imply that the category of child victim of crime could be confused with the wider category of victims with specific needs[16], as the combination of articles 23 and 24 is unclear. Article 23 deals with victims with specific needs; a rather vague category, given the fact that Member States are free to decide which categories of victims are included among those with "specific needs" (the Directive only provides a few indications, such as «the personal characteristics of the victim; the type or nature of the crime; and the circumstances of the crime»). The combination of the two articles gives rise to two slightly different interpretations.

From a first perspective, a minor is a victim with specific needs and the Member States are free to establish the scope of application of special treatment, with the authority to limit it to offences with a sexual background and to serious offences. Article 24 may be construed as limited by the future transposition of article 23: a minor is a victim with specific needs, hence all measures provided for in article 23 shall apply to his/her case, in addition to those provided for in article 24 as limited by article 23. For instance, if France decides that article 23 shall only apply to victims of serious offences and of offences with a sexual background, then article 24 too shall be limited to the same types of offences. From this perspective, France complies with the Directive.

According to another interpretation, article 24 shall apply to all minors, in all cases, and is not limited by the transposition of article 23, hence all measures as per article 23 and article 24 shall apply, and the latter shall be deemed as granting more protection to a special category of victims, i.e. minors. According to this interpretation, a reform of French law is required. It is believed that the latter option should prevail, as it

[16] J. ALIX - R. PARIZOT, *Le mineur en droit de l'Union européenne: un statut pénal à construire?*, in C. LAZERGES - G. GIUDICELLI-DELAGE (eds.), *La minorité à contre-sens*, Paris, 2014, p. 205.

is closer to the spirit of the Directive, which does not only deal with very serious offences or offences with a sexual background.

4. Conclusion: good practices

Even though some improvements could be introduced to make sure that the French system complies with the Directive, to be transposed into national law by 16 November 2015, France can count on a number of good practices supplementing its legal and regulatory framework. As already mentioned, the functions of the Children's Ombudsman, established in 2000, have been granted to the Defender of Rights since 2011. This broader role arises from the revision of French Constitution in 2008, recognising a constitutional status to the Defender of Rights (art. 71-1 Constitution)[17]: a measure of rather strong value, although in practice the effectiveness of this institution depends first and foremost on the Defender's will and personality. Namely, as far as child victims of crime are concerned, in 2004 France established a National Observatory for Children in Danger[18], an institution aimed at preventing and identifying cases of child abandonment and abuse. In spite of the Directive's scope of application being limited to criminal proceedings, a better knowledge of the victimisation of minors is essential and in line with the philosophy underlying the Directive itself.

Within the specific field of criminal proceedings, in 2003 the Ministry of Justice and the Ministry of Education published a shared official guide containing good practices to apply in the presence of child victims of criminal offences[19]. In the guide's

[17] *Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^ème^ République*, JORF of 24 July *2008*, p. 11890.

[18] *Loi n° 2004-1 du 2 janvier 2004 relative à l'accueil et à la protection de l'enfance*, JORF of 3 January 2004, p. 184. French name: *Observatoire National de l'Enfance en Danger* (ONED). Website: oned.gouv.fr. The status of the Observatory was specified and strengthened in 2007: see *Loi n° 2007-293 del 5 mars 2007 réformant la protection de l'enfance*, JORF 6 *March 2007,* p. 4215.

[19] Ministère de la Justice, Ministère de la Jeunesse, l'Éducation et la Recherche, Direction des Affaires Criminelles et des Grâces, *Enfants victimes d'infractions pénales: guide de bonnes pratiques. Du signalement au procès*

introduction, it is reminded that in France the protection of child victims is very comprehensive compared to other European countries. In spite of this, the management of child victims of crime still relies on the good will of operators in the field and shows geographical inequalities. Therefore, the guide suggests how to act to improve the treatment of child victims and outlines the various stages of intervention if a child is a victim of crime: reporting process, specific interview techniques, supply of medical treatment, assessment protocol and child support for the whole duration of proceedings.

In France, the implementation of the Directive would not seem to require any regulatory effort, but rather an improvement of practices in the field. If child victims of crime are seen as a category of victims with specific needs, the transposition of this Directive into the national law will be negligible, although this should not hide the few weaknesses still present in the French system.

pénal, December 2003. The guide is accessible online, from the website *http://www.justice.gouv.fr/art_pix/guide_enfants_victimes.pdf.*

CHAPTER XIX

PROTECTION OF PARTICULARLY VULNERABLE VICTIMS IN THE ITALIAN CRIMINAL PROCESS

by Hervé Belluta[*]

TABLE OF CONTENTS: 1. Photograms of a dynamic system. - 2. Protection of the vulnerable source during preliminary investigations. - 3. The *incidente probatorio*. - 4. The trial: between readings and verbal character. - 5. Protection of the victim from the defendant.

1. Photograms of a dynamic system

Since Europe has placed the victim at the centre of its own regulatory action, a lot has changed, in Italy too[1]. The criminal system, which has been inattentive for a long time, today seems to be more sensitive and open to the needs for recognition and protection demanded by victims. Moreover, having understood that the crime is not only «a wrong for society, but also a breach of the individual rights of the victims» (Recital no 9 Dir. 2012/29/EU) marks a point of no return.

The trial notices that it needs the victim, at least as much as the victim needs the trial. In this exchange, the victim claims identity and the trial offers recognition; the victims ask for participation and the trial involves him; the victim asks for protection and the trial protects him. On its side, the criminal initiative of the victim sometimes represents the indispensable condition to proceed; other times, it is only thanks to the contribution of the victim that the trial can fulfil its cognitive path.

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[1] In summary, on the topic, S. ALLEGREZZA - H. BELLUTA - M. GIALUZ - L. LUPÁRIA, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Turin, 2012.

In the slow dynamics of harmonisation between criminal ascertainment and the presence of the victim, the trial has acted in a utilitaristic key; first of all, providing protection instruments calibrated on the witness, then recognising the osmosis that often identifies witnesses and victims[2].

In particular, the irruption of the source of evidence vulnerable by antonomasia, i.e. the child[3], is crucial. The need to guarantee the child maximum serenity in making his or her own contribution of evidence, forced the legislator to create a thick network of protections around this individual.

In particular, a dual need was found to exist initially: that of protecting the child source of evidence *from* the trial and *in* the trial. Since, in fact, the reconstruction of the facts and the interrogation can have strong anxiety-inducing connotations, the system was concerned about limiting to the maximum the risk of secondary victimisation "from the trial". So much so that an attempt was made to de-trialise, both for the witness and for the victim of the crime, understood as limiting the occasions of contact between the person and the trial context. At the same time, once called to give evidence, the child was treated with kid gloves[4], in order to guarantee that he wasn't upset, at the same time guaranteeing a truthful deposition.

The best compromise between protecting these needs and respecting the defendant's right of defence – understood above all as the right to confront his own accuser – is represented by the mechanism of giving evidence. Although without going into details[5], the main structure of the protection guaranteed to the child transpires from the dual aspect of anticipation-crystallisation of evidence. Listening to the source soon after the events also helps to prevent the mnestic removal of memories. Giving immediate life to evidence then means that the person should not have to return to depose during the trial since his or her previous declarations[6] can be used to reach a decision.

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[2] See L. SCOMPARIN, *La tutela del testimone nel processo penale*, Padua, 2000.

[3] For an overall picture, C. CESARI (ed.), *Il minorenne fonte di prova nel processo penale*, Milan, 2008.

[4] Literally, C. CESARI, *La "campana di vetro": protezione della personalità e rispetto del contradditorio nell'esame dibattimental del teste minorenne*, in *Il minorenne fonte di prova*, cit., p. 219.

[5] For which reference must be made to *infra*, § 3.

[6] On this point see *infra*, § 4.

Although they represent the driving force of vulnerability in the criminal trial, no longer do children alone, among the victims, require particular protections. Over time, thanks to the jurisprudence of the Italian Constitutional Court[7] and numerous legislative actions[8], some of the mentioned guarantees have been extended to vulnerable adults. In particular the "unconditional" giving of evidence was made feasible in order to take the evidence of the adult injured person who is mentally ill; as far as the trial is concerned, proceeding from crimes in the sexual sphere, maltreatment or persecutory acts, the mentally ill adult who is the victim of crime can be interrogated via examination screened by a one-way mirror.

Lastly, as proof of how important the topic of vulnerability has become, the law on combatting gender violence[9] has

[7] In particular, Italian Constitutional court, decision 29.1.2005 no 63, which declared illegitimate art. 398, par. 5-*bis*, Italian code of criminal procedure in the part in which it does not provide that the judge can adopt particular guaranteed procedures of time and place where most of the people interested in the assumption of evidence are mentally ill adults and the needs of those make it necessary or appropriate; and also 498, par. 4-*ter*, Italian code of criminal procedure in the part in which it does not provide that examination of the mentally ill adult victim of crime can be made, on his or her request or that of his or her defence council, via the use of the mirror with phone.

[8] Note, in particular, the so-called "security package" of 2009, composed of legislative decree 23.2.2009, no 11, conv. l. 23.4.2009, no 38 and of law 15.7.2009, no 94 (about which see O. MAZZA - F. VIGANÒ (eds.), *Il "pacchetto sicurezza" 2009*, Turin, 2009); law 1.10.2012 no 172, in ratification and execution of the Convention of the Council of Europe for the protection of children against exploitation and sexual abuse, made in Lanzarote on 25 October 2007, and updating provisions of the internal regulations, about which see, for procedural law profiles A. M. CAPITTA, *Legge di ratifica della Convenzione di Lanzarote: le modifiche al codice di procedura penale e alla legge sull'ordinamento penitenziario*, in *Diritto penale contemporaneo*, 5 November 2012; C. CESARI, *Il minore informato sui fatti nella legge n. 172/2012*, in *Riv. it. dir. proc. pen.*, 2013, p. 157.; M. DANIELE, *Un ulteriore restyling incompleto delle norme processuali*, in *Leg. pen.*, 2013, p. 64; B. PIATTOLI, *Audizione protetta del minore e tutela delle vittime del reato*, in M. BARGIS (ed.), *Studi in ricordo di Maria Gabriella Aimonetto*, Milan, 2013, p. 163.

[9] This is legislative decree 14.8.2013 no 93, conv. with amend. in law 15.10.2013, no 119, about which see H. BELLUTA, *Processo penale e violenza di genere: tra pulsioni preventive e maggiore attenzione alle vittime di reato*, in *Leg. pen.*, 2014, n. 1-2, p. 70; R. BRICCHETTI, *Braccialetto elettronico per chi viene allontanato*, in *Guida dir.*, 2013, n. 44, p. 93; P. DE MARTINO, *Le innovazioni introdotte nel codice di rito dal decreto legge sulla violenza di genere, alla luce della Direttiva 2012/29/EU*, in *Diritto penale contemporaneo*, 8 October 2013; A. DIDDI,

extended protection methods for trial examination to any injured adult who has profiles of particular vulnerability. Moreover, in implementing Directive 2011/36/EU, relating to the repression of human trafficking and the protection of victims, the legislator has absorbed the figure of the particularly vulnerable adult[10]. In this way, the methods guaranteed for taking evidence from vulnerable sources are extended, finding application, on request of the party, «when the persons involved in the taking of evidence include particularly vulnerable adults, assumed also from the type of crime involved in the trial».

The concept of vulnerability also appears with regard to protection of the victim from the defendant. In giving consideration to this aspect of secondary victimisation caused by repeated offences or intimidation, the trial imposes filters between the accused and the injured party. Intervening on the cautionary level, special instruments have been created to protect the life and the safety of the injured person, if the person should be put at risk by the release of the defendant. By banning the accused from the family home and, then banning the person from entering the places frequented by the injured party[11] a subjectivised protection of victims[12] was created. Lastly, a new precautionary instrument was also created, to be used by the judicial police.[13]: urgent removal from the family home, to be adopted in cases of need and urgency dictated by the state of flagrancy of crimes against individuals and sexual freedom.

Chiaroscuri nella nuova disciplina sulla violenza di genere, in *Proc. pen. giust.*, 2014, n. 2, p- 91; C. IASEVOLI, *Pluralismo delle fonti e modifiche al c.p.p. per i reati commessi con violenza alla persona*, in *Dir. pen. proc.*, 2013, p. 1390; G. PAVICH, *La nuova legge sulla violenza di genere*, in *Cass. pen.*, 2013, p. 4314; S. RECCHIONE, *Il decreto legge sul contrasto alla violenza di genere: una prima lettura*, in *Diritto penale contemporaneo*, 15 September 2013.

[10] For an initial comment on legislative decree 4.3.2014 no 24, S. RECCHIONE, *Il dichiarante vulnerabile fa (disordinatamente) ingresso nel nostro ordinamento: il nuovo comma 5-ter dell'art. 398 c.p.p.*, in *Diritto penale contemporaneo*, 14 April 2014.

[11] Concerning this, F. ZACCHÈ, *Vecchi automatismi cautelari e nuove esigenze di difesa sociale*, in *Il "pacchetto sicurezza" 2009*, cit., p. 296.

[12] On this delicate topic see D. NEGRI, *Le misure cautelari a tutela della vittima: dietro il paradigma flessibile, il rischio di un'incontrollata prevenzione*, in *Giur. it.*, 2012, p. 467.

[13] On the new mechanism see A. DIDDI, *Chiaroscuri nella nuova disciplina sulla violenza di genere*, cit., p. 101.

The series of information about the trial which should be provided to the victims[14] also falls within the wide sphere of protection. In particular, note the obligation to provide information to the injured party concerning crimes committed with violence to the individual, in the case of repeal or substitution of coercive cautionary measures applied to the defendant, according to art. 299, par. 2-*bis*, Italian code of criminal procedure (from now on, c.p.p.)[15].

In this way, at least partial expression is given to the expectations of art. 56 of the Istanbul Convention, where, in letter b, the contracting Parties are asked to guarantee that «victims are informed, at least in cases where the victims and the families might be in danger, when the perpetrator escapes or is released temporarily or definitely». In the same sense, Directive 2012/29/EU also establishes, in art. 6, §5, that victims of crime must have the possibility of being informed, without undue delay, about the release or escape from prison of the person placed in arrest before trial, tried or sentenced «concerning the victim».

In short, even though with often disjointed actions, the Italian criminal process is starting to get used to the presence of an essentially new subject. The victim is gaining ground on the criminal scene; the vulnerable victim is gradually obtaining recognition and specific protection, in the name of that protective "shield" that only the trial can offer.

2. Protection of the vulnerable source during preliminary investigations

Concentrated on the dual aspects of evidence gathering-trial, the criminal process has for a long time underestimated the possibility of hearing the vulnerable source of evidence during the preliminary investigations, In fact, in spite of the preference given to gathering evidence from the child during interim proceedings, nothing prevents the public prosecutor and the defence council from gathering summary information from the

[14] For an overall picture see H. BELLUTA, *Un personaggio in cerca d'autore: la vittima vulnerabile nel processo penale italiano*, in *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, cit., p. 119.

[15] This is another innovation made with law no 119 of 2013.

child that may be useful for their investigations [16]. In this way, however, in the absence of a specific discipline, the opposite result to the one hoped for was achieved: rather than interviewing the vulnerable person only once, it was in actual fact possible to hear the person on various occasions. Moreover, without the particular precautions that only the gathering of evidence is able to give.

This way of getting out of the protection guaranteed to children appears to be put back into perspective by law 172 of 2012, which invented the assisted interview. The public prosecutor, the judicial police or the defence councillor who, when prosecuting crimes of cruelty, persecution[17], violence and sexual abuse, must gather information from the child, are obliged to avail themselves of the aid of an expert in psychology or a child psychiatrist.

The apparent increase in the guarantee given in favour of child witnesses however hides some concerns. With regard to the previous system, it represents a step forward; compared with the indications coming from Dir. 2012/29/EU, it is a disappointing result.

In fact, the Directive in addition to recognising the rights due to all victims with specific protection needs (art. 23), intends recognising a strengthened protection to children (art. 24). Therefore, due to the need to provide special premises, the presence of operators – usually the same ones – trained, *ad hoc*, all investigation interviews of the child should be videotaped, so that full use can be made of them for the purpose of evidence. A "minimum" level of guarantee that our legal system does not provide, either because the presence of professional operators and adequate premises appears very aleatory or because there is

[16] Let us examine in detail the relevant problematic aspects, respectively L. CARACENI, *Assunzione di dichiarazioni dalla fonte di prova minorenne e attività investigativa della pubblica accusa*, in *Il minorenne fonte di prova*, cit., p. 21; F. SIRACUSANO, *Indagini difensive e "persona informata" di minore età*, *ivi*, p. 69.

[17] Crimes of cruelty against family members of cohabitants (art. 572 Italian criminal code) and acts of persecution (612-*bis*) have been added, to art. 351, par. 1-*ter*, Italian code of criminal procedure, by law 119 of 2013. The original catalogue only envisages the crimes provided in articles 600, 600-*bis*, 600-*ter*, 600-*quater*, 600-*quater*.1, 600-*quinquies*, 601, 602, 609-*bis*, 609-*quater*, 609-*quinquies*, 609-*octies* e 609-*undecies* criminal code.

no obligation to video-tape interviews carried out during investigations[18].

It must also be added that the law does not cite the victim, but the child: therefore, the guarantee of qualified assistance does not look at the actual condition of the person who has suffered one of the listed crimes, but only the age of the declaring person. Beyond the child, however, vulnerability has moving boundaries: in fact, the same Dir. 2012/29/EU cites the disabled, victims of human trafficking, terrorism, organised crime, violence in close relationships, sexual violence or exploitation, gender violence and hate-based crimes (Recital no 57). These people could actually benefit from specialised support, functional even on the authenticity of the contribution. To this end, however, that individual assessment would be useful around which recognition of the particular vulnerability, presumed only for children, revolves, within Europe. Moreover, such interviews certainly take the place of the indiscriminate gathering of information from vulnerable sources, by the investigating authorities and the defence council. However, there is the risk that they replace the much better guaranteed gathering of evidence, on which the legislator has invested a great deal in order to protect witnesses and victims who reveal the need for special protection measures.

3. Special evidence pre-trial hearing

During investigations and the preliminary hearing, the prosecution and the defence can ask the judge to listen amongst other things to the evidence of the child, without producing causes of non-adjournment or non-renewability of evidence when cruelty, persecution or crimes regarding the sphere of personal or sexual liberty are being prosecuted (art. 392, par. 1-

[18] In the same way, there is no provision of sanctions for the case where specialist assistance is not provided during the taking of evidence in favour of the declaring child. Only if the defence council is prosecuting, does art. 391-*bis*, par. 6, Italian code of criminal procedure provide that «the declarations made and the information gathered in breach of one of the provisions mentioned in the previous paragraphs cannot be used», and paragraph 5-*bis* imposes the help of an expert in psychology or a child psychiatrist if the rimes mentioned in art. 351, par. 1-*ter*, Italian code of criminal procedure are being prosecuted. Concerning this, C. CESARI, *Il minore informato sui fatti*, cit., p. 165; B. PIATTOLI, *Audizione protetta del minore*, cit., p. 176.

bis, c.p.p.). At the same time, when a child is involved, the judge can identify particular procedures for proceeding with a special evidence pre-trial hearing, establishing that the hearing must be carried out in specialised facilities, such as hospitals and nursery schools, or at the child's home (art. 398, par. 5-*bis*).

Moreover, since evidence is taken with the forms established for the trial (art. 401, par. 5), the child shall be examined by the judge, on questions presented by the parties, perhaps with the help of a family member or an expert in child psychology (art. 498, par. 4). Or, if crimes of violence or child pornography are being prosecuted, the person may be interviewed through a one-way mirror, with the use of an intercom (art. 498, par. 4-*ter*). Finally, witness declarations «must be fully documented with phonographic or audio-visual production means».

From the cross-reference between the special evidence pre-trial hearing and trial, in spite of the obvious difficulties of interpretation, the adult witness receives wide protection. Moreover, the pre-trial hearing discipline itself was recently modified in order to extend its guarantee network to vulnerable adults. In implementation of Dir. 2011/36/EU, the legislator has accepted the general principle (provided in art. 1 of legislative decree no 24 of 2014), highly innovative for our legal system, according to which, in implementing the provisions of the decree, consideration is given, «on the basis of an individual assessment of the victim, of the specific situation of the vulnerable persons, such as children, unaccompanied minors. the elderly, disabled, women, in particular if they are pregnant, single parents with children, persons with mental disorders, people who have suffered torture, rape or other serious forms of psychological, physical, sexual or gender violence».

Thus, through the new paragraph 5-*ter* of art. 398 c.p.p., it is established that the particular procedures guaranteed for taking evidence from vulnerable witnesses may apply, when requested by the parties, «when among the persons involved in the giving of evidence there are adults in a condition of particular vulnerability, also deducible from the type of crime being prosecuted».

