DIRITTO PENALE CONTEMPORANEO

PARTICIPATION OF THE VICTIM IN CRIMINAL INVESTIGATIONS: THE RIGHT TO RECEIVE INFORMATION AND TO INVESTIGATE*

Victims in Europe: needs, rights, perspectives
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1. The Directive 2012/29/EU and the minimum rights of the victims in the pre-trial phase.

Talking about procedural rights of the victim, it is possible to say that – in the structure of the Directive no. 29, as well as in the framework Decision no. 2001/220/JHA – the victim has three fundamental rights: the right to participate, the right to compensation, the right to protection. The rights to information and assistance have an instrumental role, in respect to the others.

The ground on which these rights could be recognized is the criminal proceeding: indeed, the Directive no. 29 picks up the baton of the framework Decision 2001/220/JHA, dedicated to draw the position of the victim «inside of the criminal process».

If it is true, how true is that the «offense is not only a wrong to society, but also a violation of the individual rights of the victims», the question is: which is the minimum level of rights that must be guaranteed to the victim?

The Directive no. 29 leads us to believe that the criminal proceedings, better than other kind of process, is the correct "hyperbaric chamber" for the claims of private justice, because it offers hearing and composition, personal presence and participation, identification and cross examination, defense and prosecution. Therefore, the minimum standards (with respect to rights and assistance) impose that the victim must be understood, that she must be able to understand the spoken language of the proceeding, that she must know the meanings of the criminal procedure, that she can participate in hearings, she can provide evidence.

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Now, the new question is: with regard to the instruments provided by the Directive no. 29, does it exist a "right to the process" for the victim? Moreover, does it exist a right to participate to the process?

The answer is not so univocal: too much still depends on the national legislators. This jeopardizes the effectiveness of the European law and the harmonization of the national legislations. Instruments, anyway, do not lack: direct enforcement of self-executing rules, the conforming interpretation of national law and the preliminary ruling to the Court of Justice of Luxembourg are common tools for harmonization. Perhaps, more courage was necessary by the European Legislator: the request to establish which criteria «apply to determine the scope of rights set out in this Directive» (Recital no. 20) should be more explicit. According to the Directive, Member States can freely decide whether to consider the victim a party to criminal proceedings or not, rather classifying her as a mere witness. Such different variables throw shades on the suitability of the Directive no. 29 to be the *Magna Charta* of the rights of the victims in the area of freedom, security and justice.

2. The pre-trial phase and the right to understand and to be understood.

It is intuitive that the pre-trial phase is the most delicate for the victim. Here she decides whether to turn to criminal justice, whether to believe in it, whether to contribute to its results. Not by chance, the Directive invites to consider the «moment when a complaint is made as falling within the context of the criminal proceedings» (Recital no. 22 and 24). The complaint represents the genesis of the proceedings; for the victim, it is the most significant moment, result of the (often-difficult) decision to put her expectations in in the hands of the criminal justice[1]. To respond appropriately to the solemnity of the complaint, the Directive no. 29 calls on the States to guarantee that victims have the right to understand and to be understood, even by submitting acts in a known language or by receiving the assistance of an interpreter.

This is the first right of the victim: without comprehension, any right to participation or to defense can exist[2]. Too many aspects, however, still depend on the national systems, especially with regard to the role of victims in the proceedings, and on their specific requests. Unfortunately, the national legislators seems to be more careful when the victims take on also the role of witness, as they often become key sources of evidence.

The victim's comprehension of the proceedings must become an imperative for the Member States: the victim trusts more in criminal justice if she is sure to be

[1] About the complaint, may be interesting the right to file an online pre-complaint/charge, with possibility for the victims to present themselves at the offices of the judicial police later (see the French example: *httsp://www.pre-plainte-en-ligne.gouv.fr*). About it, see L. LUPARIA-R. PARIZOT, *Which good practices in the field of victim protection?*, in L. LUPARIA (ed.), *Victims and criminal justice. European standards and national good practices*, WKI, 2015, p. 338.

