Revista Chilena de Derecho y Ciencia Política
Diciembre 2022 • E-ISSN 0719-2150 • Vol. 13 • Nº 2. Págs 111-126
Recibido 24/07/2022 - Aprobado 04/12/2022- Publicación - 15/12/2022
https://doi.org/10.7770/rchdcp-V13N2-art2990

ARTÍCULO DE INVESTIGACIÓN

The exercise of accusation by the victim as ancillary prosecutor in the new Cuban Criminal Procedure: possibilities and limits

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ABSTRACT This study addresses a specific aspect of the procedural status of the victim in the new Cuban Law of Criminal Procedure: his/her participation as an *ancillary prosecutor*. The main object of the study is to clarify the possibilities and limits of the intervention of this figure, as distinct from the accusatory role of the prosecutor, specifically with respect to the different elements that make up the subject of the procedure and the subject of debate. In this line, the model implemented in 2021 by the Cuban legislator is contrasted with other systems in comparative law, which allow the victim to participate in the exercise of public criminal prosecution. After this preliminary step, interpretative guidelines are offered aimed at clearing up some doubts about the scope of action of the ancillary prosecutor. The author believes that this study is the first to address the issue at a national level, and therefore, that it opens the debate on a figure with regard to whom, due to its novelty, there is as yet insufficient practical experience.

KEYWORDS Victim; ancillary prosecutor; procedural intervention.

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RESUMEN La presente contribución aborda un aspecto concreto del estatuto procesal de la víctima en la nueva Ley del Proceso Penal cubano: su participación como *coadyuvante de la acusación*. El objetivo central ha sido clarificar las posibilidades y límites de su intervención frente a la postura acusatoria del fiscal, en concreto, respecto a los distintos elementos que componen el objeto del proceso y el objeto del debate. En esa línea, se contrasta el modelo implantado por el legislador de 2021 con otros sistemas que, en Derecho comparado, permiten a la víctima participar en el ejercicio de la acción penal pública; ello como paso previo para ofrecer luego pautas interpretativas orientadas a despejar algunas dudas sobre el alcance de la actuación del acusador coadyuvante. Salvo error involuntario, se trata del primer estudio que encara la cuestión en el ámbito nacional y, por tanto, inaugura el debate sobre una figura que, por su novedad, no ha tenido aún suficiente recorrido práctico.

PALABRAS CLAVE Víctima; querellante adhesivo; intervención procesal.

1. Introduction

The improvement of victims' legal situation has been one of the main lines of reform of the Cuban criminal justice system. At the procedural level, which currently represents a main point of interest, particularly the Law 143/2021 of the Criminal Procedure Law (hereafter, CPL[1]), has resolutely opted for recognizing important procedural rights and powers to the victims in a clear line of redress against this "stone guest", which used to be no more than a simple instrument for ascertaining the truth[2].

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1. Law No. 143/2021 "Criminal Procedure", October 28th, 2021. Gaceta Oficial, No.140, Ordinaria, December 7th, 2021.

2. The historical evolution of the victim's legal situation can be systematized in 3 historical phases or moments: 1a) the "golden age", 2a) the "neutralization" stage, and 3a) the "rediscovery" stage. In the most primitive phase of history, the victim was the absolute protagonist in determining the penal reaction to the victimization suffered, which evolved towards compensation. Already in the 13th century, with the consolidation of the Inquisition, the conflict between victim and defendant was re-categorized as a matter between State and defendant: the notions of *ius puniendi* and legal good (State creation that depersonalizes the conflict and objectifies the victim in a criminal type) appear. Finally, since the middle of the 20th century, with the help of Victimology, an interest in the victim resurfaces, leading to the "rediscovery" of the victim, who had remained petrified for more than seven centuries. The current international political- criminal trend seeks to improve the victim's situation at all levels, including his or her procedural position, and so is reflected in several global and regional instruments. In this regard, it is mandatory to refer to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by Resolution 40/34 of the United Nations General Assembly of November 29th 1985 (known as the "Magna Carta of Victims' Rights"); and, at the European regional level, to Directive 2012/29/EU of the European Parliament and of the Council of October, 25th 2012, establishing minimum standards on the rights, support and protection of victims of crime.

We started from a situation that was certainly unfavorable. The victim of a criminal act was only allowed to bring a criminal proceeding, as a private prosecutor, in two specific cases: crimes of libel and slander (private action), through the special procedure of criminal complaint[3]; and in cases in which the Court considered the request for dismissal of the case by the prosecutor to be unjustified[4]. In the rest of the cases - and without prejudice to the recognition of other isolated powers[5] - the victim only had the status of witness (source of evidence), whose rights and expectations, including those of a purely civil nature, were left to the Prosecutor's Office, with which those affected by the crime were not always pleased. However, the scenario has changed radically. The victim has been emancipated and finally enjoys a solvent procedural statute, the hard core of which is found in Title VI of Book Two of the CPL, which is based on the recognition of effective judicial protection (art. 138 CPL) and covers a broad group of rights and powers (arts. 141 and 142.2 CPL): some are fundamental rights of procedural projection (such as the right of the victim to be respected in its dignity and privacy), and others, have an exclusively procedural significance (such as the right to examine the proceedings).

