

The Victim of Crime Between Oblivion and Protagonism

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Abstract

The crime doesn't constitute a bilateral relationship, between the offender and the victim or between the State and the offender, rather is a trilateral relationship, between State, offender and victim. So, no rights of the involved parties should be denied. The victim's rights and the active participation in the trial can't be neglected, but the victim-paradigm, which is the result of an emotional criminal law, can't be abused. It's necessary to find a difficult equilibrium. Through an historical reconstruction of the condition of the victim and its guarantees in the Italian penal system, we will be able to discover the balance point found today. A new reform in the Italian criminal system accepts the challenge of the restorative justice, which is not only a kind of compensation, but which constitutes a real sanction, overturning the traditional system of punishment.

Keywords: Italian criminal system-victim-offender- rights- restorative justice

I. The Victim in the Rocco Criminal Code

Each legal system must necessarily deal with two opposing aspects: the victim of the crime must not be forgotten – how happened often in the past – but neither must become a vengeful tyrant. Because the rights of the victim must go hand in hand with the rights of the accused. The protection of the victim is a prerogative of the social-right State and is connected to the duties of the welfare State, but the principles guaranteeing the offender shouldn't be forgotten. So, each legal system needs to find a balance. A balance that has a single center: the human being, whether victim or offender. And a balance that also depends on historical sensitivities. For this reason, I would like to retrace what happened in the Italian legal system from the entry of the penal code, which dates back to 1930, until today. I would like to look at the evolution of this kind of balance in that wide span of time, in order to see how changed over time.

The 1930 code is an illuminist-liberal penal code and, according to the illuminist-liberal vision, the victim plays an irrelevant role, because it wants to affirm the idea that it's the State that must deal with the crime, it is not the private citizen who is entitled to revenge: the relationship is all public, between the offender and the State that imposes the punishment. The relationship is only bilateral: the offender and the State. This is because criminal law is an extrema ratio law and must be used to guarantee peaceful coexistence between citizens. It doesn't work, in the illuminist idea, to

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implement solidarity requests: thus the protection of the legal assets is depersonalized and the only thing that matters is the objective damage to a legal asset. According to this model, the individual victim is replaced by a collective victim who represents all the interests. It's a process that starts with the ideas of Locke, Rousseau and Beccaria and is based on the fact that the offense is an attack to society and not to the singular victim. Idea that still goes even further in the thought of Binding, who thinks that the victim has to be swallowed by the legal asset. For this reason, the Italian penal code is based on the fact and not on its author.

Is the fact of crime that must be judged, regardless of the characteristics of the criminous. In the same sense, not even the victim can play a role: what matters is just the fact of crime. The reference to the victim in the 1930 code (but also in the precedent code, dated 1889, the Zanardelli Code) was limited to the mitigation of the punishment due to the provocation of the victim. This was the only way to tie the victim and the crime.

A kind of criminal law that presents the value of not falling into the temptation of the enemy's criminal law, but which certainly doesn't value the subjective characteristics of the offender and the victim. And this is because the 1930 penal code was the compromise between two criminological schools: the Classical School and the Positive School. For the Classical School the crime is the result of the free will of the man and the punishment is just the retribution for the evil committed. For the Positive School the crime is the result of family and social problems and the punishment has the purpose to remove the causes that led to the crime. The Positive School retrieves the victim's role, identifying in the compensation the only way for the State to act a real protection of the victim. The compensation is a kind of protection for the victim and is a punishment for the offender too. And this is very important for the end of this analysis, when we will know the new balance found nowadays in the Italian legal system between the guarantees of the offender and the protection of the victim. Sign that the history of a legal system throws seeds destined to sprout. Certainly, the Classical School prevailed in 1930, but there are many aspects in the criminal code that come from the ideas of the Positive School, which wanted to give more attention to the victim. But at that time there was still no victimological awareness. Therefore, the victim could be valued only by the ethical principle of the protection of weak people.

In 1930 the victimology science was just at the beginning. We can't forget that Von Henting's book, *The criminal and his victim*, is from 1948 and we can't forget too that the first victimology science studied the biological, psychological, moral, social and cultural characteristics of the victim just to identify the link between these characteristics and the crime. Victimology as criminogenesis and criminodynamics. Offender and victim are an inseparable pair in the genesis of crime. So, the victim was studied to understand if its behavior or even its way of life had been able to ease that type of crime. It wasn't yet a question of enhancing the rights of the victim. It was simply a way of identifying the victim and consider the victim in the dynamic of the crime. Nothing to do with the idea we have today.