[2] See also S. ALLEGREZZA, *Victim's statute within directive 2012/29/EU*, in *Victims and criminal justice*, cit., p. 8.

understood and to understand. Good practices – rather than law – have a fundamental role in it, as it is the realm of social assistance and police agencies: first, it is necessary to help them and to prepare them (art. 25).

3. The right to receive information: a) basic information.

Without understanding, there is not information; without information, there is not assistance, participation and protection. All the rights guaranteed by the Directive no. 29 depend on the ability of the national systems to inform properly the victims about the proceedings, about their role in it, the offender's status, in particular in cases of organized crimes, violent crimes and terrorism.

Anyway, the Directive also guarantees the will of the victim not to receive information about her case (Recital no. 29 and art. 6, par. 4): indeed, the victim might want to avoid any form of secondary victimization, eventually related to the proceedings.

This option does not concern, however, the duty of the States to inform the victim on the rights set out in the Directive, from the first contact with the competent authority (art. 4). The preliminary information responds to the need of awareness about: comprehension, assistance, defense, participation, compensation and protection. Only in this way, a victim can take conscious decisions: this basic information should be mandatory. Even better would be to provide such information through channels being independent from the criminal proceedings, like information campaigns, dedicates websites, support projects (in particular «by targeting groups at risk such as children, victims of gender-based violence and violence in closed relationships», *ex* art. 26). Indeed, the art. 8, par. 5 of the Directive establishes that «access to any victim support services is not dependent on a victim making a formal complaint (…) to a competent authority». The first place for the right to be (fairly) heard and to receive information is out of (and before) the criminal proceedings.

Inside of the criminal proceedings, instead, additional «details may also be provided at later stages depending on the needs of the victim and the relevance, at each stage of proceedings, of such details» (art. 4, par. 2). In this sense, the updating information of the victim could be entrusted to a judge: following the example of the French experience of the *Juge délegué aux victimes*, or by developing the Italian proposal to create an office for victims in each Court[3], with a judge supported by social services and associations specialized in victims' protection and listening.

[3] See Parliamentary Opinion on Draft Decree on implementation of the Directive 2012/29/EU.

3.1. The information about the case.

Upon request, the victims may receive further information about their case (art. 6). This right seem to stem from the complaint itself (art. 6, par. 1 and par. 2); but, if the victim is identified, this information must be ensured also «where authorities initiate criminal proceedings *ex officio* as a result of a criminal offense suffered by a victim» (Recital no. 22).

In particular, it is necessary to inform the victim about the decision to prosecute or not to prosecute.

In the event of «decision not to proceed with or to end an investigation or not to prosecute the offender» (art. 6, par. 1.*a*), the victim should be able to ask «a review of (this) decision». Only, however, in the case of «decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers». Not in case the decision is taken «by courts» (Recital no. 43). Even more relevant than the right to a review, is the right to be informed of the request to drop the case and to participate to the decision to not prosecute. This can happen just before the courts, within a specific hearing: the alternative between prosecuting or not is too important for the victim to leave it in the hands of the police or of the public prosecutor (and in their own decisions). When there is a victim, maybe only for certain crimes, the decision about the prosecution of the offender should always be taken by a court or by an impartial judge. In this way, also the reasonable time of the process would improve.

In case of decision to prosecute, the victim should receive information on «the time and place of the trial, and the nature of the charges against the offender» (art. 6, par. 1.*b*) and on «any final judgment in a trial» (art. 6, par. 2.*a*). These are minimum standards: however, they seems to guarantee enough the victims' rights to participate to the trial and to appeals (Recital no. 31).

Anyway, the «information enabling the victim to know about the state of the criminal proceedings» is closely linked to the «role in the criminal justice system» (art. 6, par. 2). The information will change depending on whether the victim is considered as a witness or a party. Just thinking to the victim as a party to criminal proceedings, we may believe that she is a part of the due process of law.

3.2. Information on the offender's liberation.

For the victim it is more important than ever to have information about the offender's *status libertatis*. In such context, awareness is functional to the protection, not to participation.