This new regulatory panorama, which is expected to have a significant practical impact, calls for calm reflection in order to minimize, as far as possible, the situations of re-victimization, without undermining the coherence of the system. Along these lines, the content and scope of the procedural rights and faculties of the victims will have to be studied in depth and, very importantly, formulas will have to be sought to balance their exercise with the rights and guarantees of the accused/defendant, whose procedural position should not be diminished as a result of the entry of this new procedural subject.

This current contribution addresses a particular aspect of the new procedural status of the victim: his or her participation as an *ancillary prosecutor*. This figure raises several aspects of interest, which are is not possible to go deeper into now. Therefore, the analysis will focus on the possibilities and limits of this intervener as opposed to the prosecutor's accusatory position, which has been one of the most controversial points of the reform since the formula used by the legislator in Art. 459.4 *in fine* CPL and other concordant precepts is not at all conclusive as to the position that the prosecutor can assume with respect to the different elements that make up the object of the process and the object of the debate.

3. *Cfr*. Art. 420 CPL repealed.

4. *Cfr*. art. 268 CPL repealed.

5. Thus, for example, the previous procedural law recognized the right of the victim or injured party to appeal the decision to close the proceedings agreed by the investigator and ratified by the prosecutor (*cfr*. art. 106 *in fine* CPL repealed).

II. Methods

1. The protection of the victim as an end of the modern criminal process: the victim's right to effective judicial protection (and the non-existence of a right to criminal punishment of the perpetrator)

Traditionally, it has been understood that the purpose of criminal proceedings is to serve as an instrument to establish the guilt or innocence of a subject to whom the commission of a crime is attributed, and to apply criminal law in accordance with a system of guarantees. And this is indeed true: this is the "classic purpose" of criminal proceedings. However, for some time now there has been agreement in recognizing that the criminal process has a "new purpose": the protection of the rights of the victims[6]. The aforementioned is due to the influence of Victimology, which since the end of the last century has claimed the need for the victim to participate in the social reproach formulated by the State authority as a consequence of the victimizing act. From this starting point, not only have different restorative justice mechanisms been introduced, but also the participation of the victim in the exercise of the public criminal action has been defended, on the understanding that his or her intervention in the accusatory activity can have a healing and cathartic effect, by helping the victim to gain self-esteem and reduce his or her feeling of impotence (among other arguments)[7].

Thus, it has come to be understood, that the criminal process must be conceived as an instrument of guarantee aimed at safeguarding the system of values, rights and freedoms recognized in the Constitution *for all citizens*. It is available not only to the accused (whose legitimate conviction requires respect for the criminal and procedural rules limiting State action), but also to the victims (whose effective reparation or compensation must be guaranteed, as well as their moral recovery, avoiding secondary victimization). And both conceptions, the classic and the modern, must coexist peacefully[8].

To the extent that this conception has been consolidated, both specialized doctrine and jurisprudence agree in recognizing the right of victims to effective judicial protection, exercisable in this procedural order (apart from their civil rights and interests, about which there is no doubt)[9].

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6. See, among others, SANZ (2008) pp. 63 ff; GÓMEZ (2014) pp. 231-233; DE HOYOS (2016) pp. 45 ff; PLANCHADELL (2021), p. 120.

7. Thus, in Italian doctrine, FLORIDIA (1996) pp. 27 and 29. BORDALÍ (2011) p. 526.

8. SANZ (2008) p. 63; PLANCHADELL (2016) p. 120.

9. 10On the victim's right to effective judicial protection see, extensively, SANZ (2008) pp. 63-76; DE HOYOS (2016) pp. 75 et seq.

After the positivization of the right to effective judicial protection in the Cuban constitutional text of 2019 (art. 92), MENDOZA and GOITE (2020) were right in clarifying that this included "access to justice, the right to obtain a reasoned judgment that resolves the merits of the conflict and the right to obtain its execution "[10]. However, the understanding of this right in the sphere of criminal proceedings, and more specifically, in its connection with the right of criminal action (art. 138 CLP), acquires particular nuances, which derive from the specialty of the underlying material relationship. And the fact is that, unlike what happens in other legal systems - in which the action presupposes the ownership of a material subjective right that stands as a title of legitimacy for its exercise -, in criminal proceedings, there are no subjective rights of criminal content[11]. Neither the Prosecutor's Office nor the victim have a subjective right to have the criminal law applied in the proposed terms, nor to have a penalty imposed on the guilty party of the criminally relevant act. The exercise of the criminal action -which for the Prosecutor's Office is a right-duty, and for the victim, a right[12] - must be understood as an ius ut procedatur, that is, a right of access to the jurisdiction and to obtain from the courts a pronouncement in accordance with the rules of due process, which must be sufficiently reasoned, motivated and not arbitrary[13]. Thus, when the legislator empowers the victim to become a private prosecutor (arts. 436, 18.2 and 142-h CLP)[14], or an assistant prosecutor (arts. 142.2-f and 459.1 and 4 LPP), he/she is not granting him a subjective criminal right, but a subjective procedural right to promote the application of criminal law in the specific case[15].