Paradoxically, however, the position of the adult (whether he or she is a victim or not) seems to be more guaranteed than when a child is involved: in fact, the precautions indicated in art. 398, par. 5-*bis* are still applicable, in the presence of

children, only when the expressly mentioned crimes are being prosecuted. However, the system seems to be making small steps towards updating. It is to be hoped that the regulatory opening up to the individual assessment launched in this way may, in the future, also concern children.

Generally speaking, the specific protections must be calibrated, as Dir. 2012/29/EU, to the needs of the individual people. However, when children appear, the concept of vulnerability *ex crimine* must be overcome: the technique of reference to individual crimes places the Italian criminal process in conflict with Dir. 2012/29/EU. Corresponding interpretation, recourse to the Luxembourg Court of Justice and incidents of constitutionality could substitute the legislator in updating the trial treatment of particular vulnerability, especially in the presence of children[19]. The rigidity of the regulatory reference should be substituted with greater judicial discretionality and with the flexibility of case by case assessment.

4. The trial: between readings and verbal character

The trial, the heart of the formation of evidence in cross examination, appears to be rather permeable to the needs of children and vulnerable victims for protection.

Above all, the judge can order that children are questioned in private (art. 472, par. 4, c.p.p.); moreover, questioning is always carried out in private when the victim of crimes punished in compliance with arts. 600, 600-*bis*, 600-*ter*, 600-*quinquies*, 601, 602, 609-*bis*, 609-*ter* and 609-*octies* Italian criminal code is a child (art. 472, par. 3-*bis*, c.p.p.)[20]. As far as the examination of witnesses is concerned, when a child is involved the system is willing even to waiver cross-

[19] This path is also indicated by A. BALSAMO - S. RECCHIONE, *La protezione della persona offesa tra Corte europea, Corte di giustizia delle Comunità europee e carenze del nostro ordinamento*, in A. BALSAMO - R.E. KOSTORIS (eds.), *Giurisprudenza europea e processo penale italiano*, Turin, 2008, p. 326.

[20] We must not however ignore the fact that this list, made by art. 15 l. 15.2.1996, is worthy of expansion, along the lines of that which happened for other provisions of the code which were gradually updated with reference to cases "with a vulnerable victim" (such as, for example, articles 392, 398, 498 Italian code of criminal procedure).

examination: in fact, examination of the child «is conducted by the president on demands and disputes raised by the parties» (art. 498, par. 4, c.p.p.). The deposition can continue with ordinary forms only if, after hearing the parties, the president decides that direct examination «cannot damage the peace of mind of the witness». When, then, the needs for protection are even greater, the child victim (and also the adult mentally-ill victim) is examined through the use of a one-way mirror with intercom (art. 498, par. 4-*ter*, c.p.p.). Separation of the source of evidence from the trial and the absence of direct confrontation with the defendant appear to be functional to protecting victims of crime from strong secondary victimisation such as cruelty (art. 572 Italian criminal code), stalking, crimes of paedophilia and crimes against sexual freedom[21].

The concentration of guarantees on the child has for a long time left the adult victim in the corner. As we have said, however, thanks to the intervention of the Constitutional Court, followed by the legislator, the screened examination has been extended to the mentally-ill adult victim of crime. In this way, however, no protection was recognised to the adult victim who is not mentally-ill, nor to the simple "weak" witness, in this way undermining the value of the realistic view that they too could reveal aspects of particular vulnerability.

Only with the recent law against gender violence was a remedy found: thanks to the new paragraph 4-*quater* of art. 498 c.p.p., the protected procedures of examination can be applied to the injured adult who presents profiles of particular vulnerability. Implementing the invitation of Directive 2012/29/EU, the specific needs of the victim obtain both recognition and protection. Above all, particular vulnerability must be assumed «also from the type of crime being prosecuted»: therefore, even from the personal characteristics of the injured party, such as age, gender, ethnicity, race, religious, sexual orientation, state of health or relationship with the person undergoing investigation or charged (Recital no 56). From an objective point of view, however, the provision seems to be limited, operating only if «the crimes provided by paragraph 4-*ter* are being prosecuted»; in such cases, in the face of particular vulnerability, the judge, "where he considers it appropriate",

[21] Regarding this, H. BELLUTA, *Un personaggio in cerca d'autore: la vittima vulnerabile nel processo penale italiano*, cit., p. 112.

orders, on the request of the injured party or of his or her defence council, «the adoption of protected procedures», i.e. the use of the examination screened by a one-way mirror, examination conducted by the president on claims and disputes raised by the parties, or the protected examination according to the forms provided art. 398, par. 5-*bis*, c.p.p. (referred to by art. 498, par. 4-*bis*).

From the system point of view, moreover, there are two differences between the trial and the special evidence pre-trial hearing. On one hand, during the trial, protected procedures can only concern witness examinations, while during the pre-trial hearing protective precautions (art. 398, par. 5-*bis*, c.p.p.) operate for all those means of evidence that concern the vulnerable source, such as confrontation, recognition, the judicial experiment or the report. On the other hand, while during the pre-trial hearing, where there are particularly vulnerable adults, the special protection procedures are always applicable, during the trial, the prosecution must concern one of the (few) crimes indicated art. 498, par. 4-*ter*, c.p.p.

To remedy this last aporia, action could be taken in an interpretative manner on the basis of a reading orientated favourably toward the victim, in light of Directive 2012/29/EU: since the procedures mentioned in art. 398, par. 5-*bis*, c.p.p. are discussed during the trial and also art. 398, par. 5-*ter* makes a reference to them, this last provision could find application, thanks to the reference *ex* art. 498, par. 4-*bis* during the trial, thus overcoming the boundary traced by the individual crimes mentioned in paragraph 4-*ter* and also making the protected procedures feasible for the vulnerable adult.

Every beneficial synergy between the special evidence pre-trial hearing and the trial lose efficacy, however, before a process that fails to avoid the repeating of evidence. Given that the system aims at bringing forward and not repeating examinations of the victims and vulnerable witnesses, such persons should rarely appear during the trial, once evidence has been taken during the special evidence pre-trial hearing. On the contrary, their presence at the trial appears even more problematic: in fact, the "way in" for vulnerable individuals (art. 190-*bis*, par. 1-*bis*, c.p.p.) remains inexplicably open. The limit to the right to evidence, constructed on the admissibility of the examination «only if it regards facts or circumstances different from those that are the object of previous declarations

or if the judge or one of the parties should consider it necessary on the basis of specific needs » exclusively concerns children under sixteen years of age, pending such crimes of sexual violence and paedophilia. On this level also, we must hope for an action aimed at linking the limits to the right to evidence with the actual vulnerability of the victims and witnesses, irrespective of the age of the person and the individual circumstances of the offender.

In short, before the particular vulnerability of victims and witnesses, the system must be able to waiver some of its most qualifying traits, such as the oral character and cross examination. On the other hand, the *mise en balance* of the interests of the players in the trial is precisely the most classic teaching of the ECHR[22], and the inspiration behind the policy of the European Union concerning victims.

5. Protection of the victim from the defendant

In addition to the classical spheres of protection of the victim *from* the trial and *during* the trial, the system has gradually built a network to protect the victim *from the defendant*. In a very wide sense, the attenuation of the strength of cross-examination, designed to protect the weak individual from direct confrontation and even from being seen by the accused, seems to be orientated in this direction. On the other hand, a strongly subjectivised protection comes from the creation of specific precautionary measures applicable to the defendant in order to prevent episodes of repeat crimes and intimidation of the victim[23].

Thus, already in 2001 the measure of removal from the family home (art. 282-*bis* c.p.p.) made its appearance in the criminal procedure code, understood as creating a physical distance between the defendant and the places habitually frequented by the injured party, in order to protect the safety of the crime victim and his or her nearest family members. More recently, through the so-called “safety package” of 2009, the ban was included on approaching the places frequented by the injured party (art. 282-*ter*), the added value of which is found

[22] On this point, L. SCOMPARIN, *La tutela del testimone*, cit., p. 1.

[23] For critical remarks on the topic see D. NEGRI, *Le misure cautelari a tutela della vittima*, cit., p. 467.

both in the possibility of banning the defendant from approaching the victim, his or her close family members, co-habitants and anyone who is emotionally linked to them, and the possible ban on communicating with them[24] through any means whatsoever.

Continuing along this line of action, in dealing with gender violence[25], the legislator has operated on a precautionary level, widening the margins of practicability of arrest *flagrante delicto* and creating the new measure of urgent removal from the family home (art. 384-*bis* c.p.p.). On the first hand, the cases that legitimise the obligatory arrest *flagrante delicto* include both the crime of cruelty perpetrated against family members and cohabitants, and stalking, which are mentioned in let. l-*ter* of art. 380. Although these are cases of repeated behaviour, therefore difficult to perceive "in flagrante", they represent crimes with a high level of victimisation, often a warning sign of future, perhaps more serious acts[26].

Concerning urgent removal, this places itself as a natural premonitory symptom of the precautionary measure of removal from the family home, but it also lends itself to anticipating the ban on approaching places frequented by the injured party. This provision, enforced at the discretion of the officials and officers of the judicial police, must be previously authorised by the public prosecutor in writing, orally or by communication means. It can be applied when a person has been caught red-handed committing the crimes mentioned in article art. 282-*bis*, par. 6, c.p.p. and when there are firm grounds to envisage that such crimes will be repeated, causing serious and actual risk for the life, physical or psychological safety of the inured party[27].

After which, the ordinary procedure of ratification will follow (articles 390 ff. c.p.p.), perhaps with the adoption of a

[24] On the reach of the measure disciplined in art. 282-*ter* Italian code of criminal porcedure, amongst others, F. ZACCHÈ, *Vecchi automatismi cautelari: dietro il paradigma flessibile, il rischio di un'incontrollata prevenzione*, cit., p. 296.

[25] This is again a matter of legislative decree no 93 of 2013, converted with amendments into law no 119 of 2013.

[26] Regarding this see S. RECCHIONE, *Il decreto legge sul contrasto alla violenza di genere: una prima lettura*, in *Diritto penale contemporaneo*, 15 September 2013, p. 6.

[27] In other words, the precautionary measure in question rests on the assessment of the dangerousness of the accused person. On this point A. DIDDI, *Chiaroscuri nella nuova disciplina*, cit., p. 102.

coercive measure. Equally, the new hypothesis of the immediate trial contemplated in art. 449, par. 5[28] could find application. A system that has now become multi-functional[29], which here brings the defendant before the trial judge for ratification of the urgent removal from the family home and for the simultaneous judgement concerning it. An intrinsic path of special prevention, but also capable of showing – through a decisive acceleration of trial times – a peculiar attention to the "safety" needs of crime victims.

As far as the effectiveness of the innovative precautionary instrument is concerned, this should accompany the growing area of the arrest in *flagrante delicto.* In fact, a certain number of cases mentioned in art. 282-*bis* c.p.p. imposes obligatory arrest *flagrante delicto*. This is what happens for the crimes mentioned in articles 572, 612-*bis*, 600, 600-*bis*, par. 1, 600-*ter*, par. 1 and 2, 600-*quinquies*, 609-*bis*, 609-*quater*, 609-*octies*, 601 e 602 Italian criminal code.

Also, optional arrest is possible for the crimes provided in articles 570, 571, 582, 609-*quinquies* Italian criminal code.

So, urgent removal will only find a place after the police have excluded obligatory or optional arrest; essentially, it will concern, above all "sentinel" cases such as personal injuries , (art. 582 criminal code), so serious that they make further and more serious episodes of crime more likely, or where repeat abuse of means of correction or of discipline perpetrated within the family or in any case within the domestic arena prevail (art. 571).

Finally, the protective framework of particularly vulnerable individuals, *in primis* children, really seems to be experiencing a dynamic boost. The time seems right, if anything, for giving greater systematicity to the delicate topic of the rights of victims and the status of particular vulnerability.

The victim has found protection for some time; recently, also individual recognition. Reversing the terms, we can hope that legislator and jurisprudence work with attention first of all concerning the delicate profile of the identification of vulnerability, focusing above all on an expansion of the

[28] Concerning which see A. TRINCI-V. VENTURA, *Allontanamento d'urgenza dalla casa familiare e rito direttissimo*, in *Diritto penale contemporaneo*, 5 December 2013.

[29] Widely, on the topic, S. ALLEGREZZA, *I giudizi direttissimi fra codice e leggi speciali*, Turin, 2012, p. 144.

individual assessment, in order to construct guarantistic responses made to measure, without excessive sacrifices for that balance of positions between the opposing parties that, however, remains a priority in the Italian criminal trial.

CHAPTER XX

CHILDREN VICTIMS OF SEXUAL ASSAULT AND ABUSE IN VIEW OF THE SPANISH PENAL REFORM

by Antonia Monge Fernández[*]

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1. Introduction

The need to provide special protection to crime victims led the European Union to issue Directive 2012/29/EU[1] to establish minimum standards for the rights, support and protection of victims of crime, and which replaced the Council's Framework Decision 2001/220/JHA. Indeed, in the preamble to that directive and in accordance with the Budapest Working Plan, the review and complementation of the principles set out in Framework Decision 2001/220/JHA was established as an objective as well as making significant progress in protecting victims in the whole Union, particularly in the context of criminal proceedings.

Returning to the legal framework, it is worth referring to Directive 2011/36/EU of 5 April 2011, on the prevention of and fight against trafficking in human beings and the protection of victims[2], and Directive 2011/93/EU of 13 December 2011, relating to the fight against sexual abuse and the sexual

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[1] European Parliament and Council of 25 October 2012.

[2] DO L 101 de 15.4.2011, p.1.

exploitation of children and child pornography[3], which addressed, *inter alia*, the specific needs of particular categories of victims of trafficking in human beings, sexual abuse, sexual exploitation and child pornography.

Previously, the need to harmonise European legislation in the fight against the sexual exploitation of children and child pornography (framework decision 2004/68/JHA of the Council of 22 December 2003)[4] forced the Spanish legislature to establish new criminal offences, in fulfilment of its international obligations. In order to circumvent the criticisms levelled against the current penal regulation of sexual crimes involving children, and in order to comply with the European mandate, the penal legislature drafted LO 5/2010 of 22 June, under which is introduced into the Spanish criminal code Chapter II-a, entitled "Abuse and sexual assault of minors under the age of thirteen" (Articles 183 and 183-a).

Overall, the above regulation was characterized by a marked increase in punitive sanctions, with the removal or introduction of certain qualifying circumstances of behaviour. Chapter II-A gave a special dimension to the protected legal right, due to the higher content of injustice that these behaviours involve, mentoring not only sexual indemnity, but also the formation and development of personality and sexuality of the child. Law LO 5/2010 of 22 June reinforced the penal protection of sexual indemnity, providing an independent regulation on sexual attacks involving children under thirteen, in the new Chapter II-A entitled "Abuse and sexual assault of minors under the age of thirteen".

The new Chapter included four criminal typologies; firstly, sexual abuse (art. 183.1 Spanish penal code). Secondly, sexual assault (art. 183.2 Spanish penal code), identifying common qualifications for both. Thirdly, the new crime known as "Child grooming" is addressed (art.183-a Spanish penal code), which is a kind of preparatory act for the offences identified under Articles 178 to 183. Finally, the recruitment and use of the minors for exhibitionist or pornographic shows or for the manufacture of pornographic material (Article 189.1 Spanish penal code).

[3] DO L 335 de 17.12.2011, p. 1.
[4] DO C 357, de 14.12.2001.

Once this legal framework is set out, I will focus my attention on the crimes of sexual abuse and assault on minors regulated in the Spanish Penal Code, following the reform of September 2013[5] as the interests of the child are of primary application in the implementation of Directive 2012/29/EU[6], in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child. In accordance with this, under-age victims should be considered and treated as full holders of the rights set out in this Directive, and should be able to exercise those rights in a way that takes into account their ability to make their own judgement. However, I consider it necessary to make some preliminary observations, of a formal character.

Firstly, the European legislation considers a victim to be the "natural person who has suffered loss or damage, including physical or mental injury, emotional suffering or economic loss, directly caused by a criminal offense" (...) Secondly, including the concept of the victim for minors, it is understood to mean "anyone under 18 years of age"[7]. Thirdly, the Spanish penal legislature has given special attention to the sexual abuse of children under thirteen, taking into account minors under the age of eighteen, victims of crimes related to prostitution, including a concept of minor that is different from that in the Directive. 2012/29/EU.

Under the pretext of strengthening confidence in the administration of justice and the provision of a legal system guaranteeing predictable judicial resolutions, perceived by society as just, the pre-criminal legislature has undertaken a profound reform, articulated through three elements: the incorporation of revisable permanent prison sentences, reserved for crimes of exceptional gravity; a system of security measures, extending the scope of probation; and a review of regulations on continuing offenses.

One of the main consequences of this "pretense of justice" has been reflected in the reform of sexual offenses committed against children, justified under two main reasons. On one hand, the social alarm caused by repeated episodes of sexual abuse of minors and child pornography (e.g. the *Valdeluz* case), reported

[5] Ministry of Justice. Draft Law amending the Organic Law 10/1995, of 20 September 2013.

[6] DO L 317 de 14.11.2012, p.58.

[7] Article 2 Directive 2012/29/EU, 14 November 2012, pp.65-66.

by the communication media, which sparked a bitter debate on political and social levels, demanded an urgent reform of the penal code. On the other hand, the need to *harmonize* European legislation to combat sexual abuse and sexual exploitation of children and child pornography (Directive 2011/93/EU of 13 December 2011[8], replacing Framework Decision 2004/68/JHA of 22 December 2003[9]) forced the Spanish legislature to introduce new criminal typologies and modify existing ones, in compliance with its international obligations.

And while it is true that Spain, as a member state of the European Union is bound to the duty of loyalty to the legislation passed by the former[10], it is no less true that the Directive lays down minimum rules concerning the definition of criminal offenses and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of minors for sex by technological means (art. 1), leaving their development to the discretion of States.

However, the succession of such reforms in the field of sexual offences involving children has failed to avoid the main issue around which the protection of sexual indemnity revolves. It in turn pivots around the consent of the child to validly consent to a sexual relationship, without there being a general rule about the efficacy and validity of this consent.

Furthermore, the incoherence surrounding sexual adulthood[11] in the generic offences of sexual abuse, on the one hand, and those of exhibitionism and sexual provocation on the other, further complicate this extreme. Even the former penal code provided better protection for children at least 12 years old. In the following lines, I will conduct an analysis of the major developments that the reform has caused in Section VIII - Crimes against sexual freedom and indemnity.

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[8] DOUE L 335 DEL 17.

[9] See DO C 357, 14 December 2001.

[10] There is a common basis, among Member States, in the phenomenon of the Europeanization of criminal law that is the so-called "duty of loyalty" of the States to the European law. According to this principle, the Eu legislation has a primary position, and there is the mandate for the Member States to interpretate and (apply) the national law in accordance with the European one.

[11] M. CUGAT MAURI, *Delitos contra la libertad e indemnidad sexuales (artículos 181, 182, 183 y 183* bis*, 187, 188, 189, 189* bis *y 192, Disposicon final Segunda)*, in ALVAREZ GARCÍA (ed.), *Comentarios a la Reforma Penal 2010*, Valencia, 2011, p. 228.

In Chapter II of Section VIII, paragraph 1 of Article 182 has been modified, adopting a new wording: «1. He who perform acts of a sexual nature with a person older than sixteen and younger than eighteen, involved deception or abuse of a recognised position of trust, authority or influence over the victim, shall be punished with imprisonment of one to three years». Key developments over the previous regulation reside in both typical features as well as in the age of the victims. They still retain the typical structure of fraudulent abuse and undue influence, emphasizing as new «the abuse of a recognized position of trust, authority or influence over the victim» and the new age of this group, raised to younger than 18.

2. Abuse and sexual assault of minors under fifteen years of age

Secondly, the heading of Chapter II-a[12] of Section VIII of the Book II was amended to read as follows "Abuse and sexual assault of minors under fifteen years of age". In accordance with the new heading article 183 was amended, the wording of which provides that: «*1)* He who commits sexual acts with a minor of fifteen years, shall be punished as responsible for sexual abuse of a minor with imprisonment of two to six years. *2)* When the acts are committed using violence or intimidation the person responsible will be punished for the crime of sexual assault on a minor with the penalty of five to ten years in prison.

The same penalties are imposed when through violence or intimidation a child of fifteen is forced to participate in sexual acts with a third party. *3)* When the attack consists in vaginal, anal or oral penetration, or the introduction of body parts or objects by either of the first two channels, the offender shall be punished with imprisonment from eight to twelve years, in the case of paragraph 1 and with the penalty of twelve to fifteen years, in the case of par. 2. *4)* Behaviour laid down in the three previous issues will be punished with the maximum penalty of prison when any of the following circumstances also occur: *a)* when the intellectual or physical underdevelopment of the victim had placed the victim in a situation of total helplessness

[12] In detail, A. MONGE FERNANDEZ, *De los Abusos y Agresiones Sexuales a Menores de Trece Años*, Barcelona, 2011, *passim*.

and, in any case, whenever the victim is less than four years old; *b)* when the offense is committed by the joint action of two or more people; *c)* when the violence or intimidation exercised are marked by a particularly demeaning or degrading character: *d)* when for the execution of the crime, the offender exploited a relationship of superiority or kinship, being a descendant, ascendant, or sibling, either by nature or adoption, or similar, of the victim; *e)* when the culprit has endangered, either intentionally or through negligence, the life or health of the victim: *f)* when the offense is committed within a criminal organization or group that is dedicated to performing such activities. 5. In all the cases mentioned in this article, whenever the culprit has exploited their position of authority, being an agent of such or a civil servant, a general disqualification of six to twelve years will be applied».