In the light of this consideration, the victim's role is not relevant. Rather, what is relevant is the chance to point out «a danger or an identified risk of harm to the victims», considering «the nature and severity of the crime and the risk of retaliation» (Recital no. 32).

In this field, the Directive no. 29 is too shy. Both Recital no. 32 and the art. 6, par. 6 submit information «about the release or the escape of the offender» to a specific

request by the victim, «unless there is an identified risk of harm to the offender which would result from the notification». Moreover, such information is excluded in «those situations where minor offenses were committed and thus where there is only a slight risk of harm to the victim». Lastly, the release and the escape of the person remanded in custody are not the only source of risk to the victim: it is necessary to read them extensively.

Anyway, the Member States should identify the situations of danger, by delegating to judges the task of calibrating (in practice) the "information pack" to be provided to the victim. Actually, the protection is one of those rights that engage the States the most: Chapter 4 of the Directive no. 29 does not include rights that can be activated on request, but obliges States to take constructive actions to protect victims. Therefore, once the victim has received the necessary information «of any relevant measures issued» for her protection, she will decide whether to use them or not.

4. The right to investigate.

Although the Directive does not refer to the right to investigate, it emphasizes the right to be heard. The victim has the possibility «to make statements or explanations in writing» (Recital no. 41) inside the criminal proceedings. Moreover, the victim «may provide evidence» (art. 10, par. 1).

The most important (even if not the only) evidence provided by the victim is her own deposition[4]. Here as well her role is particularly relevant: if the victim takes on exclusively the role of witness, she will be more reliable, being impartial to the decision of the process. On the contrary, where she takes on the role of a civil party, the victim may become *testis in causa propria*. Sometimes – as it happens in Italy – the victim is a witness during the pre-trial phase and (could be) a party during the trial: this confusion of roles leads to believe that the victim makes investigations to the sole purpose to claim compensation for damages... If so, her credibility is minimal!

However, even if it is not the task of the Directive, it seems desirable to assign to victims a role of criminal matrix, by reserving the civil trial for damages issues. Therefore, the investigations of the victim (and her witness) would be useful to assess the liability of the defendant and to support it, as a party, before the criminal court.

Anyway, the Directive no. 29 seems to underpin the right to investigate. Private investigations could be helpful to file the complaint, to support the public prosecutor, to present «a review of a decision not to prosecute» (art. 11, par. 1), to participate in the dynamics on the liberty of the offender, to present appeals. Furthermore, the investigations of the victim are necessary in those systems where the victim can support a private accusation; *a fortiori*, when the prosecution is not mandatory, and the public prosecutor could not investigate.

[4] See G. ILLUMINATI, *The victim as a witness*, in *Victims and criminal justice*, cit., p. 65.

In Italy, the principle of mandatory prosecution does not preclude, for the victim, the right to investigate. Conversely, she has the right to "defensive investigations", both to submit the *notitia criminis* (art. 391 *nonies* c.c.p.), to support the activities of the public prosecutor, to «raise opposition to the continuation of preliminary investigations, by means of a reasoned request» (art. 408, par. 3 c.c.p.), and to promote the prosecution (like in criminal proceedings before the "judge of peace" – legislative Decree no. 274/2000).

5. The Directive 2012/29/EU and the compliance of the Italian criminal process.

On the base of delegation law no. 93/2013, the Italian Government has prepared a draft Decree to amend the Code of criminal procedure[5], by inserting some rights for the victims.

During the last years, the Italian legislator often dealt with victims[6], especially with minors' and vulnerable persons' right to protection[7]. The main concern was to avoid the secondary and repeated victimization, both because of the process and of the risk of intimidation and retaliation by the accused[8].

Nonetheless, some aspects are still weak: the most inadequate level concerns the information to the victims. Indeed, the draft Decree implements the rights guaranteed by articles no. 4 and 6 of the Directive no. 29.

The new article 90-*bis* c.c.p.[9] will provide the victim with a complete "information pack", since the first contact with the authority, with regard to her procedural rights. It will be a (pre-printed) form, written in many languages. However, such tool could have wider diffusion if available on line, e.g. on Ministerial sites or on websites of organizations and associations dedicated to victims.