Proof is that when the first paper on victimology arrived in Italy, the Italian jurists had a reaction very different from what we might expect. Two great Italian jurists, Bettiol and Leone, discussed on the possibility and utility of introducing a register of people who had been victim of fraud crimes. The idea was that often those who have been frauded are people who try to obtain undue benefits and for that reason they fall into the fraud. By setting up a register of victims of fraud, it's possible to observe a

group of people who present traits of likely and future social danger, because they had the idea of benefiting from behaviors that were not totally lawful. This is how the victim was considered in the era of the beginning of the victimological science.

Until the 1960s, the victim had no role in the Italian legal system.

This fact is also testified by the lexicon. In the criminal code the term 'victim' never appeared: the word to define the victim is *people offended by the crime*. But even in the Italian 1948 Constitution the word victim never appears: neither in the article 111, which talk about the right trial, that means the trial which retains all warranties of all the parties involved. This is because the Italian Constitution has a liberal matrix, primarily attentive to the recognition of the defensive and procedural guarantees of the accused. But it doesn't mean that the victim doesn't have constitutional rights. However, the state of art is that for sure the 1930 code, looking at the penal system as relationship between the offender and the State, neglects the victim, so the balance hangs in favor of the offender.

During the years, however, the needs of the victim have become stronger, also because the attention and care for the victims is a sign of civilization and responds to the constitutional principle of equality among citizens. Thus, the victim has become an autonomous center of rights.

II. The Victim-Paradigm

As often happens when we look for a balance point, the danger is go from an excess to another, to an unbalance to another. The danger is placing the victim's rights in the center, neglecting the guarantees of the offender. I understand that is an unpopular statement in this historical period and I hope to be able to contextualize my point of view, but victimology itself warns of the possible exploitation that the victim can try. In a very interesting paper, Caroline Eliacheff and Daniel Soulez Lariviere analyze the victim's Herostratus complex and the possible narcissistic desire for protagonism. The victim can become a bivalent figure: undoubtedly suffers the consequences of a crime in a physical and emotional sense but may devise the way to obtain privileges of various kinds too. Even unconsciously. Now we have to see how the Italian legal system, who was imposed to do it by various European directives, improved the victim protection. It protects the victim with balance or unbalance about the offender's rights. The Italian legislator started to protect the victim's rights by shaping the criminal laws around the victim. The crime ceases to be an offense to a defined legal asset and becomes an offense to an individual victim. But this way the legal asset loses its guaranteeing function of selection of facts that need the criminal protection and become linked to vague interests. Interests that don't come from the criminal law but from the criminology. An example will help to understand better. The crime that punishes the stalking, in Italian "*Atti persecutori*", occurs when the behavior of the offender leads the victim to a state of anxiety, or to fear for the own safety or for the next relatives' safety, or force to change the victim's life habits. It is absolutely clear that here the existence of the crime depends on subjective sensitivity of the victim. There are very anxious people who have a tendency to be always afraid: they met completely randomly the ex-husband or ex-wife on the street and they already enter in a state of anxiety. On the other hand, there are people who don't become anxious even facing objectively worrying behaviors. We can say the same about the fear for the own safety and about the forced change of

lifestyle habits. If the ex-husband or ex-wife simply goes to have coffee in that place every morning, without saying anything, without doing anything, without having threatening or violent attitudes, if the victim is particularly sensitive and decides to change direction and never pass there for not seeing the ex, can we consider it a necessary change in lifestyle? We can't link the existence of a crime to the victim's subjective sensitivities. This way, the expectations of the victim become a source of criminal responsibility. We can even get to what Professor Filippo Sgubbi defined as the perceived crime. A behavior that is a crime just in the perception of the victim but which the law support.