A reading of the transcript shows that typical behavior is composed of an attack on the sexual indemnity of minors under fifteen years, performed with the use of violence or intimidation. In accordance with this, it will be necessary to demarcate the contents of sexual assault, specifying which *acts* are part of a typical attack. Secondly, it will be necessary to analyze the elements of *violence* and *intimidation*. Thirdly, the question of whether or not bodily contact between the subjects of the crime is required will be addressed.

The new art. 183 Spanish penal code presents some new features over its predecessor, summarised below. Firstly, in the structure of the crime, introducing a new modality of the sexual assault consisting of compelling a minor of 15 years by violence or intimidation to "engage in sexual acts with a third party" (art. 183.2 in fine). Aside from this development, the new Article 183 matches its predecessor regarding the typical structure, distinguishing a basic type (art. 183.1 for abuse and art. 183.2 for aggression), more serious types (art. 183.3 for carnal access and introduction of members or bodily objects, similarly for assaults and abuse) and other qualifications in accordance with the concurrence of certain circumstances (art. 183.4).

Secondly, the new regulations harden penal sanctions, raising the criminal framework from six to ten years of prison (for sexual assault), revealing a "populist use of the criminal law (...) with an immediate and permanent use of criminal law to deal with certain social problems characterized by media

coverage, encouraging measures that do not pursue any strictly legal targets, but exclusively to achieve political profitability[13]".

2.1. Sexual assault

In general it can be said that the characteristic of sexual abuse in any of its three forms is, first, the negative element of absence by the perpetrator of violence or intimidation by which means, as in art. 178 and 183.2 Spanish penal code, the counter-will of the victim is mastered or overcome. On the other hand, this does not provide valuable real consent as free exercise of sexual freedom either, in which only the provision of true and valid consent excludes this classification. For example, kissing and touching the daughters of the partner of the accused[14].

Therefore, the fundamental difference with sexual assault lies in the non-occurrence in the "abuses" of violence or intimidation as a means of attacking sexual freedom, although these occur in a non-consensual attack on sexual freedom (or with forced consent) or against the sexual indemnity of minors or the incompetent[15]. The criminal legislature had traditionally considered that when sexual abuse occurred against a minor (previously younger than thirteen, now fifteen years old) it had been performed without their consent - a *juris et de jure* presumption - ignoring the fact that the minor had given consent[16]. This issue has changed as a result of the pre-legislature of September 2013.

2.2. Sexual abuse

As was the case with respect to the base rate of sexual assault, the legislature does not provide precise wording here about what kind of events make up the typical behavior of

[13]. See A. I. PÉREZ CEPEDA, *El proyecto de reforma del código penal de 2013, a debate*, Salamanca, 2014, p. 15, whose successful share fully reviewed in relation to the rationale and key political-criminal Reform Project the Criminal Code of 2013.

[14]. Spanish Supreme Court, 2 March 2010 (LL 5328/2010).

[15] See F. MUÑOZ CONDE, *Derecho penal, Parte Especial*, Valencia, 2010, p.232; Spanish Supreme Court 1 October 1999 (Tol 213.383).

[16] It is significant in this respect the Spanish Supreme Court, May 6, 2010 (LL 76121/2010) qualified sexual abuse.

sexual abuse, merely punishing with imprisonment from two to six years those offenders that perform acts attacking the sexual indemnity of minors younger than fifteen years. An initial approximation of typical behaviour of the crime of sexual abuse must be made from a negative delimitation, thereby excluding firstly that behaviour of a sexual nature committed with violence or intimidation, which comprises the basic type of sexual assaults on children under fifteen (art. 183.2 Spanish penal code). Secondly, those other behaviours should also be excluded that consist of vaginal, anal or oral penetration, or introduction of body parts or objects by one of the first two channels, which qualify as sexual abuse and assault on children under fifteen years (art. 183.4 Spanish penal code).

Secondly, given the context in which these crimes are located, typical sexual abuse acts are only those that are of a *sexual nature,* that is, that represent a manifestation of the sexual instinct[17]. As we expressed in relation to sexual assault, it is difficult to define what is meant by "acts against the sexual indemnity of minors of thirteen years of age", thereby giving rise to the same interpretive difficulties, as it is necessary to consider both cultural criteria and the personal characteristics of the victim[18]. For example, a kiss on the cheek[19], on the face, nose and mouth; touching of intimate areas[20] (breasts[21]); thighs[22]; on the buttocks; touch the stomach over the trousers[23] .

In summary, behaviour will be integrated with lewd actions carried out with or on another person (less than 15 years old) without their valid consent[24]. Sexual abuse may be defined as any salacious act that involves another person without their

[17] See Spanish Supreme Court, 18 June 2007 (Tol 1.113.051); Spanish Supreme Court, 11 May 2005 (Tol 731.543).

[18] F. MUÑOZ CONDE, *Derecho penal, Parte Especial*, cit., p. 233.

[19] U. NEUMANN - N. KINDHÄUSER - H. U. PAEFFGEN (eds.), *Strafgesetzbuch,* Baden, 2013, p. 670; *Kuß als sexueller Mißbrauch*, OLG Zweibrücken, 18April 1995, in *Neue Zeitschrift für Strafreht*, 1998, p. 357.

[20] Spanish Supreme Court, 11 February 2003 (Tol 265.562).

[21] Spanish Supreme Court, 1 July 2004 (Tol 501.608).

[22] Spanish Supreme Court, 11 October 2005 (Tol 731.543).

[23] Spanish Supreme Court, 21 November 2000 (LL 2256/2001).

[24] This review E. ORTS BERENGUER - C. SUAREZ-MIRA RODRIGUEZ, *Los delitos contra la libertad y indemnidad sexuales*, Valencia, 2001, p.123.

consent or with forced consent, without using violence or intimidation[25].

2.2.1. The question of bodily contact

The delimitation of the typical behavior of the crime of sexual abuse of minors gives rise to a second problem, which is the related to whether the realization of the attack on their sexual indemnity necessarily requires some kind of bodily contact between the active and passive subjects of the crime.

A first line of jurisprudence[26] considered the occurrence of physical contact between the active and passive subjects to be a necessary element of the crime of sexual abuse. In the same sense a sector of the doctrine has been created[24], represented as highlighted by *Octavio de Toledo*, arguing his position on the formulation of the type of attacks and abuse, prior to the reform of 2010, which is slightly different ("attacks the sexual freedom of another person" in assaults, compared with "commits acts which violate another person's sexual freedom" in abuses); it concludes that in those cases physical contact between the active subject and the passive - third-party crime - is not always precise, but it is essential in crimes *of one's own hand* that require this contact. According with this opinion, we will exclude from the scope of abuse those sexual attacks consisting of acts performed by the passive subject on his/herself, and on a third party (or vice versa) and on the active subject.

Conversely, another doctrinal opinion has been publicised, for which the offense of sexual abuse does not require bodily contact between the perpetrator and victim[27]. In scenarios where the victim is determined to have maintained body contact with a third party it will not be possible to go to refer to the qualifying forms of sexual intercourse (arts. 182 or 183.2) without adapting to the demands of proportionality and being prevented

[25] See E. ORTS BERENGUER in T.S. VIVES ANTÓN - E. ORTS BERENGUER - J.J. CARBONELL MATEU - J.L. GONZÁLEZ CUSSAC - C. MARTÍNEZ-BUJÁN PÉREZ (eds.), *Derecho Penal. Parte Especial*, Valencia, 2008, p. 243.

[26] Spanish Supreme Court, 8 June 2007 (Tol 1.106.917) (LL 52026/2007).

[27] E. OCTAVIO DE TOLEDO AND UBIETO, *Razones y sinrazones para una reforma anunciada*, in *La Ley*, 1997, p. 1144; J. J. GONZÁLEZ RUS, *Los delitos contra la liberdad sexual en el Código Penal*, in *CPC*, 59, 1996, p. 340.

by a teleological interpretation[28]. In my view, the requirement of *bodily contact* must be qualified so as to also include cases in which the passive subject is persuaded to touch themselves. Even when they are convinced to perform obscene acts or practices of unquestionable sexual nature that do not require bodily contact between the subjects[29].

2.2.2. The absence of violence or intimidation

If we read article 183.2 Spanish penal code, we can conclude that sexual assaults are abuse with coercion or threats, although the opinion of the legislature was different, defining it differently. In accordance with this, if both criminal types have common features, such as the protected legal right, the issue of bodily contact, and the absence of consent, the main difference lies in the contributory means, since sexual assault requires the use of violence or intimidation, elements that are absent in sexual abuse. Therefore, certain types of attack, affecting the projected sexual indemnity of minors under thirteen, revealing a sexual instinct without violence or intimidation, will be classified as sexual abuse. For example, surprise attacks, offenders assumed to lack awareness, a victim suffering from inability to resist, etc.

2.2.3. The consent of the victim[30]

In general it can be said that lack of consent is a basic requirement in the offence of sexual abuse[31], simply sufficing

[28] J. M. TAMARIT SUMALLA, *La protección penal del menor frente al abuso y explotación sexual*, Pamplona, 2000, p.72; E. ORTS BERENGUER - C. SUAREZ-MIRA RODRIGUEZ, *Los delitos contra la libertad e indemnidad sexuales*, cit., p. 123, n.1; M. GÓMEZ TOMILLO, *Derecho penal sexual y reforma legal: análisis desde una perspectiva político-criminal*, in *Revista juridica de Castilla y León*, 5, 2005, p.138.

[29] E. ORTS BERENGUER - C. SUÁREZ RODRÍGUEZ, *Los delitos contra la libertad e indemnidad sexuales*, cit., p. 123, n. 1.

[30] E. ORTS BERENGUER in T. S. VIVES ANTÓN - E. ORTS BERENGUER - J.J. CARBONELL MATEU - J.L. GONZÁLES CUSSAC - C. MARTÍNEZ-BUJÁN PÉREZ (eds.), *Derecho Penal. Parte Especial*, Valencia, 2008, p. 244. Cfr. Spanish Supreme Court 8 June 2007 (LL 52026/2007).

[31] Faced with writing the Spanish Penal Code, the European legislator, however, gives some relevance to the consent of the child, stating that "child

that the perpetrator takes advantage of negligence of the victim to perform the sexual attack. The crime of sexual abuse consists of an attack on the freedom or sexual indemnity of another person, carried out without violence or intimidation, and without their consent, or with forced consent[32], so if the victim consents, even behavior becomes tacitly atypical (in the case of sexual abuse of adults). However, this statement cannot confirm that any body contact alters the typical characteristics of sexual abuse[33]. The reform of 1999, which changed a traditional criteria of the nineteenth-century criminal code, assumed a process separate from the consent of minors in sexual matters, setting an age limit up to which value to the consent given by children *under thirteen years of age* was denied in order to exclude from the definition those acts of a sexual nature perpetrated upon them by third parties. So, the criminal legislature presumed *juris et de jure* that minors under thirteen lacked sufficient ability and maturity to know the meaning of sexuality and behave accordingly[34]. In accordance with this, it was assumed without exceptions that even if a child under that age was able to understand perfectly and accept and provoke the relationship with an adult, they would still be considered unable to consent validly and effectively[35].

It should be emphasized that the age at which the legislature refers is the physical or chronological age[36], without taking into account the greater or lesser psychological maturity of the victim to these effects[37], presuming *juris et de jure* that

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victims should be considered and treated as full owners of the rights established in this Directive , should be able to exercise those rights in a way that takes into account their ability to own judgment"(recital 14, p.58).

[32] Spanish Supreme Court, 20 January 2006 (LL 10925/2006); Spanish Supreme Court, 15 December 2009 (LL 273453/2009).

[33] Consider the cases in which the consent is obtained by abusing a position of undue influence, or through deception.

[34] See F. MUÑOZ CONDE, *Derecho penal, Parte Especial*, cit., p.233.

[35] Spanish Supreme Court, 18 April 2006 (LL 39837/2006).

[36] Prior to 1999, the criminal legislature kept the age limit at 12 years, increasing to 13 now, lacking reason increased, because from the point of biological or psychological change, rather it transpires is not justified, as all the 1999 reform, an effort to increase the severity of criminal offenses and extend the application of sexual abuse without consent (F. MUÑOZ CONDE, *Derecho penal, Parte Especial*, cit., p. 210).

[37] See J. J. GONZÁLEZ RUS, *Los delitos contra la liberdad sexual en el Código Penal*, cit. p. 341; C. CARMONA SALGADO, *Los delitos de abusos deshonestos*, Barcelona, 1981, p. 155.

there is always sexual abuse when performing an act of sexual content with a person under thirteen years of age[38]. Thus, the legislature has introduced a specific age as an element of the type, precluding any interpretation of it, even when the need to protect these subjects due to this lack of mental maturity and development of their free personality could make their assimilation with this mental age advisable.

A contrary interpretation followed, in addition to violating the principle of legality, legal certainty would be violated, especially in the absence of fixed criteria to determine the cases in which assimilation would proceed (Spanish Supreme Court, January 2, 1990). The drafting of the crimes of sexual abuse on minors of thirteen years, by virtue of the law LO 5/2010 of 22 June, has abolished the presumption *juris et de jure* of the absence of consent in cases of sexual abuse of children under thirteen years. How should this abolition be interpreted? Can we give any relevance to consent given by minors under thirteen to a sexual relationship with an adult? Are we witnessing an *iuris tantum* presumption?

In my opinion, the definition by LO 5/2010 granted reelevance to the consent of minors under thirteen years in cases of sex between minors. The *ratio legis* intends only to minimise relations practiced with adults, to prevent them from being manipulated by adults. In this context cases of *error* will arise around the consent of the victim that will be treated as cases of error of the entire part of the criminal offence, giving rise to impunity, as the imprudent commision was not forseen[39].

Finally, in the chapter "Abuse and sexual assault of minors of 15 years of age", the pre-legislature introduced a new provision, concerning the consent of the minors of fifteen years of age, pursuant to the 2011 Directive, albeit with an unfortunate wording, have established an open type, allowing the judge to give validity to the consent of the minor of fifteen years, when the perpetrator of the offences set forth in this chapter is a person close to the victim in age and level of development or maturity. And while the Spanish legislature justifies reform in these offenses under the said duty of

[38]. In this line, F. MORALES PRATS - R. GARCIA ALBERO, *Comentarios al Nuevo Código Penal*, Pamplona, 1996, p. 891.

[39].F. MUÑOZ CONDE, *Derecho penal, Parte Especial*, cit., p. 210; F. MORALES PRATS - R. GARCIA ALBERO, *Comentarios al Nuevo Código Penal*, cit., pp. 890-891.

harmonization, it does not properly interpret said law, producing bad wording. In this sense, article 184b provides that: "The free consent o minors of 15 years of age shall exclude criminal responsibility for crimes provided for in this chapter, when the perpetrator is a person close to the victim in age and level of development or maturity[40]".

3. The determination of the minor to engage in a sexual encounter

Article 183-a was changed, with the following wording "Whoever, for sexual purposes, forces a minor under sixteen to engage in conduct of a sexual nature, or forces them to witness acts of a sexual nature, even if the perpetrator does not participate, shall be punished with imprisonment of between six months and two years. If there is any sexual abuse, even if the perpetrator does not participate therein, a penalty of imprisonment of one to three years will be imposed".

4. Child grooming

A new article 183-b was added: "1. He who, via the Internet, telephone or any means of information or communication, contacts a minor under sixteen years and proposes and arranges a meeting with the same purpose of committing any of the offenses described in arts. 183 and 189, provided that the proposal is accompanied by material acts leading to the approach, will be punished with one to three years in prison and a fine of twelve to twenty four months, without prejudice of the penalties for crimes committed in his case. The maximumpenalties are imposed when the approach is obtained through coercion, duress or deception. 2. He who contacts through the Internet, phone or any other information or communication technology a person under sixteen years and perform acts aimed at encouraging them to provide him with pornographic material or who shows pornographic images in which said minor is represented or

[40] See F. MUÑOZ CONDE, *Derecho penal, Parte Especial*, cit. On the contrary, Spanish Supreme Court, 20 January 2006 (LL 10925/2006).

appears shall be punished with a penalty of imprisonment from six months to two years". The development of the welfare society has resulted from the extensive use of new technologies of information and communication (Internet), not always for legitimate purposes, but sometimes for sexual purposes against minors. It was precisely this phenomenon that highlighted the need to pursue and punish criminal behavior where one adult person abuses the trust of a child, with the aim of concluding a meeting of a sexual nature. The predecessor of the current provision was article 183-a Spanish penal code which is inserted into the new Chapter II-a, entitled "Abuse and sexual assaults of minors under thirteen years of age", and was introduced suddenly into the articles of the penal code[41], as its own numbering reflects, identifying a new type of crime that is mainly developing among young users of new technologies[42].

The recent Chapter complies with several reasons that can be summarized mainly into two. The first lies in the fulfilment of the international obligations assumed by Spain, through the technique of *harmonization*[43]. The second is connected with the increase in cases of child abuse and paedophilia[44], with their greater social impact and alarm[45]-, e.g. *Case Mariluz*.

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[41] In its report "Protection of Children Against Abuse Through New Technologies", the Council of Europe Committee for the Convention on Cybercrime addressed emerging issues of violence against children through new technologies, with particular emphasis on grooming both the Internet and mobile telephony. The issue of child pornography on the Internet is covered in Article 9 of the Convention. Some countries have already embraced the "grooming" offense under their laws. See, for example, the case of Germany, where it is forbidden to influence a minor, through the display of pornography or conversations in the same direction. In Spain, Law 5/2010, for the first time defines the "grooming" between the types of attacks against sexual freedom and integrity.

[42]. See Provincial Court of Ourense, 4 October 2013 (LL 723/2013); Provincial Court of Málaga, 26 July 2013 (LL 396/2013); Provincial Court of Burgos, 17 March 2014 (LL 183/2014).

[43] See M. CUGAT MAURI, *Delitos contra la libertad e indemnidad sexuales (artículos 181, 182, 183 y 183* bis*, 187, 188, 189, 189* bis *y 192, Disposicon final Segunda)*, cit., p. 224.

[44] Thus, L. GRACIA MARTÍN, *Prolegómenos para la lucha por la modernización y expansión del Derecho penal y para la crítica del discurso de resistencia*, Valencia, 2003, p. 98. The Spanish penal legislator meets the mandate of the EU rule especially protect children under thirteen years of age, raising it to the category of crimes under national law. Vid. 2004/68/JAH Council Framework Decision on the fight against sexual exploitation of children and child pornography, that grants special protection to children who have not reached the age of sexual consent under national law, as well as a

In closing, the drafting the EU Directive 2012/29/EU should be recognized as a very laudable task, as well as the anticipated Statute of the Victim. However, it must be said that for a many years already, the idea of a possible unity of Europe, a relative unification of national wills to form a whole, not uniform, but consistent, has had to overcome a thousand obstacles. As *Ortega y Gasset* said, the unity of Europe is not a fantasy, it is reality itself. Today is much more than a dream or a utopia, it is a reality that is still taking shape but is still "unfinished business".

special punishment for those cases in which the child is exposed to a particular risk to life or health or the offense is committed within the framework of a criminal organization.

[45]Pedophilia is defined as a sexual disorder in which the object of the excitement lies in fantasies or sexual activity with prepubescent children. Vid. *DSM-III-R: Diagnostic and Statistical Manual of Mental Disorders*, pp.339-340, cited by J.M. TAMARIT SUMALLA, *La protección penal del menor frente al abuso y explotación sexual (Análisis de las reformas penales de 1999 en materia de abusos sexuales, prostitución y pornografía de menores)*, Pamplona, 2000, p. 28.

CHAPTER XXI

COMPARATIVE REMARKS

by Raphaële Parizot[*]

TABLE OF CONTENTS: 1. Who shall be intended as a victim with specific protection needs? - 2. How should we consider the victims with specific protection needs?

The question of victims with specific protection needs, already dealt with in the Directive of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, particularly in chapter IV (more specifically in the second part of chapter IV: part one, in fact, relates to the protection of victims – art. 18 to 21; part two instead concerns the acknowledgement of victims with specific protection needs – art. 22 to 24), implies a double question: Who shall be intended as a victim with specific protection needs? How should we consider these victims?