New art. 90-*ter* c.c.p.[10] is expected to implement the contents of the art. 6, no. 5 of the Directive. Nevertheless, it provides for information about the release or the escape

[5] See M. GIALUZ-L. LUPARIA- F. SCARPA (ed.), *The Italian Code of Criminal procedure. Critical Essays and English Translation*, WKI-Cedam, 2014.

[6] See the "Security Package" of year 2009 (Decree 23.2.2009, n. 11/Law 23.4.2009, n. 38, and Law 15.7.2009, n. 94); see Law 1.10.2012 n. 172, ratifying and implementing the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, also known as "the Lanzarote Convention" (Lanzarote, 10.25.2007). See Decree 14.8.2013, n. 93/Law 15.10.2013, n. 119, on the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, the 5.11.2011); see also Legislative Decree no. 24/2014, implementing the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

[7] See art. 392 c.c.p. (Cases of Special Evidentiary Hearing, so-called "Incidente probatorio"); art. 398 c.c.p. (concerning the special methods to hear the vulnerable witness during the "Incidente probatorio"); art. 498 c.c.p. (concerning the possibility to conduce – during the trial – the direct and cross examination of vulnerable victim using a mirror screen combined with a phone device, or other protection measures).

[8] See art. 384-*bis* c.c.p. (Urgent injunction to stay away from the family home), art. 282-*bis* c.c.p. (Injunction to stay away from the family home), art. 282-*ter* c.c.p. (Injunction to stay away from the places attended by the victim), and art. 282-*quater* c.c.p. (Obligations to communicate).

[9] See here.

[10] *Ibidem*.

of the offender only in those proceedings that are related to violent crimes, committed with violence against a person. Thus, it does not respond completely to the standard of the art. 6, no. 6 of the Directive (which refers generally to real danger or risk for the victim): indeed, the key element of some crimes, as stalking (art. 612-*bis* crim. Code), reduction to slavery (art. 600 crim. Code) and sexual violence (art. 609 crim. Code), is threat.

The draft Decree also deals with the right to understanding (art. 7 of the Directive no. 29). The new art. 143-*bis* c.c.p. will ensure that victims are provided with interpretation during the interviews or questioning, and that they can obtain the translation of a text or of acts of the proceedings. Victims may also obtain the assistance of an interpreter at the moment to file the complaint, and they may receive a written acknowledgement in a known language (art. 107-*ter* Decree no. 271/1989 – Implementing Rules of the Code of Criminal Procedure)[11].

6. Something missing?

Compared to the intentions and the expectations, the level of rights marked by the Directive no. 29 has many opportunities of improvement.

Reading the Directive, in comparison with the framework decision 2001/220/JHA and with other Directives about rights in criminal proceedings, the impression is the European legislator failed in being courageous. Indeed, it refers and relies too often on national systems and on the role of the victims in domestic jurisdictions.

Up to a certain point, this choice appears to be normal: the victim is only an eventual subject on the scene of criminal proceedings. In theory, member States could also not recognize the victim; anyway, the functional flexibility of the role of the victim is greater than that of the defendant.

The effectiveness of the Directive no. 29, however, rests on direct application of self-executing rules, conforming interpretation and preliminary ruling to the Court of Justice. These are the instruments of concrete harmonization.

In my opinion, I think that the cultural revolution anticipates any normative revolution. So far, I am sure that it is necessary to educate to the respect to the victim, moving from the Universities, where we teach the principles of the criminal process: one of the keys to understand the criminal proceedings of tomorrow is the balancing of interests (as long taught by the European Court of Human Rights).

The debate on victim is mature enough to affirm that, through the criminal proceedings, she does not seek revenge; rather, she is the voice of a participated justice model, where the collective dimension of justice moves from the contribution and needs of the individual[12].

[11] For other provisions, see the document linked to the note no. 9.

[12] See G. GIUDICELLI-DELAGE – C. LAZERGES (eds.), *La victime sur la scène pénale en Europe*, PUF, 2008.