There have been numerous victim-centric reforms which are manifestation of symbolic-special legislation that satisfies populist requests. It is easier for the legislator to promote "manifesto laws" that introduce new crimes, than to implement preventive social policies that really help the victims. The increasingly significant role that emotions have acquired in contemporary reality means that the perception of the victim assumes centrality also in the criminal dynamics: the agent's conduct can be neutral, but if it is perceived as harmful by the interlocutor it becomes a crime. The criminal nature of the fact derives directly from the liking or disliking of the recipient. This way the balance falls to the advantage of the victim, creating a sort of criminal law not of the enemy but of the friend, which is incompatible with the guarantees that the Italian Constitution attributes to the offender. For this reason, the victim is also an argumentative tool – that of victim-centrism – defined as the most formidable criminal law of the friend, in which the hostile relationship doesn't pre-exist the repressive reaction but is constituted *ex novo*. Here the crime is impoverished and tends towards a disproportionate sanctioning response, reversing the purpose of the punishment. The risk we were talking about has materialized.

Often even the use of victimological language can be misleading. In Italy we use to speak about femicide, meaning the murder perpetrated by a man against a woman for gender reasons. A crime whose introduction is invoked by several parties, that starts from a category of victims to arrive at the legal asset, following the opposite path to the one that should be followed: first the legal asset is identified and then it is protected in the way that is considered most appropriate. It's from this process that the protection of the victim has to arise. In the specific case of femicide, the legal asset is human life, which must always be protected, regardless of the sex of the victim and the offender. The motivation of the murder linked to gender may constitute a way in which the crime is committed and affects the punishment, it isn't a new and different legal asset. And this is even a way to guarantee more and better the victims of the crime. Therefore, we mustn't fall into attractive temptations, in contrast with the principles that regulate the penal system.

This way of protecting the victim tilts the balance towards the victim, to the detriment of the guarantees owed to the offender.

III. The Restorative Justice

Let us question, which is the balance that can be attempted between the reasons of the offender and those of the victim? I don't have a certain answer valid over time. I just can explain which was the balance found today in the Italian legal system. And today means that this balance is the result of a law reform that was approved at the end of September 2022 and is starting to operate just now.

To properly enhance the role of the victim, the new Italian legal system bet on restorative justice. Before the reform, the only instruments which, after the commission of the crime, protected the victim were the restitutions and the compensation for damages. Pursuant to article 185 of the Criminal Code, each crime obliges to restitution in accordance with the civil laws and, if it has caused pecuniary or non-pecuniary damage, obliges to compensation. In the Zanardelli code, which is prior to the Rocco code, the institution of pecuniary compensation for moral damages already existed. The Rocco code changed the moral damages into non-pecuniary damages, but it didn't arrive at a compensation regime for damages as a public function due to the State – that was the idea of the Positive School. If the restitution is a hypothesis of compensation in a specific form, aimed at restoring the status quo antes the commission of the offence, the compensation has a compensatory function, when restitution is no longer possible. But in the Rocco code the reparation of the damage was cumulative to the sanction, at most had a lenient function. Nowadays the restorative justice assumes the same function of the punishment, of which it stands as an alternative.

The compensation for damage takes on a strictly penal importance, becoming a kind of extinction of the crime or of the punishment. It's no longer just a question of compensation, which consists in a mere monetization of the damage suffered: it's a real reparation for the damage, it's a positive action towards the victim and/or the community.

Criminal law can't be just an instrument of justice that aimed to satisfy the victim and can't be just an instrument of social defense that neglects the victim's rights. This point of view has to change the criminal system: not just a bilateral relationship between the offender and the State, not just a bilateral relationship between the offender and the victim, but a trilateral relationship between offender, State and victim. The reform implemented now in Italy has a clear personalist imprint, both for the offender and for the victim. The scene is no longer dominated only by the State but by the people. In this way vanishes the colorless victim without a story to tell and the doors open to the concrete victim, who becomes the principal narrator of the story of the crime.

For the first time, the word victim enters in the criminal law lexicon, because the victim is the key of the new Italian criminal justice model: the restorative justice. Restorative justice is the paradigm of the enhancement of the victim's role in the criminal system, still it is also a new punitive model: the tendency is to cure the evil suffered by the victim and not just to inflict another suffering to the offender for the crime committed. It's not a matter of privatizing the criminal justice system and it's not a matter of give to the victim the lordship on the consequences of crime, but it's a new criminal model with a strong characteristic of general prevention.

This is the new equilibrium point found by the Italian legal system. We don't know yet if it will work, if the reasons of the offender and those of the victim will remain in balance.

But this is the new challenge of the Italian criminal law.

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