1. Who shall be intended as a victim with specific protection needs?

The directive does not provide for any definition of victims with specific protection needs and it seems to leave the competence on this item in the hands of the Member States. Even worse, the directive sometimes uses the expression «particularly vulnerable victims» (§ 38) and sometimes the expression «victims with specific protection needs» (art. 22). As a matter of fact, these two expressions possibly refer to the same meaning, however it looks like they have a slightly different point of view, one more substantial (particularly

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vulnerable victims) and one more procedural (victims with specific protection needs). Apart from this observation, we must wonder who the victims with specific protection needs are. The directive provides for two sets of indications.

First of all, in the Directive, the victims with specific protection needs are concretely defined, in the course of the procedure, by means of an «individual assessment» (art. 22).

The special needs for protection are identified specifically starting from the victim's own personal characteristics, by the type or the nature of the crime and by the circumstances of the crime with the following strange (actually redundant) definition of the Directive: «The extent of the individual assessment may be adapted according to the severity of the crime and the degree of apparent harm suffered by the victim» (art. 22, par. 5).

However, article 22, par. 1, of the directive leaves much room for Member States to act since the timely and individual evaluation of the victim has to be carried out «in accordance with national procedures».

This room left to the Member States is however corrected by a list of particular victims with specific protection needs: some must be submitted to a «particular attention» or to «due consideration» (art. 22, par. 3[1]); others – e.g. child victims – are intended as presumably having specific protection needs (art. 22, par.4). This way to proceed shows an advantage, however a fault too. The advantage consists in the flexibility of the process, already tested in other occasions, which provides the Member States with the task to define the victims with specific protection needs on a case by case base. The fault lies in the fragmentation risk in the European law on the subject. As a matter of fact, there is for sure a common European fund offering a special protection to children, however as for the rest, e.g. for vulnerable victims in general, European rights are pretty different. If we consider the example of mentally-ill victims, of victims «with disabilities» (victims who must be paid special

[1] «Victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable» e.g. «victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities».

attention pursuant to the provisions in the directive, art. 22, par. 3), you can see that, in Italy, they benefit from the procedural specificities as given at the beginning to children[2] only, while in France this extension is very much sought for, however it has not been realized in practice yet.

2. How should we consider the victims with specific protection needs?

This consideration, this protection, is organized at a double level: at a substantial and at a procedural level (and hence the double language: «particularly vulnerable victims» / «victims with specific protection needs»). And the same Directive of 2012 on the victims of crimes (procedural aspect) connects these two aspects by referring to the directives of 2011 on preventing and combating trafficking in human beings and protecting its victims on one side and on combating the sexual abuse and sexual exploitation of children and child pornography (substantial aspect): these two Directives of 2011 address, *inter alia*, the specific needs of the particular categories of victims of human trafficking, child sexual abuse, sexual exploitation and child pornography[3].

For instance, as for children who are vulnerable victims par excellence[4], we can have, at a substantial level, the adoption of cases in point allowing for a strengthened protection of child victims. This protection may occur by means of special aggravating circumstances or through special matters in question. The Spanish report shows well how Spain used the European needs by creating new cases related to sexual crimes[5].

At a procedural level, the arrangement of existing rules or the creation of new regulations which are still to be assessed as

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[2] H. BELLUTA, *Protection of particularly vulnerable victims in the Italian criminal process*, *supra*.

[3] *Directive of 25th October 2012 establishing minimum standards on the rights, support and protection of victims of crime*, recital §7.

[4] To analyse the way the European Union intends the child being a victim of a crime (and the child author of a crime as well), please compare ALIX - R. PARIZOT, *Le mineur en droit de l'Union européenne: un statut pénal à construire?*, in G. GIUDICELLI-DELAGE - C. LAZERGES (eds.), *La minorité à contresens. Enfants en danger, enfants délinquants*, Paris, 2014, p. 205.

[5] A. MONGE FERNANDEZ, *Children victims of sexual assault and abuse in view of the Spanish penal reform*, *supra*.

for their compliance with the European needs since national regulations were often produced before European worries. As a matter of fact, child victims are particularly vulnerable and they no doubt have specific protection needs; that is why they must be protected specifically against secondary and repeat victimisation and against intimidations and retaliations.

The protection of this victim with special needs translates, following the directive, with different mechanisms for the protection of the child's word to avoid the child being too harshly impacted by the contact with the judicial reality (a sort of «*de-trialization*» to use an expression by Hervé Belluta). For instance the following is to be provided for:

o the registration of the interviews (art. 24 for children): this mechanism exists in France[6], but it does not exist in Italy[7]. In Italy, however, there is a special procedure (non-existent in France), e.g. the special evidentiary hearing allowing for an advanced consideration of the child's testimony during the preliminary phase[8];

o the mechanism of the trial in chambers (art. 23 3. *d*) as provided for all the victims with special needs) which is quite widespread: you can have it in France and in Italy even though with slightly different characteristics. In France, the trial in chambers (*huis clos*) is common when the defendant is a child. Instead, when the victim is a child, the *huis clos* is not provided for *in se*; it is only given that – whatever the age of the victim – when the trial relates to a sexual abuse, to tortures or to acts of barbarism with sexual assaults, the trial in chambers is a right if the victim being the civil party asks for it and in any other cases the trial in chambers may be applied only if the victim being the civil party is not opposing it (art. 306 of French code of criminal procedure). In Italy, «the judge may decide that the hearing with children is to be held in chambers» and however the trial in chambers is always applied when the victim of sexual crimes or of related acts of slavery is a child (art. 472, par. 4 and par. 3 part two of the Italian code of criminal procedure).

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[6] S. DELATTRE, *Victims with special needs (namely children) in French legal system*, *supra*.

[7] H. BELLUTA, *Protection of particularly vulnerable victims in the Italian criminal process*, cit.

[8] *Ibid*.

These reports on the French, Italian and Spanish laws highlight that substantial and procedural mechanisms exist (even if not fully complete compared to the needs expressed in the directive) to consider the victim child – since they are particularly vulnerable victims/victims with specific protection needs, specifically if they are victim of sexual crimes. They also demonstrate that there is still so much to do to consider all other victims with special needs for protection (with the preliminary difficulty to get to know who is a victim with specific protection needs).

SECTION 4

VICTIMS' COMPENSATION

CHAPTER XXII

CRIME VICTIMS' COMPENSATION IN FRANCE

by Isabelle Sadowski[*]

TABLE OF CONTENTS: 1. Introduction. - 2. Presentation of the French system of victims' compensation. - 2.1. The crime victims' compensation milestone: the FGTI. - 2.2. A system aligned with victims' expectations. - 3. Compliance with European requirements? The first European texts on victims' compensation. - 3.1. Recent achievements and the Directive of 25 October 2012. - 4. A major challenge: the effectiveness of the victims' right to compensation. - 4.1. The role of victim support organisations. - 5. To conclude.

1. Introduction

The word "compensation" means the financial way to compensate any harm or damage caused by a prejudicial conduct which, as an alternative, could also be compensated in kind[1]. Under the French law, compensation is associated with civil liability, defined as the standards pursuant to which the perpetrator of the damage to a third party is compelled to repair it by offering compensation to the damaged party[2]. The writers of the French Civil Code have defined in the art. 1382 a general principle of the civil liability: "Any act of a person which causes damage to another makes him, by whose fault the damage occurred, liable to make reparation for the damage".

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[1] See especially A. FAVRE ROCHEX - G. COURTIEU, *Fonds d'indemnisation et de garantie*, in *LGDJ*, 2003, p. 1.

[2] G. VINEY, *Introduction à la responsabilité*, in *LGDJ*, 1995, p. 1.

Nevertheless, despite the growing number of situations posing a threat and the real need for compensation expressed by public opinion, the legal framework was then forced to adapt itself, passing from a fault-based liability policy to a liability without fault in the 20th century, progressively moving towards a policy where victims' compensation is based on national solidarity. To summarize the evolution of this right, in a schematic way, it can be stated that "the focus has shifted from a desire for revenge requiring the punishment of the guilty in the criminal field to the research of liability in the civil field, to finally focus on the effectiveness of compensation thanks to the solvency of insurance companies or of Guarantee Funds"[3]. The victim's compensation, which will be translated, in a financial standpoint, in monetary compensation called "compensation for damages"[4], is to be considered as a full one. The main principle of the full compensation is based on the commitment of providing the victim with a situation that can be comparable, as much as possible, to what could have happened without any crime committed.

Accordingly, from the above, it is possible to deduce the indemnification principle that, in order to prevent the unjust enrichment of the victim, establishes the prohibition of exceeding the actual amount of the damage and of accumulating compensations for the same damage: "*tout le préjudice mais rien que le préjudice*" is the best way to summarize both the full compensation principle and the indemnification principle[5].

For the purpose of the compensation, a crime victim can choose among many different strategies: to apply to an insurance company, to take legal steps in a civil or criminal procedure (beginning the criminal action, if appropriate, or participating to the action already taken by joining a civil action) or also apply to a compensation fund. As a consequence, after the court's decision about the civil action, sentencing the offender to compensate the victim, the difficulty for the victim

[3] Y. LAMBERT-FAIVRE - S. PORCHY-SIMON, *Droit du dommage corporel, Systèmes d'indemnisation*, Paris, 2009, p. 42.

[4] "Under the civil law, the reparation of the harmed party is, above all, the compensation. Reparation and compensation are almost synonyms", cfr. C. LAZERGES, *L'indemnisation n'est pas la réparation*, in G. GIUDICELLI-DELAGE - C. LAZERGES (eds.), *La victime sur la scène pénale en Europe*, Paris, 2008, p. 229.

[5] N. PIGNOUX, *La réparation des victimes d'infractions pénales*, Paris, 2008, p. 45.

is to exercise his/her right of compensation. As a matter of fact, there is still quite an important gap between the right to compensation and its actual application.

Quite often, this is only a theoretical right, which is also subject to the completion of complex procedures for the victim. The mere theoretical nature of the right is due, on the one side, to offenders which are very often insolvent and, on the other, to compensation in favour of the victim neither subjected nor controlled by the legal authority, except when the sentence requires a treatment (in particular, in case of suspended sentences or in case of a sentence of sanction-compensation[6]).

The victim is then supposed to be actively engaged to obtain compensation, which can consequently bring difficulties of different nature: logistic issues (such as the identification of the offender, in case he/she has moved elsewhere, without communicating the new address), psychological issues (the victim can be reluctant in getting in touch with the crime perpetrator) and financial issues (in particular, in case of recourse to a competent authority, such as a bailiff).

In view of the foregoing, a dual action has been carried out in France aiming to enhance the guarantee of the victim's right to compensation. First of all, this led to a significant growth of liability insurance even if, despite they represent a clear element of progress in victims' compensation system, they proved to be insufficient. As a matter of fact, considering the nature itself of the act that caused the damage, it is not imaginable to insure a person for committing an intentional crime and not even, consequently, to compensate victims. This is the reason why it was decided to rely on national solidarity within the framework of a social guarantee for the risk of crime: that led to the creation of compensation funds, as an exclusive way to secure effective compensation for the damage caused to the victim, even in the case of an insolvent or unknown offender.

[6] Pursuant to article 131-8-1 of the French code of criminal procedure, this involves the "obligation, for the offender to proceed, within the terms and pursuant to the conditions provided by the judge, to compensate the damage caused to the victim".

2. Presentation of the French system of victims' compensation

At the very beginning, in 1951, the creation of the *Fonds de Garantie Automobile*[7] (since 2003, called *Fonds de Garantie des Assurances Obligatoires de dommages*, FGAO[8]) expressed the intention of compensating the victims of car accidents, whose offenders were not insured or not identified.

The scope of application has been progressively broader, including the compensation of personal injuries caused by hunting actions or in a public place, as well as damages caused by a technological disaster, or arising from mining activity or the bankruptcy of an insurance company. Eventually, the Fund has also become a compensation authority for car accidents on an international level. Over the years, new funds have been created, sharing the same goal, with a wider scope of application, in order to cover other risks.

2.1. The crime victims' compensation milestone: the FGTI

The first step for the creation of a mechanism based on national solidarity dates back to 1986, when France was hit by a wave of terrorist attacks. With the law of 9 September 1986, the government created a compensation fund for victims of terrorist attacks, in order to grant them the right to the full compensation of personal damages. In 1990, the scope of application has been extended to the victims of other crimes, becoming the *Fonds de Garantie des victimes des actes de Terrorisme et d'autres Infractions* (FGTI)[9], which is managed by the FGAO. It is important to point out that, with the law of 3 January 1977, the French State was already committed to pay for the victims' compensation for the most serious offenses, even if subject to very stringent requirements. The system has then been extended in 1983, with the creation of *Commissions d'indemnisation des victimes d'infractions pénales*[10] (CIVI), one Commission for each *Tribunal de Grande Instance*, offering a limited

[7] Automobile Guarantee Fund.

[8] Mandatory Liability Insurance Guarantee Fund.

[9] Guarantee fund for victims of terrorism and other offences. For further information, please visit the FGTI website. *http://www.fondsdegarantie.fr.*

[10] Crime Victim Compensation Commission.

compensation, exclusively intended for victims of insolvent or unknown offenders.

The law of 6 July 1990 paved the way of the current compensation mechanism[11], based on a dual regime:

- the first involves the right to full compensation for the victims of serious personal injuries[12] without any subsidiary character, unlike beforehand, and without considering any possible resource of the victim.

- the second establishes the right to partial compensation, for the victims of damage to property (the damage must result from theft, fraud, breach of trust, financial extortion, acts of destruction, devastation or tampering of goods), or to people with bodily injuries preventing the victim from working or forcing the victim to interrupt his/her activity for less than one month. In this case, the action has a complementary nature, it is subject to restrictive requirements (in terms of resources and the need to demonstrate a serious psychological or material situation) and, in any case, only limited compensation will be granted to the victim[13].

In both regimes, victims will have to address to CIVIs, independent civil jurisdictions, authorized to compensate the victims without waiting for the outcome of criminal proceedings or even outside any criminal proceeding, since the

[11] The law of 9 March 2004 and a decree of 27 May 2005 also introduced a compulsory conciliation phase within the damage compensation proceedings before the CIVI.

[12] The main reference is Article 706-3 of the French code of criminal procedure that establishes full compensation in many different cases :- for victims of crimes involving permanent or total incapacity from work, for at least one month; - for victims of rape, acts of violence or sexual abuse, or for trafficking of human beings, without the requirement of a specific minimum duration of total incapacity from work; - for family members of victims who have died as a result of a crime. The law of 5 August 2013 has then extended the list of crimes involving compensation granted by CIVIs, without the requirement of a specific minimum duration of total incapacity from work. This list also includes the crimes of enslavement, exploitation of enslaved people, forced labour and reducing people to servitude. It is important to figure out that the law of 5 August 2013, establishing various adjustment measures within the judicial field in accordance with the European Union law and with France's international commitments, is mainly aimed to adjust the French law to the Council of Europe Convention on preventing and combating violence against women and domestic violence, the so-called Istanbul Convention, signed on May 11th, 2011.

[13] See Art. 706-14 of the French code of criminal procedure.

competence criterion is the actual crime that has caused the damage suffered by the plaintiff.

It is crucial to understand that the existence and the right functioning of the two compensation mechanisms mentioned above, both for terrorism and for common law offences, which are meant to compensate most victims, are based on the principle of national solidarity. Actually, the FGTI, charged of their management, is fed with policyholders' contributions, equal to a withdrawal of 3.30 Euros on any insurance contract for goods, and so without depending on state budget.

Eventually, in more recent times, a law of 1 July 2008, which entered into force on 1 October of the same year, entrusted the FGTI with a new mission, creating the "*Service d'Aide au Recouvrement des Victimes d'Infractions* (SARVI)".

This service has been created for victims that, despite having received a final criminal judgment awarding them compensation for the damages suffered, they did not match with the requirements to be refunded by CIVIs and so they did not receive any compensation and they were often unable to force the offender to pay that amount of money. Complementary to the CIVI, this service is bringing forward a new concept, since it is based on a philosophy which is totally different from compensation linked to national solidarity. As a matter of fact, the basic requirement to apply to the SARVI is a judgement delivered by a French court. The SARVI cannot operate outside this framework and it has no independence in granting damage compensation[14]. Everything depends on the execution of criminal convictions, and so on the effectiveness of the judgements passed in the name of the French people, with the goal of speeding up and facilitating the collection of compensation already established by the judge for victims that are parties to civil proceedings.

[14] If the compensation amount for the victim is not higher than 1,000 Euros, victims are fully refunded by the FGTI within two months of the date when the harmed party presents a claim for compensation to SARVI, while, if the compensation exceeds 1,000 Euros, victims are covered for 30 % of the total sum and, anyway, for an amount included between 1,000 and 3,000 Euros (Art. L422-7 of the French Insurance Code).

2.2. A system aligned with victims' expectations

Generally speaking, in a little more than twenty years, the FGTI has then developed three mains tasks, fully covering any issue related to the victims' compensation, with three separate fields of intervention, according to the kind of crime committed and depending on different rules: the acts of terrorism, crimes with more severe consequences refunded by CIVIs and minor crimes, where the offender has already been ordered to refund the victim, managed within the SARVI.

It must be pointed out that the compensation mission played by the guarantee fund is also entitled, wherever possible, to exercise the right of appeal against offenders[15]. The refund, asked to offenders, of the sums paid to the victims of the guarantee fund has different objectives: make offenders responsible about the financial consequences of their actions, prevent recidivism, create new resources to refund other victims (considering that the FGTI has its own financial independence) and, last but not least, demonstrate to victims that compensation based on national solidarity is neither synonym of financial irresponsibility nor of financial impunity of crimes offenders[16].

The effective completeness of the system fully matches with victims' expectations:

- in terms of rapidity (clear compensation terms are established and, in the first two cases, it is not required to wait for criminal proceedings to have the victim refunded);

- in terms of simplicity in administrative formalities (no particular formality is required, the victim is only supposed to make a claim, including documentary evidence; the victim can also act on his/her own initiative, since it is not required to be supported by a lawyer);

- in terms of easiness of processes (the victim can appreciate the presence of an interface with the offender, in case the victim is afraid get in touch again with the offender);

- in terms of acknowledgement (it is reminded that CIVIs are civil jurisdictions composed of one magistrate and two

[15] As a matter of fact, the guarantee fund has been included among victim's rights to collect the sum allocated to the victim and to be paid by the offender (Art. 706-11 of the French code of criminal procedure and Art. L422-7, paragraph 3, of the Insurance Code for the SARVI).

[16] N. FAUSSAT, *Aide au recouvrement et recours*, in *20 ans d'indemnisation des victimes d'infractions*, Paris, 2013, p. 162.

judges aside, that are able to reckon and acknowledge the status of victim in probably unprecedented situations, for instance in case of impossibility of proceedings);

- in terms of effective support to victims, after the judgements: the breakthroughs achieved over the years guarantee the presence of an exhaustive and an actual mechanism (especially since the introduction of the SARVI) at the basis of the right to compensation.

Consequently, as it has been stated by senators Christophe Béchu and Philippe Kaltenbach: "France can be proud of having implemented a comprehensive mechanism, combining the right for the victims to join a civil action in the criminal proceedings and the existence of a compensation system based on national solidarity for the management of the most severe damages"[17].

3. Compliance with European requirements? The first European texts on victims' compensation

Europe is not lagging behind in this topic of right to victims' compensation. The very first recommendations adopted by the Committee of Ministers of the Council of Europe date back to 1977, and they were followed by a European Convention on the compensation of victims of violent crimes, signed in 1983. The importance of those measures was quite modest, until the adoption of the Directive 2004/80/CE, on 29 April 2004, on crime victims' compensation, an important text on the matter, since it was the very first directive dealing with victims' compensation, establishing a binding modality for member countries. The goal of the Directive was to create a cooperation system where all member States make sure that their national regulations establish the presence of a compensation scheme to victims of violent intentional crimes committed in their respective territories, guaranteeing fair and appropriate compensation for victims. Compensation must be possible in national and cross-border cases, regardless of the Member State where the victim resides and of the place where the crime has been committed. France was already beyond the

[17] C. BÉCHU-P. KALTENBACH, *Rapport d'information sur l'indemnisation des victimes*, October 2013, p. 10.

requirements established by the Directive of 29 April 2004, since there is a chance of compensation provided through CIVIs to any victim of crime committed on the French territory, provided that the victim comes from an EU member State or that he/she was in France in a lawful situation at the time of the facts or of the request for compensation[18].

3.1. Recent achievements and the Directive of 25 October 2012

The situation of victims has then been more clearly defined by the Council of Europe within the "Stockholm Programme", adopted in December 2009, a five-year plan with guidelines inviting member States to substantially modify their regulations on the victims' rights. In the wake of this initiative, on June 8th, 2011, the European Council adopted a "roadmap for strengthening victims' rights and protection", called "Budapest roadmap", establishing many different measures, such as the review of the Directive of 29 April 2004.

In this sense, a first step has already been made with the adoption of the Directive 2012/29/EU of the European Parliament and of the Council of Europe, on 25 October 2012, establishing minimum standards with regard on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings. Member countries have three years to transpose the Directive into national law, which is to be done before 16 November 2015.

This Directive does not specifically concern the victims' compensation but it comes within a wider assistance and protection scheme of every victims, regardless of the nature of the crime. As a matter of fact, this Directive represents the first step of a process aiming to put crime victims at the heart of judicial systems. In the next few years, the Commission is

[18] See art. 706-3, 3°, of the French code of criminal procedure. It should be noted that the law of 5 August 2013 substantially modified this point, establishing a compensation mechanism, through the CIVI, for non French victims, if the crime is committed within the French territory, including non-EU citizens and those who are not in France in a lawful situation. The new wording of article 706-3, 3°, of the French Code of Criminal Procedure, under the law of 5 August 2013, is the following: "3° The injured party has the French citizenship or, if not, the acts have been committed in the French territory".

expected to adopt measures to reinforce the standards currently in place in the EU with regards to the crime victims' compensation and, in particular, in case these acts have been committed abroad.

Nevertheless, article 16 of the Directive is specifically dedicated to the right of compensation, which is dealt with in two ways: on the one side, the right to obtain a decision on compensation from the author of the crime within the criminal proceedings and in a reasonable period of time and, on the other, the adequate compensation to victims. The French law is already largely compliant with the European standards and regulation.

4. A major challenge: the effectiveness of the victims' right to compensation

If the existence of the right to compensation, in the strict sense, appears to be confirmed on a national and European level, it is also essential that the victim has the possibility of exercising his/her right: hence, the victim is required to know his/her rights, such as the right to compensation, and the modalities to exercise them. This is why victims are supposed to be informed, which is an inevitable and crucial requirement for the victims' compensation.

Within the French law, there are many measures establishing the right of information for the victims, as set out, in general terms, in the preliminary article of the French Code of Criminal Procedure[19], and referred to, in a more specific way, throughout the different steps of the proceedings[20]. After the judgment, the legislator has even used the requirement of the information of the victim as a starting point to calculate the term of one year to transfer the case to the CIVI; the absence of this requirement makes the term non applicable[21].

[19] "II- The judicial authority is charged to inform and to guarantee the victims' rights throughout the whole criminal procedure".

[20] See, for instance, at the stage of the investigation, art. 53-1 of the French code of criminal crocedure: "Judicial police officers and agents inform victims, using any means of communication, about their right: 1- to obtain compensation for the harm suffered (…) 5- To transfer the case, where appropriate, to the committee for the compensation of victims of offences".

[21] Art. 706-15 of the French code of criminal procedure: "Where a court sentences the perpetrator of a crime mentioned in articles 706-3 and 706-14 to

4.1. The role of victim support organisations

In order to guarantee the exercise of the victims' right, also in terms of compensation, it is essential to benefit from specific structures: since the '80s, to provide victims with assistance and support, France chose, in addition to the state response, to resort to specific organisations implementing the public policy of victim assistance[22].

The Directive of 25 October 2012 establishes as well the right to assistance and support, firstly guaranteed by victim support services. The article 9 sets the minimum level of assistance provided by victim support services, in particular information and assistance regarding victims' rights, such as the possibility of having access to national systems of crime victims' compensation. In this case as well, it is possible to state that, happily, France is compliant with European requirements, because it is approximately thirty years now that missions have already been effective and operating, thanks to victim support general organisations, called INAVEM[23].

One of the main missions of victim support organisations, next to psychological assistance and social support, is to inform victims about their rights. This consists of explaining and clearly describing to the victim the different possibilities of action, so that he or she can make an informed and deliberate choice, in full knowledge of the facts. Information on rights also means to inform the victim on compensation procedures, which represent, after all, a substantial part of the daily activity of these organisations, and meet an important expectation of the victims who turn to them[24].

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pay damages to the civil party, the court notifies the latter of the option to refer the case to the CIVI". It would be appropriate to create a similar provision for the SARVI – See, to this effect, Proposition n° 33, of the *40 propositions for evolving victims' rights*, INAVEM – Edition, 2014.

[22] It is in this context that Robert Badinter, Minister of Justice in that period, created a research board focusing on treatment of victims that proposed, in Milliez report in 1982, to support them through the creation of an associative network to assist victims.

[23] Created in 1986, the *Institut National d'Aide aux Victimes et de Médiation* - INAVEM - has grouped and federated victim support general organisations, created in 1983, to host, listen, inform and support, on their path, any person who considers to be a victim (INAVEM, 27 av. Parmentier, 75011 Paris - *www.inavem.org*). Missions are free and confidential.

[24] According to a survey conducted by the Minister of Justice in July 2012, 83% of victims declare to have applied to an organisation to obtain

These organisations are not charged to refund the victims, but they simply inform them about different compensation modalities, in a legal context, through a settlement agreement or also applying to a compensation fund. In this respect, furthermore, it is possible to mention the activity of victim assistance offices, namely assistance services managed by organisations (all members of INAVEM) within courts, with a generalisation implemented by means of the decree of 7 May 2012 to be effective from the beginning of 2013. Victim assistance offices are open at least when criminal hearings are scheduled, in order to provide victims with a support before, during and after trial.

Actually, it is not unusual that, at the end of the hearing, the President reminds the existence of these offices, where victims can personally go to obtain any information about the procedures to be followed to get compensation. In this phase, one of the office's tasks is to support victims having to choose the most appropriate compensation mechanism (CIVI-SARVI) in which they are eligible. Legal experts explain the different procedures in a clear and pedagogical way, provide assistance to submit the documents required and, in certain cases, create the application file and fill the appeal form.

Eventually, in most cases, these organisations follow and support the victim throughout the whole duration of the compensation proceedings. Furthermore, collaboration partnerships tend to be developed more and more between victim support organisations and magistrates charged of the compensation, especially some presidents of CIVIs. For example, when the victim is not assisted by a lawyer and his/her file is incomplete, the CIVI can send the victim to the appropriate office, in order to receive assistance and support for the procedure. In other jurisdictions, the CIVI President may involve local organisation since the initial phase of the proceeding, if he/she may retain appropriate to support the victim, considering the weight and the importance of the case.

The main underlying idea is to guarantee the positive treatment of victims. Furthermore, the information about the possibilities of compensation provided to the victim by these organisations can certainly contribute to assure the efficacy of

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information about his/her rights - *Enquête de satisfaction auprès des victimes d'infractions pénales ayant recours aux associations d'aide aux victimes*.

the right to compensation. Actually, quite often, victims ignore, for instance, the application procedures to have access to compensation funds in order to obtain the compensation granted them by a court. Hence, the role of the organisation is absolutely decisive[25], since it represents, for the victim, a sort of "facilitator" in the procedure management and of "common thread" throughout the proceedings.

5. To conclude

France has a compensation system particularly developed and performing, based on national solidarity, with the FGTI representing the "milestone of victims' compensation"[26]. Nevertheless, in past years, we saw a profusion of special compensation regimes[27], which are likely to break the principle of victims' equal treatment on compensation.

Funds follow different standards in terms of schedules and compensation patterns and it could be interesting and useful to study the possibility of aligning them, if not merging them in a unique fund[28], in order to guarantee an effective victim support, regardless of the origin of the harm suffered.

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[25] According to the survey on victims conducted by the Minister of Justice in 2008: *La satisfaction des victimes d'infractions concernant la réponse de la justice*, only 15% of the victims interviewed declared to know the existence of CIVI.

[26] C. BÉCHU - P. KALTENBACH, *Rapport d'information sur l'indemnisation des victimes*, October 2013, p. 10.

[27] Alongside the different fields of competence falling under the responsibility of the FGAO (see above), it is also possible to mention the ONIAM - *Office National d'Indemnisation des Accidents Médicaux, des Affections Iatrogènes et des Infections Nosocomiales*, created by a law of 4 March 2002 on the indemnification of medical accidents especially due to therapeutic risks; the FITH - *Fonds d'indemnisation des transfusés et hémophiles*, created in 1991; the FIVA - *Fonds d'indemnisation des victimes de l'amiante*, created in 2000, as well as, in 2011, the compensation mechanism for the victims of benfluorex, managed by the ONIAM.

[28] As foreseen, for instance, by the Research *La réparation du dommage: bilan de l'activité des Fonds d'indemnisation*, carried out with the patronage of the Research Mission "*Droit et Justice*" directed by Professor A. d'Hauteville, Montpellier 1 University, February 2009 - *Proposition n° 1: favoriser le rapprochement (physique et juridique) des fonds avec l'objectif de réunification en un fonds unique.* See again C. BÉCHU - P. KALTENBACH, *Rapport d'information sur l'indemnisation des victimes*, cit., p. 75, describing

After all, the compensation mechanism in force before the CIVI should be amended, establishing, in particular, that it cannot allocate an amount of money which is lower than the sum granted by the court, when the judgement has already been pronounced[29]. The situation described above, which is based on the autonomy enjoyed by CIVI to assess the amount of money granted to the victim, is not only the cause of many misunderstandings of the latter, but also the symbol of the non recognition of his/her condition of victim.

Finally, regardless of the breakthroughs accomplished, it is crucial not to limit the victim's compensation only to a certain amount of money because, despite being a crucial element for the recovery, it is not only goal to be pursued. As stressed by Anne d'Hauteville, president of INAVEM scientific committee, during a hearing at the Senate in 2013, "victim's claim for compensation is not limited to financial compensation. Full and effective compensation is an imperative of justice as a recognition of the harms suffered, but it is not enough: victims want, first of all, to know the true course of events and to establish individual responsibilities". The assistance offered by professionals that contribute, in different ways, to the application of rights and to the guarantee of a fair compensation for victims, contributes to the fight against exclusion and to the restoration of social cohesion, ensuring full respect of restorative justice[30].

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the proposal that was formulated, during the hearings, to create a *fonds national unique*.

[29] See, in this sense, the Proposition n° 32 of the *40 propositions for evolving victims' rights*, INAVEM – Edition, 2014.

[30] Restorative justice is an approach mainly inspired by Quebec and that developed in France over the past twenty years, thanks to Professor R. Cario. According to art. 2 Directive 2012/29/EU of the European Parliament and of the Council, of 25 October 2012, restorative justice means *"*any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party*"*. Its transposition into the French code of criminal procedure is foreseen in the draft law on the definition of punishments and on the enhancement of the effectiveness of existing criminal sanctions, approved in summer 2014 (art. 7-*quinquies*).

CHAPTER XXIII

COMPENSATION OF DAMAGE FROM CRIME IN THE ITALIAN SYSTEM COMPARED WITH EUROPEAN CONSTRAINTS

by Marco Maria Scoletta[*]

TABLE OF CONTENTS: 1. Compensation obligations in regulatory sources of the European Union. - 2. The provision for compensation of damage from crime in the Italian criminal system. - 3. The effectiveness of compensatory protection and the policy of solidarity funds. - 4. Implementation of Directive 2004/80/EC and doubts of discrimination 'in reverse' in the compensatory discipline. - 5. The mechanisms that reward encouragement of compensation of damage caused by crime

1. Compensation obligations in regulatory sources of the European Union

Within the framework of the general valorisation of the figure of the victim of crime in European judicial harmonisation policies, particular attention to the "compensatory" profile has constituted one of the bench marks both in the Framework Decision 2001/220/JHA (relating to the status of the victim in the criminal trial), and in the more recent Directive 2012/29/EU (which, in substituting the Framework Decision, establishes minimum provisions concerning the rights, assistance and protection of victims of crime). Art. 16 of the 2012 Directive, reproducing essentially that provided by art. 9 of the Framework Decision – except for some linguistic changes and the separation of the part concerning restrictions, the object of art. 15 of the Directive –, imposes on Member States a triple fulfilment, since: *(i)* it recognises for the victim the right to obtain a decision regarding compensation of damages from

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crime by the protagonist within the sphere of the criminal trial, as long as the same has not been deferred to another judicial procedure; *(ii)* it requires that the decision be made within a reasonable lapse of time; *(iii)* it urges the promotion of measures that encourage the offender to provide adequate compensation. Compared with the Framework Decision, the Directive seems to want to emphasise the need that the subject obliged to provide compensation must, in any case, be "guilty" of the crime (and not third parties, among whom the State), even though the pronunciation regarding compensation can be the object of an autonomous judicial procedure and different from the criminal trial. Moreover, the same Guidance document regarding the transposition and implementation of the 2012 Directive, drafted by the Department of Justice of the European Commission, underlines that art. 16 deals only with the obligation for compensation of the offender and not of the one that may possibly be attributed to the State[1].

The compensation of victims of crime by the State, on the other hand, is a specific object of Directive 2004/80/EC, which, however, limits compensation obligations to particular cases of "violent cross-border crimes": in other words, the State within which territory the violent crime was committed is obliged to provide fair and adequate compensation in favour of victims who are residents in other member Countries. The *ratio* of such a Directive, obviously, is that of guaranteeing subjects in situations of particular weakness – such as, in fact, foreign victims of violent crimes - an easier instrument for compensation of the damage suffered. In fact, the regulatory provisions of the 2004 Directive are functional to this end, drafting rapid and simple procedures for requesting state indemnities and adequate information measures for foreign victims.

2. The provision for compensation of damage from crime in the Italian criminal system

In the Italian system, the obligation of a compensatory provision in favour of the victim of crime is formally satisfied

[1] In fact, we can read in the above-mentioned *DG Justice Guidance Document* regarding the transposition and implementation of Directive 2012/29/EU: "The Article [16] only deals with compensation from the offender and not from the State".

by the general provision of art. 185 Italian criminal code, which not only envisages the right to "restitutions", i.e. to the *restitutio in integrum* of the pre-existing *status quo* when the crime was committed, but, precisely, also obligates the guilty party (or the subjects who must, according to civil law, be considered liable on his behalf[2]) "to compensate the damage", both financial and asset-related, caused to victims with commission of the crime[3].

Moreover, in guarantee of the possible civil obligations of the offender, a series of regulatory measures are provided which are instrumental to preserving the wealth of the assets of the offender in function of guarantee for fulfilment of the compensatory obligation: *(a)* the attachment (art. 316 ff. Italian code of criminal procedure) of moveable and immovable assets of the defendant or of the sums or things due to him, which can be requested at any state and level of the proceedings by the plaintiff if legitimate grounds exist to consider that the asset-related guarantees may be missing or may be lost[4]; *(b)* the revocatory action (art. 192-194 Italian criminal code), which makes it possible to make inefficacious acts of disposal, on a free basis or subject to payment, carried out fraudulently – i.e. with the purpose of avoiding fulfilment of civil obligations – before or after having committed the crime[5]; *(c)* withdrawal from pay (art. 24 Italian penitentiary law) paid to prisoners who work in prisons.

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[2] The subject under the compensatory obligation caused by a crime, in fact, is not necessarily the same person as the offender, since such an obligation can be extended to other subjects responsible on the basis of civil law (for example to parents with respect to responsibility for their children; or the employer with respect to actions committed by their own employees; or to the owner of the vehicle with respect to the actions of the driver, etc.), in this way extending the potential guarantees to satisfy the victims; see A. DE CARO, *Responsabile civile*, in *Dig. disc. pen*., XII, Turin, 1997, p. 1; F. P. GUIDOTTI, *Persona offesa e parte civile,* Turin*,* 2002; C. QUAGLIERINI, *Le parti private diverse dall'imputato e l'offeso dal reato*, Milan, 2003.

[3] In general regarding the substantial and procedural problems of compensation for damage caused by crime in the Italian legal system, see G. ALPA – V. ZENO ZENCOVICH, *Responsabilità civile da reato,* in *Enc. dir.*, XXXIX, 1988, p. 1274; M. C. BARBIERI, *Art. 185 c.p.*, in E. DOLCINI – G. MARINUCCI (eds.), *Codice penale commentato*, Vol. I, 2011, p. 2127; P. GUALTIERI, *Soggetto passivo, persona offesa e danneggiato dal reato: profili differenziali,* in *Riv. it. dir. proc. pen.,* 1995, p. 1071.

[4] See M. MONTAGNA, *I sequestri nel sistema delle cautele penali*, Padua, 2005.

[5] Concerning this, L. BIGLIAZZI GERI, *Revocatoria,* in *Enc. giur.*, XXVII, 1991, p. 1.

On the procedural level, the possibility for the victim to join proceedings as a "plaintiff" in the criminal trial in order to be able to exercise, immediately on such an occasion, the civil action for restitutions and for damage compensation (art. 74 Italian code of criminal procedure)[6] is functional to this end. Moreover, all those "damaged" by the crime, i.e. subjects – who may also be different from the passive subject owning the juridical asset directly injured by the unlawful conduct (i.e. the "injured person") – who has in any case suffered damage (even only moral) from commission of the illegal action, have the right to join the proceedings as a plaintiff.

3. The effectiveness of compensatory protection and the policy of solidarity funds

In addition to the formal provision of a judicial compensatory protection in favour of the victims of crime, the real level of fulfilment of the obligation of art. 16 can only be measured in terms of practice regarding the "effectiveness" of the satisfaction of the compensatory rights of victims, which takes shape in the specific constraint imposed by paragraph 2 of art. 16 to guarantee a decision concerning compensation "within a reasonable period of time". In this different judicial perspective, the compensatory objective imposed by the Directive finds a sensitive compromise in the notoriously unreasonable duration of trials in the Italian system, which results in invalidating "at a later date" any regulatory action abstractly functional to strengthening the rights and judicial protections of the victims of crimes[7]. The abnormal duration of crimes is therefore a defect in the judicial system, which could expose the Italian State not only to a breach – proclaimed and repeated – of art. 6 European convention of human rights, from the point of view of guaranteeing (above all) the rights of the defendant/perpetrator of the crime, but also to that of art. 16 of

[6] See M. MANISCALCO, *L'azione civile nel processo penale*, Padua, 2006.

[7] Even though such a consequence may be mitigated by the fact that the judge decides on compensation of damage already on the result of the first level sentencing and such a situation (so-called "provisional") has an immediately executive nature (see articles 539 and 540 Italian code of criminal procedure).

Directive 2012/29/EU, in the different perspective of the legitimate compensatory claims of the victim.

Beyond such a profile, the problem of compensatory protection in the rather frequent cases in which the guilty are not identified or are not solvent with respect to the civil obligations deriving from criminal acts, remains open. As already mentioned, this is an aspect which even the Directive of 2012 fails to discipline and which the Guidance document of the European Commission indicates as one of the profiles of discrepancy in the various national systems on which it is appropriate to concentrate attention from the point of view of an implementation of the harmonising action in favour of victims.

The Italian system is lacking a general provision on the subrogating role of the State in all cases in which it is not possible to guarantee adequate restoration to the victims of crimes. A partial but positive response to such needs for protection is given by the establishment of a series of "solidarity funds", ordered by the legislator for the purpose of guaranteeing in any case timely and sure compensation in favour of the victims of specific categories of crimes, considered worthy of immediate reparation due to their position of particular weakness with respect to the aggressions they have suffered. Such a compensatory model of the welfare/public law type is currently applied to the victims of crimes of terrorism and of organised crime (see law no 302 of 1990, law no 512 of 1999 and law no 206 of 2004) and to those of crimes of usury and extortion (law no 44 of 1999)[8]. In these cases, access of the victims to solidarity funds is allowed irrespective of the discussion of the civilly obliged subject and, in certain circumstances, also in the absence of a final sentence of ascertainment of the fact, and also in the case in which the guilty party has not been identified.

Notwithstanding some critical remarks which can be made concerning the strategy of solidarity funds – which would make the guilty party not responsible as far as the victims are concerned and which in any case does not manage to guarantee a compensation for the damage suffered – this policy of public intervention is none the less the most efficacious one for guaranteeing *sure* and *timely* economic restoration to the

[8] P. PISA, *Istituito il fondo di solidarietà per le vittime di richieste estorsive*, in *Dir. pen. proc.*, 1999, p. 283.

victims of particularly odious aggressions, which otherwise, in the best of hypotheses, would see their own compensatory rights satisfied only at the end of extenuating legal battles.

4. Implementation of Directive 2004/80/EC and doubts of discrimination 'in reverse' in the compensatory discipline

As already mentioned, Directive 2004/80/EC concerning compensation of victims of crime aims to protect the peculiar situation of foreign victims of intentional violent crimes, leaving the options of member States open concerning the "internal" compensatory policy, i.e. regarding victims permanently resident in the state in which the crime has been committed. Moreover, although implemented by the Italian legislator with legislative decree no 204 of 2007, this Directive also has not been successfully absorbed by the national system, since the law limits itself to disciplining certain procedural aspects, but does not list the crimes that can be compensated by the State, nor does it identify all the circumstances that legitimise access to public compensation (including the criteria for establishing the compensation). Such a situation of incorrect assimilation of the European constraint has been punctually censored in juridical circles, where certain national judges – on the basis of Francovich jurisprudence[9] – have recognised the responsibility of the Italian State for having failed to implement the Directive, ordering the Presidency of the Council to "compensate" in favour, in the case in question, of the foreign *victim* of sexual violence committed by two fugitives from justice[10].

[9] M. WINKLER, *Francovich colpisce ancora: una nuova condanna dello Stato per ritardato (ed errato) recepimento di una direttiva europea*, in *Resp. civ.e prev*., 2011, p. 923.

[10] See Court of Turin, 4 May 2010, no 3145, in *Giur. mer*., 2010, p. 3057 with note by M. CONDINANZI, *La responsabilità dello Stato per violazione del diritto dell'Unione europea: prime applicazioni dei recenti orientamenti della Corte di Cassazione*; F. BRAVO, *La tutela sussidiaria statale "risarcitoria" o "indennitaria" per le vittime di reati intenzionali violenti in Europa e in Italia*, in *Riv. crim. vitt. e sic*., 2012, 1, p. 144. Such a statement was then later confirmed, even though with some clarifications, by C. App. Turin, 23 January 2012, n. 106, in *Corr. giur*., 2012, p. 63 (with note by C. CONTI, *Vittime di reato intenzionale e violento e responsabilità dello Stato. Non è ancora tutto chiaro*), which indicated that this is the matter of state subsidiary

With the result, however, that the compensatory system resulting from application of the 2004 Directive heralds an inequality of treatment which seems to take the form of a typical so-called "in reverse discrimination"[11], because the Italian victims[12] of crimes committed on the soil of the State are without compensatory protection, since they are outside the sphere of application of the Directive. In an attempt to overcome such an apparently unreasonable situation, the question has been referred prejudicially to the Court of Justice[13], which however declared its own lack of jurisdiction in reaching a decision, since the question submitted to its attention has a merely internal[14] significance and therefore did not regard the free movement of citizens belonging to the Union for the protection of whom the 2004 directive had been adopted.

The irrelevance of the matter in the community law sphere none the less leaves the discriminatory profile open, which would have good reasons to be brought, on the internal level, to the attention of the Constitutional Court for breach of art. 3 Italian Constitution (as recently proposed, moreover, also in juridical circles[15]), even though it certainly is not easy to identify the specific law that should be submitted to constitutional legitimacy judgement.

The optimal solution would clearly be that of providing compensatory protection by the state also for internal situations, with the understanding that the public administration will step into the credit position of the victim against the offender for the purposes of compensation. In this way the victims would be guaranteed sure and timely restoration, while it would be the

protection and of an indemnifying (and not compensatory) nature; see also Rome Court, 4 November 2013, in *Rass. Avv. Stato*, 2013, p. 26.

[11] On the delayed fulfilment by Italy and on the internal "in reverse" discrimination within the Italian system see in detail, R. MASTROIANNI, *La responsabilità patrimoniale dello Stato italiano per violazione del diritto dell'Unione: il caso dell'indennizzo delle vittime dei reati*, in *Giust. civ.*, 2014, p. 283.

[12] The above-mentioned verdict by the Court of Turin has provided an extensive interpretation of the application area of the Directive, recognising compensatory protection to a victim who is foreign but also a resident in Italy.

[13] Court of Florence, 20 February 2013, in *Corr. giur.*, 2013, p. 1387.

[14] ECJ, 30 January 2014, C-122/13, *Paola C. v. Presidenza del Consiglio dei Ministri*, in *Corr. giur*., 2014, p. 756, with note by C. CONTI, *Nell'attesa di una legge: capolinea per gli indennizzi statali alle vittime da reato?*

[15] The discussed hypothesis, see Court of Florence, 8 September 2014, (still) unpublished.

State that would have to suffer the inefficiencies of the judicial system. By taking on the economic burden of such a situation, the State itself would be the most interested party in obtaining an efficient reform of the system, in which the potential recovery for the public coffers of the sums previously paid in the pre-eminent interest of the victims would correspond to rapid procedural ascertainment of the responsibility of the offender. The cost of such a reform would however be very high, and difficult to include in the budget of public expenditure, above all in the current situation of economic crisis. Rather than looking at such a solution, perhaps it would be more realistic to examine forms of regulatory *incentivation* of the *direct compensation* by the guilty parties, in compliance with that expressly provided by paragraph two of 16[16].

5. The mechanisms that reward encouragement of compensation of damage caused by crime

From this point of view, the Italian judicial system recognises an articulated series of mechanisms which, intervening on various functional levels, attribute specific significance to compensation of damage by the guilty party in political-criminal logic of an essential "rewarding" type as far as the offender is concerned. Without claiming completeness in the systematic recognition, it is possible to group together the various regulatory provisions into four types of reward effects[17].

(A) The first form of reward valorisation of the compensation of the victim takes place on the level of the proportioning of the criminal sanction. Fundamentally the archetypical provision of art. 62, par. 1, no 6 Italian criminal code, which envisages a common attenuating circumstance in all cases in which the offender, before the trial, has made full reparation of the damage through compensation and, when it is possible, through restitutions[18] satisfies this end. The originally

[16] Notwithstanding the "structural" problem in cases in which the perpetrator of the crime is not identified or is not solvent.

[17] See also D. FONDAROLI, *Illecito penale e risarcimento del danno,* Milan, 1999, p. 242.

[18] On such a provision see T. PADOVANI, *L'attenuante del risarcimento del danno e l'indennizzo assicurativo*, in *Cass. pen*., 1989, p. 1183; F. PALAZZO*, Quale sia la natura la natura giuridica della circostanza attenuante*

highly "subjective" nature of the circumstance, the *ratio* of which was identified in the reward response to demonstration of the resipiscence of the offender (therefore, with irrelevance, of the compensatory intervention of third parties, including insurers), was partially overcome from an objectivistic point of view, so that the objective need for financial reintegration of the victim and/or of the damaged party assumed decisive significance, on the sole condition that the compensatory intervention, when also implemented by third parties (including insurance companies), must in any case refer to the wish of the defendant (who, for example, has stipulated the policy and does not demonstrate to be against compensation)[19].

From the same point of view of objective satisfaction of the interest of the victim, jurisprudence has stated that "in the conflict of interests between the offender and the victim of the crime, the prevalence of the latter's interest in full reparation does not leave any space even to eloquent manifestations of amendment of the offender[20]". Consequently, the attenuating case is not integrated by an only "partial" compensation of the damage, even if the offender has actually committed himself (without success) in favour of the victim[21].

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comune della riparazione del danno derivante da reato, in *Studium iuris*, 1997, p. 516; F. VERGINE – G. GATTA, *Art. 62 c.p.*, in E. DOLCINI – G. MARINUCCI (eds.), *Codice penale commentato*, Vol. I, III ed., 2011, p. 1144.

[19] In this sense, fundamentally, Italian Constitutional Court no 138/1998; in the same sense see also Italian Court of Cassation, 6 February 2009, *Cappelletti*, in *Ced Cass.*, no 243202; Italian Court of Cassation, Plenary Session, 22 January 2009, no 5491, *Pagani*, in *Ced Cass.*, no 242215; on the debate relating to the "subjective" or "objective" nature of the circumstance see, in the manual, G. MARINUCCI – E. DOLCINI (eds.), *Manuale di diritto penale. Parte generale*, Milan, 2012, p. 525.

[20] So Italian Court of Cassation, 17 January 2013, no 13282, in *Dejure* (online database); in the same sense also Italian Court of Cassation, 24 March 2010, no 12366 and Court of Cassation, 9 June 2004, no 28554, *ibidem*.

[21] In this sense, G. MARINUCCI – E. DOLCINI, *Manuale di diritto penale,* cit., p. 526; *contra*, instead, F. MANTOVANI, *Diritto penale. Parte generale*, Padua, 2009, p. 408, that attributes attenuating significance also to the positive effort of the offender in the compensatory function, on the basis of that provided by the second part of the same art. 62, par. 1, no 6), which makes reference to the fact that the guilty party has "taken action spontaneously and efficaciously to prevent or attenuate the harmful or dangerous consequences of the crime" (such a regulatory provision makes specific reference, however, to the different level of the injury to the protected juridical asset and not to the compensation profiles).

The provisions of legislative decree no 231/2001 respond to the same logic of rewarding by means of sanctions, i.e. the regulatory *corpus* that disciplines responsibility for crime of the bodies, that attribute specific significance to compensation of damage by the body accused of the assumed crime. In particular, art. 12, par. 2, let. *a)*, which envisages that cases of reduction of the financial fine, describes amongst other things an attenuating circumstance similar to that of art. 62, par. 1, no 6; with the difference that in this case, for the purposes of integrating the attenuating circumstance, damage compensation must contribute to eliminating the harmful/dangerous consequences of the crime (while in the codicistic provision the two hypotheses are autonomous and alternative). The same circumstance of art. 12, par. 2, let. *a)*, is also valorised again by art. 17, par. 1, legislative decree no 231/2001 as an assumption for exclusion of the application of prohibition sanctions: in this case, however, in addition to the conditions envisaged therein (compensation and elimination of harmful consequences) circumstances *(i)* of the correction of the organisational shortcomings that have allowed the commission of the committed crime *(ii)* making the profit available for confiscation purposes, must further contribute.

(B) Compensation of damage also finds specific relevance within the sphere of certain cases of *extinguishment of sentence*. The provision of art. 163, par. 4, Italian criminal code is paradigmatic. It concerns the conditional suspension of punishment, which, in fact, subordinates the granting of the so-called short suspension (introduced by art. 1 of Law 145 of 2004) to the two reparatory actions typified by art. 62, par. 1, no 6, i.e. to *full* compensation of the damage (and, when possible, to restitutions), or, alternatively, to the efficacious actions on the part of the offender, to cancel or attenuate the harmful or dangerous consequences of the crime that he can eliminate. In this case, moreover, the reparatory actions can also be carried out after the trial has started, even though within declaration of the first level sentence.

Again concerning *conditional suspension*, art.165 Italian criminal code also provides the general possibility of subordinating the granting of the conditional suspension (*ordinary*), amongst other things (not only to the fulfilment of the obligations of restitutions, publication of the sentence *ex* art. 186 Italian criminal code or to elimination of the harmful or

dangerous consequences of the crime) but also to payment of the sum liquidated by the judge for compensation of the damage or of that provisionally allocated on the amount of it[22]. In this case, therefore, the offender can effectively pay the compensation even after recognition of his own responsibility and on infliction of the sanction, according to a logic which evidently takes into account the difficulties that are often met in actual exhausting of the compensatory credit.

Granting of conditional release is also subordinate, *ex* art. 176, par. 4, Italian criminal code, to fulfilment of the civil obligations deriving from the crime (which obviously includes the sum due for compensation of damage in compliance with art. 185 Italian criminal code) "unless the sentenced person demonstrates that it is impossible for him to fulfil them"[23], on condition – however – that the sentenced person does his best to fulfil the compensatory purpose[24]. The pronounced subjectivist dimension assumed by the compensatory requirement, which in this case does not aim so much at ensuring an effective restoration (at least financial) to the victim of the crime – through full compensation of the damage so as to confirm the overall reformation of the offender with respect to the committed crime is explained within the context of the re-educational re-socialisation function attributed to this mechanism .The same logic can be found regarding the granting of *rehabilitation,* in order to extinguish the accessory sentences and the criminal effects of the conviction: in this case also art. 178 Italian criminal code conditions the application of the mechanism to fulfilment of the civil obligations deriving from the crime, but rehabilitation can in any case be granted if the sentenced person/the rehabilitating person shows that it is

[22] R. BARTOLI, *Sospensione condizionale e obblighi del condannato,* in *Studium Iuris*, 2001, p. 1216; C. DE MAGLIE – G. GATTA, *Art. 163 c. 4,* in *Codice penale commentato*, cit., p. 2000.

[23] A. MORRONE, *Liberazione condizionale tra risarcimento del danno e ravvedimento del offender*, in *Dir. pen. proc*., 2006, p. 207; ROTA, *Art. 177 c. 4*, in *Codice penale commentato*, cit., p. 2102.

[24] In this sense see, in relation to damage compensation as in art. 176 Italian criminal code, Italian Constitutional Court no 138 of 2001: "The circumstance in which (…) the convicted person demonstrates solidarity with the victim, taking an interest in his conditions and doing everything possible to mitigate the damage caused, rather than assuming an attitude of total indifference, cannot fail – for the considerations made – to have a particular impact in verifying the results of the path of re-education".

impossible for him to fulfil, due to objective circumstances that cannot be attributed to him[25]. On the other hand, from the point of view of making it easier for the sentenced person to return fully to society and to work, which constitutes the *ratio* of the mechanism in question, in this case too, compensatory obligations assume significance in the specific subjectivist perspective of assessing the personality of the offender and his fine (with respect to which satisfaction of the victim constitutes a secondary and all things considered incidental profile).

(C) A further profile of reward valorisation of compensation of damage is also found in the executive phase of criminal sanctions and more precisely in the discipline of *prison treatment*. Emblematic of this approach is the regulatory provision of art. 4-*bis,* paragraph 2, of the Prison System (law no 354 of 1975), which, with regard to specific particularly serious crimes (terrorism, organised crime, reduction to slavery, sexual exploitation, human trafficking, kidnapping for the purposes of extortion), subordinates the granting of many prison benefits – work outside the prison, reward permits, alternative measures to imprisonment (home detention, semi-freedom) – to a series of conditions, including also compensatory satisfaction of victims (in compliance with art. 62, no 6), in this case also significant if it takes place after the conviction sentence.

Compensation of damage is also one of the elements that the Supervisory Tribunal must take into account when deciding on suspension of the sentence for assigning on probation to social services in compliance with art. 47 penitentiary law[26].

Again, paragraph 7 of the same article expressly provides that, for the purposes of granting probation, the Supervisory Tribunal, at the time the person is put on probation, must dictate

[25] See Italian Court of Cassation, 29 September 2009, no 40018, in *Guida dir.*, 2010, 5, p. 90, according to which, moreover, the offender is obliged to attempt compensation of damage also in the case of waiver by the injured parties of the right to make the relevant civil law appeals; see also Italian Court of Cassation, 21 September 2007, no 39468, *Catania*, in *Ced Cassazione*, n. 237738.

[26] Italian Court of Cassation, 25 September 2007, no 39474, in *Cass. pen*. 2009, 3, p. 1199: "The unjustified unwillingness of the convicted person to compensate the victim of the crime for the damages caused constitutes a negative element legitimately assessable by the court in order to refuse assigning him on probation to the social services, not pointing out that compensation of damages is not provided by the provision as a condition for the granting of the alternative measure".

the prescriptions on the basis of which "the person on probation must behave as far as possible in favour of the victim of his crime*"* (also in order to fulfil compensatory obligations); in this case too, moreover the granting of the measurement cannot be unconditionally subordinate to full compensation of the damage, since it is necessary to take into due account the particular economic conditions of the convicted person and, consequently, to attribute significance to the subjective efforts aimed at making reparatory action[27].

(D) A final important regulatory valorisation procedure, in the reward sense, regarding compensatory actions is found in the context of certain causes *of extinguishment of the offence.*

A paradigmatic hypothesis of this function is provided in the special discipline of offences attributed to the jurisdiction of the justice of the peace (legislative decree 28 August 2000 no 274), which in art. 35 in fact provides a particular cause of extinguishment "when the defendant demonstrates that he has eliminated the harmful or dangerous consequences of the crime", also indicating that the sentence of extinguishment is only pronounced if the judge "considers the compensatory and reparative activities suitable to satisfy the needs of criticism of the crime and those of prevention".

Unlike the hypotheses illustrated up to now, the function of the extinguishing cause in question can also be seen as a deflationary and procedural economy logic, allowing interruption of the trail in its initial phase (before the appearance hearing) and therefore not taking into consideration at all ascertainment of the criminal responsibility of the

[27] See Italian Court of Cassation, 21 November 2012, no 2614, in *Cass. pen.*, 2013, p. 3694; Italian Court of Cassation, 17 November 2009, no 47126, in *Ced Cass.,* n. 245886; Italian Court of Cassation, 27 May 2004, n. 37049, *ivi*, n. 230361; Italian Court of Cassation, 7 December 1999, n. 6955, ivi, n. 215204; Court of Milan, 5 April 2006, in *Foro ambr*., 2007, 3, p. 370**.** Concerning this, see also, within the sphere of wider remarks on reparative justice in the Italian criminal system, M. G. MANNOZZI – G. A. LODIGIANI, *Formare al diritto e alla giustizia: per una autonomia scientifico-didattica della giustizia riparativa in ambito universitario*, in *Riv. it. dir. proc. pen.*, 2014, p. 133: "The formulation of art. 47, n. 7, penitentiary law underwent a structural change in 2010, where the term "must", referring to the formalisation, by the judge, of reparatory prescriptions in favour of the victim, was substituted with the term "can" and it was specified thatreparatory prescriptions do not take into consideration compensatory obligations*:* a fundamental acknowledgement that reparation has a different semantic area from that belonging to the term compensation".

defendant. The significance of the compensatory profile however remains within the sphere of an overall assessment of the reparatory conduct of the offender, who is obliged to demonstrate not only correct fulfilment of the compensation obligation and elimination of any consequences of the crime, but also the specific satisfaction of wider needs of *corroboration* of the crime and of *prevention*. From this perspective, which confirms the public-law nature of the mechanism (orientated towards the re-education needs of art. 27, par. 3, Italian Constitution), in jurisprudence it has been pointed out that "the legislator has moved in a direction to promote not only re-integrational actions, but also behaviour aimed at loyalty, correctness and the rules of *bon ton*, in view of the reaffirmation of the social values naturally damaged by the criminal action[28]"; and that the assessment of the satisfaction of the requisites required by the provision can only be carried out "positively, on the basis of the characteristics of the crime and the event that is the object of the specific notification[29].

A further channel of potential valorisation of damage compensation as a function of the extinguishment of the offence could already be found in criminal law for children, where, in disciplining the mechanism of probation of the child (art. 28 of D.p.r. 448/88), it is provided that the judge, in prescribing suspension of the trial through a court order and assigning the accused to child services, can "issue prescriptions aimed at repairing the consequences of the crime, and promoting the mediation of the child with the person injured by the crime"[30]. In the context of reparatory activities, in fact, prescriptions could theoretically find space which are directed at also ensuring economic reparation of victims (also possibly through the child's commitment to work useful for compensatory ends), even though, to date, such potentials have not been adequately examined in probation programs, which envisage reparatory

[28] Italian Court of Cassation, 10 July 2008, n. 38004, in *Guida dir*., 2008, 45, p. 82.

[29] Italian Court of Cassation, 24 September 2008, n. 41043, in *Guida dir*., 2008, 49, p. 89.

[30] See S. LARIZZA, *Il diritto penale dei minori. Evoluzioni e rischi di involuzione*, Milan, 2005; M. MIEDICO, *La sospensione del processo e messa alla prova tra prassi e prospettive di riforma*, in *Cass. pen.*, 2003, p. 2648; L. SCOMPARIN, *Sospensione del processo minorile e "messa alla prova": limiti di compatibilità con i riti speciali e altri profili processuali dopo l'intervento della Corte costituzionale,* in *Leg. pen.,* 1995, p. 512.

paths of a mediation nature (but not very sensitive to the compensatory rights of the victims).

In the same perspective, a greater sensitivity to compensatory profiles is found, last of all, in the new hypothesis of "suspension of the trial with probation" introduced by the recent law no 67 of 2014: *probation*, up until now limited to the children's criminal system, now finds a systematic general application, even if limited to crimes punished with a monetary penalty or with a custodial sentence of a maximum of 4 years (only, together with or as an alternative to the monetary penalty), as well as for crimes for which a writ of summons is envisaged *ex* art. 550, par. 2, Italian code of criminal procedure. So, in a clearer manner than that provided by art. 28 of D.p.r. 448/88, the new legislative action also includes among the contents of "proof" (the object of assessment for the purposes of recognising the extinguishment effects) *"*the provision of actions aimed at eliminating the harmful and dangerous consequences of the crime, and also, where possible, compensation of the damage caused by the same" (to which we can add assignment of the defendant to social services so that specific prescriptions can be carried out; doing a job of public usefulness, and, where possible, following a mediation program with the victim)[31].

In the economy of the mechanism, which primarily satisfies the deflationary needs of the legal system (and of the prison-related one), under the reparative profile, attention for the victim assumes an important position which, within the limits of not particularly serious offences, can constitute a strong element of encouragement of the compensatory obligations of defendants; however, the interpretation of the compensatory "possibility" (in fact provided only "where possible"), remains an unknown: from an *objectivistic* perspective, the possibility of reparation/compensation should be assessed exclusively in

[31] F. CAPRIOLI, *Due iniziative di riforma nel segno della deflazione: la sospensione del procedimento con messa alla prova dell'imputato maggiorenne e l'archiviazione per particolare tenuità del fatto*, in *Cass. pen.*, 2012, p. 7; M. MIEDICO, *Sospensione del processo e messa alla prova anche per i* maggiorenni, in *Dir. pen. cont.*, 2014; ID., *Sospensione del processo e messa alla prova per imputati maggiorenni: un primo provvedimento del Tribunale di Turin*, *ibidem*; BOVE, *Messa alla prova per gli adulti: una prima lettura della L. 67/14*, in *Dir. pen. cont.*; F. VIGANÒ, *Sulla proposta legislativa in tema di sospensione del procedimento con messa alla prova,* in *Riv. it. dir. proc. pen.*, 2013, p. 1300.

relation to the structure of the crime – whether or not it produces reparable consequences and damages that can be compensated; from the *subjectivist* perspective, the personal conditions of the defendant in relation to his economic possibilities functional to fulfilment of the compensatory obligations, should also assume significance.

Summing up, in the Italian system, compensation of damage in favour of the victims of crime finds numerous potentially "encouraging" regulatory measures. The reward logic underlying valorisation of compensatory actions, however, more than satisfying victims, places itself within the framework of a more complex assessment of the personality of the guilty party, of his resipiscence or his re-education, in a perspective of "reparatory justice", which prevents solving of social conflicts on the merely private law-monetizable level in compensatory terms – and also suggests attributing reward mechanisms to the re-education needs of the offender and to the purposes of general positive prevention as a function "of reconciliation"[32].

[32] For the debate on the possible role of damage compensation in the criminal system in light of the theory of the sentence, see C. ROXIN, *Risarcimento del danno e fini della pena*, in *Riv. it. dir. proc. pen.*, 1987, spec. p. 16; H. J. HIRSCH, *Il risarcimento del danno nell'ambito del diritto penale sostanziale*, in *Studi in memoria di Pietro Nuvolone*, vol. I, Milan, 1991, p. 277, and M. ROMANO, *Risarcimento del danno da reato, diritto civile, diritto penale*, in *Riv. it. dir. proc. pen.*, 1993, p. 865.

CHAPTER XXIV

COMPENSATION OF VICTIMS IN THE SPANISH CRIMINAL PROCEDURE

by Ana Ochoa Casteleiro[*]

TABLE OF CONTENTS: 1. Introduction. - 2. Right of the victim to compensation during criminal proceedings. - 3. Civil responsibility deriving from a crime in Spanish law - 3.1. Procedural aspect of such civil responsibility. - 3.2. Essential aspects. Content of civil responsibility. - 3.2.1 Quantification of damages. 3.2.2. Other persons responsible. - 4. Execution of civil responsibility - 5. Civil responsibility and victims protection within the Spanish penitentiary regulation. - 6. Conclusion.

1. Introduction

In compliance with Directive 2012/29/EU "victim" means: *a)* a natural person who has suffered harm, including physical, mental or emotional harm or economic loss directly caused by a criminal offence; *b)* family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.

The recent Directive has been recently adopted by the EU Council and Parliament, pursuing their commitment to protect victims and to define minimum standards of this topic, in order to strengthen and integrate the principles defined in 2001 by Framework Decision 2001/220/JHA. The fundamental aim of this supranation regulation is to promote protection for victims within criminal proceedings carried out in the European Union and to establish minimum provisions in order to make the Member States free to extend the rights that are recognized inside the EU Directive.

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2. Right of the victim to compensation during criminal proceedings

According to art. 16 of the Directive, Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.

Generally speaking, two procedural ways exist through which the victim can exercise this right through the civil action: through criminal proceedings and/or through civil proceedings.

As it is known, in comparative law there are various systems in force for exercising the civil action deriving from crime. In some Countries, criminal proceedings only punish acts that constitute a crime and the civil action is always exercised in civil proceedings with separation of the criminal action (for example, the Anglo-American criminal proceedings). In other systems, it is possible to exercise the civil action in the criminal proceedings, in collaboration with the public prosecutor in order to obtain the right to compensation.

In Spain, the injured party is not limited to collaborate with the public prosecutor, but he is entitled to be a protagonist, so that he can act inside the criminal proceedings in the following ways: *a)* as a private prosecutor, practicing the civil or criminal action in the same proceedings; *b)* in the capacity of private prosecutor, practising the criminal action and reserving the possibility of exercising, within the sphere of a civil procedure, once the criminal proceedings have ended. *c)* as a civil plaintiff, applying only the civil action in the criminal proceedings.

In spite of the many criticisms that have been moved against the Spanish system, I think that it is much more favorable for the victim. Before illustrating the various reasons why I believe that this system is the best, let us look at the specific rules of the Spanish law.

3. Civil responsibility deriving from a crime in Spanish law

Up until the last century, the so-called “civil responsibility deriving from crime” was regulated by criminal laws. Already in the criminal code of 1848, it was established in art. 15 that any person responsible of a crime or an offence was so civilly.

The doctrine maintained that, in the absence of a civil code, it was not a negative thing that the provisions should be found at least in the criminal regulation[1]. The Spanish civil code contains the distinction between a civil offence and a criminal offence (arts. 1092 and 1093), establishing that civil obligations deriving from crimes should be regulated by criminal provisions, so that the provisions contained in the civil code would remain complementary. Therefore, civil responsibility deriving from crimes and the relevant procedural provisions on this topic are regulated by arts. from 109 to 122 of Spanish penal code and by arts. 100, 106-117 LECrim.

3.1. Procedural aspect of such civil responsibility

The purpose of such provisions is to provide crimes victims with the compensation of damages through the civil action, which can be exercised, as already said, both in criminal or civil proceedings. If the victim decides to exercise it inside the criminal proceedings, he/she has the right to let the public prosecutor conduct the action, without need to appear before the court and to appoint a lawyer. Alternatively, he/she can decide to act within the criminal proceedings as private accuse, appointing a lawyer a taking part into the trial (and I think this is the more advisable option). In compliance with *Ley de Enjuiciamiento Criminal*, the public prosecutor carries out together the criminal and the civil action, but the victim can expressly waiver the right of restitution, reparation or compensation. In this case, the public prosecutor shall limit himself to ask for the penalty for punishing the accused for the committed crime (art. 108 LEcrim).

Among the first information that have to be communicated to the victim, there is also that one concerning the right to receive a compensation or to refuse it; the decision on this right has to be taken before the public prosecutor qualifies the crime.

After exercising the criminal action, the civil action is also considered as activated, unless the victim expressly waivers or reserves his right to exercise it in a separate civil proceedings, once the criminal proceedings ends (art. 112 LECrim). The

[1] P. GÓMEZ DE LA SERNA - J. M. MONTALBAN, *Elementos del derecho civil y penal de España: precedidos de una reseña histórica de la legislación española*, Madrid, 1855.

choice to not participate in the criminal proceedings, does not exclude the possible right to obtain a compensation after the final sentence, unless the victim expressly and u nequivocally waived this right.

To sum up, the victim has two procedural paths for exercising the complaint: criminal proceedings and civil proceedings. Ciminal and civil may be exercised jointly or separately, but pending criminal action the civil action shall not be exercised separately until the final criminal sentence is pronounced. Some experts[2] understand that civil responsibility is a derivation of criminal responsibility, conditioned by it, and that the civil action deriving from a crime has to be separated from that deriving from acts not penally relevant and punishable (regulated by arts. 1902 ff. Spanish civil code).

In the new statute of the victim which we expect to be incorporated in the future Criminal procedure code[3], it is stated that "the victim may bring a civil action deriving from the criminal offence or reserve the right to exercise it for the corresponding proceedings", similarly to what was already regulated in the LECrim and fully in compliance with the EU Directive.

3.2. Essential aspects. Content of civil responsibility

Arts. 109 ff. of the Spanish penal code regulate the compensation of damages deriving from crimes that can be obtained through these possibilities:

1. Reimbursements, when it is possible (art. 111).

2. Reparation of damages that can consist in an obligation to give, do or not to do, established by the court depending on the nature of the damage and the personal and financial conditions of the offender (art. 112).

3-. Compensation of ma and non-pecuniary damages, that shall cover not only damages that have been caused to the victim, but also those caused to the family or third parties.

According with the existing Spanish law, victims have to be compensated both for damages caused directly as a result of

[2] E. GÓMEZ ORBANEJA, *Derecho Procesal Penal*, Madrid 1987. *Contra*, A. DE LA OLIVA SANTOS, *Derecho Procesal Penal 2*, Madrid, 1996.

[3] *Anteproyecto de la Ley de Enjuiciamiento Criminal de 27 de julio de 2011*.

crimes (actual damage) and also for those losses of assets or profits due to the crime (loss of earnings), on condition that they can be justified in trial.

3.2.1. Quantification of damage

If the damage deriving from a criminal act is pecuniary, quantification is carried out by the Judge, who evaluates several circumstance and can ask for an expert's consult.

Concerning damages to things, for assessing compensation, the general principle of *restitutio in integrum* is applied, and so the compensation must cover the entire pecuniary damage suffered by the damaged party[4].

On the contrary, when no pecuniary damages have to be quantified, the situation is more complicated because no compensation can be able to repair these damages (for example, injuries and consequences suffered by the victim of a road accident and even less so in the event of a death caused by the crime). Given that, a system has been introduced to assess damages to persons deriving from a road accident[5]. This system, also called *Baremo* is used to give an economic quantification to the injuries suffered by victims of car accidents, but in practice it is often used as a reference also for quantifying compensations deriving from other crimes, because of the advantages that it offers: juridical safety and certainty; identical treatment for similar situations with same premises; a boost for reaching agreements, reducing judicial actions; the possibility for insurance companies to formulate estimates based on reliable criteria. In any case, the evaluation of the damages has to be motivated and justified by the Judge in the sentence, specifying the creteria that have been used for the quantification, in compliance with the Spanish Constitution

[4] Spanish Supreme Court, 30 September 1993, 5 November 1998 and 12 November 2003.

[5] One of the most important amendments that the additional Provision 8ª of Law 30/1995, on the Order and Supervision of private Insurances LOSSP (substituted on 6 November of 2004 by the Royal Legislative Decree 8/2004, which approves the new joint text of the law on Civil Responsibility and Insurance in Motor Vehicle traffic), where it incorporates a system of assessing pecuniary responsibility - deriving from damages caused in a road accidents - that can be applied irrespective of the type of insurance, even if this does not exist.

provisions[6]. The Judge can also demand the quantification of the damage to the execution judge, only specifying reasonable criteria on which he could based the calculation.

3.2.2. Other persons responsible

It is necessary to distinguish between direct civilly responsible persons and those who are responsible in a subsidiary manner. Article 116 of the Spanish penal code establishes that any person penally responsible for a crime is also civilly responsible if damages are caused by that crime[7].

But a direct civil responsibility refers also to those subjects who have assumed the risk of financial responsibilities deriving from the use or exploitation of any asset, enterprise, industry or business, when, further to a criminal action, a specific event occurs that causes an insured risk. We are speaking about the the responsibility of insurers who will be direct civilly responsible parties up to the indemnity limit established by the law or by a stipulated agreement, without prejudice to the right of restoration against the author of the crime (art. 117 Spanish penale code). Subsidiary civil responsibility applies also to individuals who have not taken part in the crime, but who have

[6] According to art. 120.3 "*Los Jueces y Tribunales deben motivar las sentencias*". Concerning the Spanish criminal code, according to art. 105, "*Los Jueces y Tribunales, al declarar la existencia de responsabilidad civil, establecerán razonadamente, en sus resoluciones las bases en que fundamenten la cuantía de los daños e indemnizaciones, pudiendo fijarla en la propia resolución o en el momento de su ejecución*".

[7] Art. 116 Spanish penal code: "*1. Toda persona criminalmente responsable de un delito o falta lo es también civilmente si del hecho se derivaren daños o perjuicios. Si son dos o más los responsables de un delito o falta los Jueces o Tribunales señalarán la cuota de que deba responder cada uno. 2. Los autores y los cómplices, cada uno dentro de su respectiva clase, serán responsables solidariamente entre sí por sus cuotas, y subsidiariamente por las correspondientes a los demás responsables. La responsabilidad subsidiaria se hará efectiva: primero, en los bienes de los autores, y después, en los de los cómplices. Tanto en los casos en que se haga efectiva la responsabilidad solidaria como la subsidiaria, quedará a salvo la repetición del que hubiere pagado contra los demás por las cuotas correspondientes a cada uno. 3. La responsabilidad criminal de una persona jurídica llevará consigo su responsabilidad civil en los términos establecidos en el artículo 110 de este Código de forma solidaria con las personas físicas que fueren condenadas por los mismos hechos*".

a relationship with the participants in the event that generates a *culpa in vigilando, in eligendo* or an "objective" responsibility.

This subsidiary responsibility requires: *a)* the commission of a crime that entails civil responsibility; *b)* the insolvency of the author of the crime; *c)* the participation of the civilly subsidiary responsible party in the criminal proceedings.

Civilly subsidiary responsible parties are:

1. Parents or guardians for damages caused by crimes committed by persons under 18 subject to their parental authority or guardianship and who live with them, as long as there is tort or guilt on their part (art. 120.1 Spanish penal code).

2. Owners of the media for the crimes and offences committed through such means (art. 120.2)[8].

3. Owners of premises when the persons who manage or are in charge of them or their employees have breached the regulations of the police or the provisions of the authority or that have connections with the committed crime, so that it would have not occurred in the absence of such violations (art. 120.3).

4. Owners of industry or commerce for crimes or offences committed by their own employees or representatives or executives in exercising their duties or services (art. 120.4).

5. Owners of vehicles that can create risks for others for crimes or offences committed in the use of the same by their employees, representatives or authorized persons (art. 120.5)[9].

6. The Public Administrations for damages caused by persons penally responsible for offences of fraud or negligence when they are authorities, agents or hired persons or public employees in exercising their duties or functions, as long as the injury is a direct consequence of the functioning of the public

[8] Art. 120.2 Spanish penale code: "*Las personas naturales o jurídicas titulares de editoriales, periódicos, revistas, estaciones de radio o televisión o de cualquier otro medio de difusión escrita, hablada o visual, por los delitos o faltas cometidos utilizando los medios de los que sean titulares, dejando a salvo lo dispuesto en el artículo 212 de este Código*"

[9] Jurisprudence declares the existence of a presumption of authorisation of the owner of a vehicle given to the person who drives it, moving to the owner the task of justifying the non-existence of such an authorisation. (for example, that the driver had stolen the vehicle), as can be seen, among the many provisions, in decision of the Spanish Supreme Court dated 23 September 2002.

services that have been assigned to them. (art. 121 Spanish criminal code)[10].

4. Execution of civil responsibility

Article 125 of the Spanish penal code establishes that when the assets of the civilly responsible person are not sufficient to satisfy all the pecuniary responsibility on one occasion, the Judge, after listening to the victim, may divide its payment, indicating at its own discretion and in relation to the needs of the damaged parties or to the economic possibilities of the responsible party, the period and the amount of the instalments.

There is an important protection for the victim or for the person damaged by the crime, since he/she is placed in first place in the order of preference provided by art. 126 of the Spanish criminal code. This provision establishes that payments made by the transgressor or the subsidiary civilly responsible party, shall be allocated to: 1. reparation and compensation of damages; 2. compensation to the State for the amount of the incurred expenses of the proceedings; 3.to the private accuser if payment is ordered in the sentence; 4. to the other left procedural costs; 5. to the fine.

Actually, Spanish criminal law demands the compensation of the victim as a pre-requisite for suspension of execution of the custodial sentence, if one could be applied[11].

When the defendant shows that he agrees with the public prosecutor and/or the accusing parties so that the minimum sentence should be imposed, he shall pay the victim or the injured party the full amount of the compensations.

5. Civil responsibility and victims protection within the Spanish penitentiary regulation

Compensation of damages deriving from the offence committed by the author is also a necessary requirement in order to obtain prison benefits, such as obtaining third level

[10] This is without prejudice to the responsibility deriving from the normal and/or abnormal functioning of the requested services according to the rules of the administrative procedure.

[11] Art. 81.3 Spanish penal code.

treatment. Arriving at such a level requires that the guilty party has behaved in a manner tending towards returning what he has stolen, repairing and compensating the damages caused. This provision is applied in his maximum extention when the guilty party has committed acts of terrorism, against property, against workers' rights and against the fiscal and social security authorities, etc[12]. Moreover, the sentenced party, in order to obtain conditional release, must find himself in the third level treatment, must have served three quarters of the sentence, must have good conduct. Besides, there must be a favourable prognostic for his return to society, for which he must have satisfied his civil responsibility for the committedcrime.

6. Conclusion

I believe that the Spanish legal system regulates in a very satisfactory way the right of the victim to obtain a compensation of the damages suffered as consequence of a crime through the exercise of the civil action.

After a brief illustration of how this right is regulated in Spain, in its procedural and essential aspects, I believe that the possibility of giving to the injured parties the right to choose between exercising this civil action in criminal proceedings or of reserving the right to exercise it in civil proceedings is very useful, and even more so if it is decided to exercise such a right in a criminal and civil action.

[12] The LO 7/2003, of 30 June, concerning reform measures for full and effective fulfilment of sentences, introduced changes in the penal code, in the *Ley de Enjuiciamiento Criminal* and in the General Organic Prison Law, with the aim of fostering payment of civil responsibilities.

CHAPTER XXV

COMPARATIVE REMARKS

by Juan Burgos Ladrón de Guevara[*]

TABLE OF CONTENTS: 1. Comparison between the analysed juridical systems. 2. Conclusions.

1. Comparison between the analysed juridical systems

Victim's right to obtain a decision on compensation from the offender inside the criminal proceedings is expressly provided by art. 16 of the recent Directive 2012/29/EU, whereas art. 15 prescribes that Member States shall ensure that, following a decision by a competent authority, recoverable property which is seized in the course of criminal proceedings is returned to victims without delay, unless required for the purposes of criminal proceedings.

Concerning Spain, the existing legal provisions (as art. 100 LECrim) make the criminal trial the appropriate judicial place not only for recognizing the author's criminal liability, but also for declaring his responsibility for the damages deriving from the perpetrated crime[1]. Through the exercise of the civil action into the criminal proceedings, victims and injured parties are therefore able to obtain the restitution and/or the compensation of the suffered damages. Recently, the draft law for a legal statute for crimes victims within criminal proceedings[2] has foreseen a modification of art. 109 LECrim aimed at introducing a specific right of the victim to be informed about the faculty to exercise the civil action to obtain compensation, together with the opposite faculty to waive this right. The main

[*] University of Seville.

[1] Cfr. A. OCHOA CASTELEIRO, C*ompensation of the victim in the Spanish criminal procedure*, in *this volume*.

[2] Repeatedly mentioned by the authors in this volume.

purpose of this provision is to provide the victim with a real juridical role inside the criminal trial, in order to satisfy his economic interest in compensation of the damages suffered as consequences of the crime.

As it is known, in Spain the compensation can be obtained by the victim not only within the criminal trial but also in a separate civil proceedings, which can be activated only after the criminal trial has ended and a final sentence has been issued. Therefore, the victim can choose to not take part into the criminal proceedings without losing his right to compensation, because the latter may be ordered in any case by the judge in the final decision (except if the victim had previously and expressly waived the right). We can say that if a right to compensation is recognized by a final judicial decision in a criminal trial, this compensation has to be obtained by victims independently from their procedural strategy and choices.

Besides, it has to be mentioned the fundamental role that is played in this matter by the Spanish assistance services (*Oficinas de Asistencia a las Victimas*), that, among their various tasks, assist victims in the process aimed at obtaining compensation.

It is therefore possible to pacifically affirm that in this specific sector, the Spanish criminal proceeding is entirely in compliance with the supranational prescriptions coming from EU Directives no 2012/29/EU and no 2004/80/EC[3], on victims' right to obtain the restitution or the compensation of the damages suffered[4]. The only real obstacle to the full and complete satisfaction of this right is the disorganization and inefficiency that in these years afflict the Spanish criminal justice system[5].

Also France foresees an adequate compensation system for crime victims. The milestone of this system is the *Fonds de Garantie des victimes des actes de Terrorisme et d'autres Infractions* (the FGTI), through which the State basically takes

[3] Actually, outdated by recent Directive no 2012/29/EU. See M. L. GARCÍA RODRIGUEZ, *Marco jurídico y nuevos instrumentos para un sistema europeo de indemnización a las víctimas de delitos*, in *Boletín de Información del Ministerio de Justicia*, 2005, n. 1980-81, p. 7.

[4] S..OROMÍ I VALL-LLOVERA, *Víctimas de delitos en la Unión europea. Análisis de la Directiva 2012/29/UE*, in *Rev. Gen. Der. Proc.*, 2013, 30, p. 16.

[5] Actually, the victims of big accidents occurred recently in Spain (such as the air disaster of Spainair of August 2008 and the rail disaster of Alvia of July 2013) have not received any compensation yet.

care to refund victims of the most serious crimes against individuals. In addition to the FGTI, starting from 1983 specific *Commissions d'Indemnisation des Victimes d'Infractions pénales* (the CIVI) have been created[6].

The present French regulation on victims' compensation is contained in law of 6 July 1990, according to which victims of terrorism or of other particularly serious crimes are compensated through the national solidarity principle. On 2008, the *Service d'Aide au Recouvrement des Victimes d'Infractions* (SARVI), directed by the FGTI, has been created.

Similarly to Spain, also France (at least starting from 2008) foresee a fundamental and essential role for the support services associations that assist victims in obtaining their compensation.

Finally, concerning Italy[7] specific provisions on this topic exist in the Criminal code (arts. 185, 192, 194), in the Criminal procedure code (arts. 74 and 316 ff.) and in the Penitentiary law (law no 354/1975, art. 24).

Besides in the Italian system, despite the lack of a general legal provision on the active role of the State in all those cases in which a compensation for the victim is quite impossible, some solidarity funds in favour of victims of specific crimes (such as terrorism and organized crime) have been created. These experiences are absolutely positive, because of their effectiveness and celerity.

2. Conclusions

All the national judicial systems that have been examined in the previous chapters appear to be in compliance with the supranational prescriptions coming from the European Union, especially through Directives no 2004/80/EC and 2012/29/EU. In fact, we have observed how Spain, France and Italy foresee in their legislations – both procedural and essential – juridical tools and provisions aimed at guaranteeing (at least, in theory) to the injured party and/or to the damaged the restitution or the compensation of the damages suffered as a consequence of a crime.

[6] I. SADOWSKI, *Crime victims' compensation in France*, in *this volume*.

[7] See M. SCOLETTA, *Compensation of damage from crime in the Italian system compared with European constraints*, in *this volume*.

So, everything is fine with the general legal provisions. The real problems in this issue start coming out in practice: all the examined States are not able to ensure efficient remedies in case of author's insolvency, delay, negligence in payments or in case of contumacy. Looking for good practices to be adopted in all the Member States (not only the three under analysis), it would be very useful and profitable to involve victims' support associations more often, also creating specific funds (both public or private) in order to extent the assistance of victims and make it particularly efficient, even after the judicial phase, once the final sentence has been issued by the judicial authority.

There is no doubt that the adoption of Directive no 2012/29/EU inside the national legal systems would be an extraordinary occasion for the Spanish, French and Italian lawmakers to further strengthen the victims' right to compensation.

CHAPTER XXVI

CONCLUSIONS

WHICH GOOD PRACTICES IN THE FIELD OF VICTIM PROTECTION?

by Luca Lupária[*] and Raphaële Parizot[**]

TABLE OF CONTENTS: 1. A premise on the method. - 2. In search of good practices from a comparative point of view. - 2.1. Information and victim support. - 2.2. Participation of the victim in criminal proceedings. - 2.3. Public opinion and victim of the crime. - 3. Conclusions.

1. A premise on the method

The expression "good practices" is used to describe a series of actions (sometimes grouped together in "guides" or "manuals" of good practices) considered to be indispensable by most operators in a given sector. Widely used in extremely technical subjects – such as medicine, engineering, information technology, agronomy – the term is rarely used in the juridical field[1].

In fact, scholars of the law, especially those operating in the criminal law sector, are not accustomed to reasoning in terms of good practices, although they are aware that the

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[1] Even if, precisely thanks to the drive of European law, in recent years cases have been recorded of its use in juridical language. For a recent example, see *Guide de bonnes pratiques en matière de voies de recours internes*, published by the Council of Europe in 2013. See the definition of "good practices" contained in Italy in article 2, paragraph 1, letter *v)*, Legislative Decree no. 81/2008 concerning health and safety in the workplace: "organisational and procedural solutions coherent with applicable legislation and with the technical provisions, adopted voluntarily and aimed at promoting health and safety in the workplace through the reduction of risks and the improvement of working conditions".

judicial phenomenon is composed of practice-related dynamics at least as important as the body of theoretical rules of a regulatory matrix.

The principle of legality, together with other fundamental canons of criminal law (most times guaranteed by the Constitutions), may appear to be a brake for operators who intend handling criminal law institutions (substantive and procedural) with a flexibility suited to the needs of a society in constant development. In fact, most times the main principles of the law and criminal procedure do not actually contrast with the development of shared operating solutions, especially when the latter fill non-regulatory gaps and they place themselves at an axiological level different from that of the classical paradigm of legality[2]. Above all, it is worth remembering that in different legal experiences, the legislator has crystallised into procedural provisions actions or habits born from the "workshop" of judicial life, showing that good practices can, in some way, fall within the sources of the criminal justice system.

2. In search of good practices from a comparative point of view

One of the main objectives set by this research project was that of establishing possible points of contact between theory and operating canons, searching for examples of good practices in France, Italy and Spain, although aware that such pieces of experience are often characterised by a fragmentation that is difficult to reconcile with the desirable achievement of general guidelines.

So, although the discipline of the rights and powers reserved for victims of crime changes considerably according to the States of the European Union, it was, however, possible, right from the start, to identify an element common to all the legal systems taken into consideration: even though space is reserved for intervention or protection regarding the injured

[2] The comparison with the matter of so-called soft law (A. BERNARDI, *Sui rapporti tra diritto penale e* soft law, in *Riv. it. dir. proc. pen.*, 2011, p. 536) and so-called post law (S. PRECHAL - L. SENDEN, *Differentiation in and through Community Soft Law* in B. DE WITTE - D. HANF - E. VOS (eds.), *The Many Faces of Differentiation in EU Law*, Antwerpen, 2001, p. 182) is interesting.

person, within the folds of criminal proceedings, the position of the latter in any case remains marginal in terms of regulatory legislation. Empirical analyses have then shown how many of the needs of protection of vulnerability or acknowledgement of the suffering of the injured parties find a better response through correct lines of conduct by the operators rather than through legislative regulations.

The considerable room attributable to good practices aimed at suggesting new mechanisms on the substantive level (mediation itself derived from practice and only after it found a regulatory recognition) or to practices that intend giving positive reality to certain rights formally recognised by legal provisions, especially those of EU derivation, clearly emerged. Moreover, we owe to the same directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, attention to practices as an instrument complementary to classical prescriptive instruments.

And proof, again, that this is the right path to adopt is, for example, given by the English experience concerning assistance services: as we know, in April 2006, following the *Domestic Violence, Crime and Victims Act 2004* a new code of practices[3] was adopted containing minimum canons on the services of the criminal justice agencies, the most important of which was the constant updating on the progresses of the judicial matter through periodic information which, in the case of vulnerable victims, assumes a reduced formulation[4].

The volume, which concludes with these few pages, reported in the main text many virtuous practices, indicated by the individual authors in the collected studies. Closing the Work, however, we intend highlighting - following the structure of the Directive - certain guidelines that can be gathered easily from the various national decisions on the following topics: *a)* information and support of the victim; *b)* participation in criminal proceedings; *c)* raising public awareness.

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[3] *https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime*.

[4] See M. HALL, *Victims of Crimes: Policy and Practice in Criminal Justice*, Devon, 2009; M. HESTER – N. WESTMARLAND – J. PEARCE – E. WILLIAMSON, *Early Evaluation of the Domestic Violence, Crime and Victims Act 2004*, London, 2008; C. HUMPHREYS - N. STANLEY, *Domestic Violence and Child Protection: Directions for Good Practice*, London, 2006. See also remarks on the point by A. KAPARDIS, *Psychology and Law. A Critical Introduction*, New York, 2014, p. 205.

2.1. Information and victim support

A fundamentally important operating solution seems to be that of publishing a sort of "national guide" to be made available in hospitals, courts and police headquarters (and above all, online), in order to provide information of a general nature that can be of first support to victims of crime. Good examples in this sense come from the model already existing in the French system[5].

Alongside this general information activity more personalised information actions must be developed aimed at victims through free services that provide information and support, at their request ("sole points of access", "one-stop shops", as suggested by the Directive in § 62).

Still from the point of view of identification, particular attention should be paid to victims with communication difficulties (because they are foreigners speaking a different language[6] or because they suffer disabilities) as well, obviously, as children, for whom a child-friendly approach would be indispensable conducted by specialised operators. For this purpose, services of an associative type, such as *les bureaux d'aide aux victimes* (offices providing aid to victims) existing in France, moreover recently consolidated through a law of August 2014[7] could be used.

Obviously, in order for such services[8] to be really operative in support of the injured parties, especially if vulnerable, it is necessary to think of forms of funding by the Institutions (*in primis,* the Ministry of Justice). Part of the funds could come from the monetary sanctions imposed on the convicted[9] or from

[5] *http://www.justice.gouv.fr/publication/guide_enrichi_des_victimes.pdf*.

[6] J. BRANNAN, *Raising the standard of language assistance in criminal proceedings*, in *Cyprus Human Rights Law Review*, 2012, p. 128 s.

[7] Law n. 2014-896 of 15 August 2014.

[8] On the development of service rights and their importance also in the adversary systems of criminal justice: A. SANDERS, *Victims participation in an exclusionary criminal justice system*, in C. HOYLE – R. TOUNG (eds.), *New vision of crime victims*, Oxford, 2002, p. 197.

[9] See art. 728-1, paragraph II, of the French criminal procedure code: *Lorsque l'auteur de l'infraction a été condamné au paiement de dommages et intérêts et que la part des valeurs pécuniaires affectée à l'indemnisation des parties civiles en application du premier alinéa du I n'a pas été réclamée, ces valeurs sont, lorsqu'elles sont supérieures à un montant fixé par décret et sous réserve des droits des créanciers d'aliments, versées au fonds de garantie des*

cases where the perpetrators of the crime are encouraged to pay sums in favour of *ad hoc* support funds or associations representing particular categories of victims of their crimes[10].

As far as specific information on individual open judicial cases is concerned, the system of communications to be sent to the injured person by the judicial authority must be examined increasing the use of e-mails (the Directive, on the other hand, also refers to communications through electronic means in § 26-27) or of virtual spaces accessible through an online portal[11]. In this sense it would be indispensable to guarantee the absolute confidentiality of the information exchanged with the victim, in order to protect his privacy, and therefore to pay particular attention in providing personal access credentials and in protecting information systems from any attacks as much as possible.

2.2. Participation of the victim in criminal proceedings

During research it was possible to appreciate the importance of the options for the victims to participate actively in the proceedings that involve them, irrespective of whether or

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victimes des actes de terrorisme et d'autres infractions à la libération du condamné.

[10] In this sense the Italian project, conducted by the Milan Public Prosecution together with the "Assessorato alle Politiche per il Lavoro" of the Municipality, to establish an economic fund, fed from compensation sums destined to injured parties not present during the criminal proceedings, for citizens or companies who are the victims of IT crimes. Good practice has been developed with particular reference to negotiation practices (in particular "plea-bargaining"). See *Presentazione delle linee guida concordate tra Procura della repubblica, ordine forense e Comune di Milano per ridurre il danno da reati informatici e tutelare le vittime*, paper presented at the Conference *Vittime di reato e giustizia penale.* Standard *europei e buone pratiche nazionali,* Milan, 9 and 10 October 2014.

[11] As happens, for example in the United States, where the government portal *Victim Notification System* (*www.notify.usdoj.gove*) is active for victims. Through special access credentials it is possible for the victim to access a great deal of information on the judicial case in which he is the protagonist, such as the current phase of the investigations underway, the possible application (or repeal) of precautionary measures against the accused, the calendar of hearings, and so forth. The injured person also has the possibility through the portal of amending his own contact details and, above all, of communicating that he does not wish to receive any more information about the case.

not they decide to ask for economic restoration in court. So, from the point of view of powers of initiative, an extremely interesting solution lies in the right which may be granted to file an online pre-compliant/charge[12], at least for less serious crimes characterised by a lower level of assessment urgency, in the immediacy of commission of the crime, with possibility for the victims to present themselves at the offices of the judicial police[13] at a later date.

It would also be desirable to provide for the drafting of specific documents and information sheets, prepared jointly by jurists and psychologists, which illustrate in a simple and immediate manner the procedures to be followed by victims in order to participate in criminal proceedings. If the criminal proceedings regard particularly serious crimes, or when the injured party must be considered as particularly vulnerable, this information should be accompanied by the presence of qualified personnel who assist the victim both in the phases prior to the hearing, and during questioning, and in the moments immediately following this.

It would also be important for the injured party to be able to count always on the same contact person (social worker, doctor or psychologist), in order to establish a relationship of confidence and trust that may relieve the trauma of impact with the judicial world. In this sense, a good example comes from the situation of the international criminal Court. When a victim (often coming from a non-European country and a backward economic-cultural reality) must take part in proceedings at the Court of The Hague, in the capacity of witness, he is assisted by a highly qualified person, who speaks his language and prepares his for what he might expect once he arrives in Holland, assists his during the days prior to the hearing (sometimes taking his first on a visit of the room where the hearing will be held so that he can see for himself the place and the context in which he will have to give evidence) and, above all, during the trial[14].

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[12] See the French example: *https://www.pre-plainte-en-ligne.gouv.fr*.

[13] See circular no. 225/B/2006-70698-U, 28 November 2006, of the Central anti-crime Division of the Central Department of the Italian State Police Force.

[14] For other further examples, see the *Policy Paper on Victims' Participation*, drafted by the *Prosecutor Office* of the International Criminal Court on the website *http://www.legal-tools.org/en/doc/3c204f/*.

Instead, from a more 'protection-orientated' point of view, it is appropriate to reflect on the organisation of areas in Court Houses, in order to protect the victim, in particular if a child is involved, from contacts with the defendant, "hostile" witnesses, the mass media, etc.

Therefore, "waiting areas" could be envisaged for injured persons separate from those assigned to the public, to witnesses or to the defendant. Also, special rooms should be set aside in all courts for the examination of particularly vulnerable victims, not only in order to protect them from the trauma that might derive from a direct confrontation with the defendant or from a public hearing, but also with the aim of guaranteeing that their deposition is as truthful as possible[15].

2.3. Public opinion and victim of the crime

In this peculiar sector an involvement of the public and more actions to raise its awareness on the topic are indispensable. Which, under no circumstances must result, as, moreover, was often stated by the various authors within this Work, in a "witch hunt" fed by incorrect information[16] and preconceptions[17].

In fact, it would be necessary to spread the use of enquiries and surveys prepared by experts, which should then be analysed

[15] With reference to Italy we can identify as a model the "protected listening rooms for children", set up in various cities inside the courts of justice (or, sometimes, in some social-health centres). These rooms are fitted with vide-recording equipment and are furnished in a comfortable way, suitable for welcoming children, often of a young age, during their questioning in the capacity of victims or witnesses both during the trail and when gathering evidence. For further information see F. POZZOLINI (ed.), *Quando la giustizia incontra il minore. L'esperienza dell'aula di audizione protetta in Italia*, Florence, 2013.

[16] Of extreme interest is the following passage from the *Pope Francis Letter to the people participating to the XIX International Congress on Criminal Law and to the III congress of the Latin-American criminal law and criminology Association* (now published in *Riv. it. dir. proc. pen.*, 2014, p. 1018): "means of communication, in their legitimate exercise of the freedom of the press, play a very important role and have a great responsibility: it is up to them to inform correctly and not to contribute to creating alarm or social panic (...) when the life and dignity of individuals are at stake".

[17] Z. BAUMAN, *Paura liquida*, Rome-Bari, 2006; R. CASTEL, *L'insécurité social, Qu'est ce qu'être protégé?*, Paris, 2003.

also in light of the actual figures relating to the various forms of criminality spread over the examined territory[18].

It is even more indispensable to support and develop highly qualified training programs[19] for operators in the sector[20], in this way fostering the development and interchange of trends, recommendations and shared good practices[21].

During these years of research we have organised three training meetings (in Bologna, Seville and Paris) and a final conference in Milan, free events open to lawyers, magistrates, psychologists, operators, association representatives, social workers and university students[22]. The impression received, common to all four conferences, is that interest on the topic is very high, and that, however, such an interest does not correspond to an adequate training offer by the Institutions.

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[18] E. CALVANESE, *Media e immigrazione tra stereotipi e pregiudizi. La rappresentazione dello straniero nel racconto giornalistico*, Milan, 2011.

[19] In Spain, in 1995, a group of specialists was created within the Corps of the *Guardia Civil* to take charge of training members of the police forces on topics relating to the types of crimes committed against particularly vulnerable victims (children and women). This group was called the *Especialistas Mujer Menor*, and is organised in *Equipos Mujer Menor* (EMUMEs) and *Unidades Orgánicas de Policía Judicial* (UOPJs) (see E. MARIANI - G. ORMAZABAL SÁNCHEZ, *La formazione dei soggetti che entrano in contatto con le vittime nel quadro del procedimento penale*, in T. ARMENTA DEU - L. LUPÁRIA (eds.), *Linee guida per la tutela processuale delle vittime vulnerabili.* Working paper *sull'attuazione della Decisione quadro 2001/220/GAI in Italia e Spagna*, Milan, 2011, p. 134 s.).

[20] With reference to Italy, in 2007 the Central Anti-crime Division, Central Operating Service of the State Police Force, in collaboration with the Department of Psychology, CESVIS Studies Centre, of the Second University of Naples, produced a list called the S.I.L.V.I.A. (*Stalking Inventory List* for Victims and Perpetrators) and a user guide destined to police forces, to provide them with information about acts of stalking and indications on how to conduct an interview with the person reporting such a crime.

[21] A specific mention in this sense is deserved by the Italian project of the National Anti-violence Network coordinated by the Department for Equal Opportunities. It involves a significant number of Italian cities and is aimed not only at support to women victims of violence through certain services dedicated to them but also to the implementation of local training ventures for police forces and operators in the social-health sector, anti-violence centres, the social private sector, with the further aim of creating a network of subjects capable of cooperating at local level to combat the phenomenon, also thanks to the adoption of common working procedures developed through protocols of understanding and/or the launching of inter-institutional projects.

[22] We suggest you should consult the research website *www.protectingvictims.eu*.

In actual fact, a specific training should also be provided during degree (and post-degree) courses at the faculties of law and psychology, as already happens, for example, in Spain[23], France[24] and in the Unites States[25]. In this sense, it could be useful to work towards creating a list of all existing training programs concerning protection and assistance to victims of crime in the Countries of the European Union, in order to finalise common programs that also contemplate membership and agreements of collaboration and inter-exchange among the various European universities.

3. Conclusions

There are many aspects which are still open to examination. In these final lines, however, it seems to be important to direct attention to two fundamental aspects.

On one hand, it seems appropriate to state that the gaps existing in the sector cannot be justified by the economic crisis and by the lack of funds that have been afflicting many European States for years, If, on one hand, in fact, there is no doubt that many of the solutions just suggested imply the use of large resources, it still cannot be denied that numerous good practices can be implemented almost "at zero cost", requiring only that operators in the sector should change their *forma mentis*.

Finally, it should be confirmed that maintaining balance within the criminal system must create new spaces for the victim without this new protagonism causing a parallel cutting back of the fundamental guarantees of the defendant. There are support services and procedural options (for example the right to language assistance) that result in an increase in protection for the victim without reductions of standards from the point of view of defensive prerogatives.

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[23] See, for example, in this sense the teaching of *Victimologia* adopted for years in the University of Seville. *See us.es/cursos/eu/victimologia/2014*) or the course to become mediation experts organised by the University of Burgos and mentioned, in Chapter XII, by Prof. Mar Jimeno Bulnes, (see *http://limbo.ubu.es/campusvirtual/catalogo/index.asp*).

[24] As the *Master 2 de Criminologie et victimologie* of Poitiers University *http://isc-epred.labo.univ-poitiers.fr/spip.php?rubrique46*.

[25] For example the *National Crime Victim Law Institution https://law.lclark.edu/centers/national_crime_victim_law_institute/*.

The entrance of the victim into certain procedural phases of a highly delicate level should, on the other hand, be considered with attention. From this, not totally shared, point of view we find: the Spanish draft law[26] on the possibility for the victim to appeal against a decision for the release of the prisoner on parole; the new French law which allows the victim to appeal to the judicial authority in order to enforce his interests when the sentence is being served (art. 707 of the French c.p.p.); the decision made by the Italian legislator with legislative decree no. 93/2013 which takes the road of a power of interference by the victim in the mechanisms of precautionary proceedings.

Criminal justice today is placed, without veils, before the suffering of the victim. An individual who, very often, asks not so much for the conviction of the perpetrator[27] as, rather, the simple consideration of his or her own human condition in relation to the criminal event. Using the acute words of Paul Ricoeur: «*derrière la clameur de la victime se trouve une souffrance qui crie moins vengeance que récit*»[28].

[26] *Proyecto de Ley del Estatuto de la Víctima del Delito*, 25 October 2013, currently being discussed in the Spanish parliament.

[27] "In our societies we tend to think that crimes are solved when the criminal is caught and sentenced, going straight to the damages caused or without paying sufficient attention to the situation in which the victims remain" (*Pope Francis Letter to the people participating to the XIX International Congress on Criminal Law and to the III congress of the Latin-American criminal law and criminology Association,* cit.).

[28] Paul Ricoeur questioned as a witness in the French trial on contaminated blood, *Le Juste 2*, Paris, Editions Esprit, 2001, mentioned by CHRISTINE LAZERGES in G. GIUDICELLI-DELAGE - C. LAZERGES (eds.) *La victime sur la scène pénale en Europe*, Paris, 2008, p. 21.