The aforementioned must be especially reaffirmed at a time when a sector of Victimology is trying to claim a " right of the victim to the punishment of the perpetrator of the crime " and, therefore, of a victim-oriented criminal law[16]. This political-criminal orientation, strengthened by the influence of victims' associations and by some

10. MENDOZA and GOITE (2020) p. 165.

11. MONTERO *et al.* (2019) p. 33.

12. LÓPEZ (2007) p. 615.

13. DE HOYOS (2016) p. 77. It should be clarified that the right to obtain a resolution based on law, does not presuppose a favorable decision, nor a ruling on the merits of the case. As LÓPEZ (2007) p. 615 argues, the right of action is also satisfied when it is agreed not to continue with the process, as long as the resolution that so provides is correctly founded.

14. The Cuban legislator ties the exercise of the private prosecution to accusations particularly contemplated in the law, linked to the non-exercise or abandonment of the criminal action, thus assuming the formula of the so-called *subsidiary private action* that opens the way to the *subsidiary or substitute plaintiff* - of Austrian roots (Privatbeteiligte, art. 48 ÖstPO) -, which was already recognized, albeit incompletely, in the repealed art. 268 LPP. On this model, see PEDRAZ (1999) p. 71.

15. MONTERO *et al.* (2019) p. 33.

16. This current of thought coincides in attributing to the punishment the function of reestablishing the equality (broken by the crime), between perpetrator and victim. Thus, REEMTSMA has argued, that the prosecution of the immaterial harm that the crime entails for the victim is only neutralized

pronouncements of international law[17], must be rejected insofar as it ignores the basis and purposes of criminal law, and evokes a talionic justice[18]. The affirmation of the alleged right to inflict "criminal pain" on the perpetrator is not compatible with the modern conception of State ius puniendi, because it would lead to the affirmation of a duty of the to impose a sanction even in those cases in which there are no preventive reasons to justify the punishment, which would place us in a scenario of illegitimate exercise of criminal power[19].

But the rejection of this "right of the victim to the punishment of the perpetrator of the crime" does not imply denying his right to satisfaction. What happens is, that the latter -for reason of civility- has become part of the benefits that the State punishment fulfills. In a penal system such as the Cuban one, which recognizes that the sanction must fulfill retributive, preventive and re- socializing purposes (art. 29 of the recently approved PC), the "penal interest" of the victim must only be taken into account to the extent that it coincides with the public interest in preventing and repressing crimes, in order to maintain coexistence and social order; and it should be neutralized in those cases in which an individual retributive (or talionic) purpose is revealed, which has no place in our legal-criminal system. However, in order for the victim's right to satisfaction not to be lost, the victim must be able to demand from the State that the victimizing act does not go unpunished.

2. Legislative variations on the participation of the victim (together with the prosecutor) in the exercise of the public criminal action. Special reference to the Cuban model

As part of the development of the victim's constitutional right to effective judicial protection, and more specifically, the victim's right to participate in the process, two legal models or variants have been developed, that enable the victim to participate,

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by the imposition of "criminal pain", insofar as the penalty is conceived as the way to achieve the re-socialization of the person who suffers the effects of the guilty wrongdoing. Similar terms are shared by GÜNTHER, who conceives the immaterial damage caused by the crime as an emotional dimension, that translates into the feeling of humiliation and permanent pain suffered by the victim; and also by FLETCHER, when he refers to the relationship of domination of the perpetrator over the victim as an effect derived from the consummation of the crime. Cited by SILVA (2008) pp. 167-169. An analysis of the state of the issue, in a critical tone, can also be found in GIL (2016).

17. On both issues, extensively, p.167; GIL (2016) p. 30.

18. SILVA (2008) p. 167; GIL (2016) p. 30.

19. As SILVA (2008) p. 171 remarks, "the imposition and execution of a punishment disconnected from such reasons [preventive], and justified by the needs of the victim, would be nothing more than institutionalized vengeance under a cloak of supposed rationality". In the same sense, MOORE (1999) pp. 65 et seq. understands that a system, in which it is up to the victim to decide whether and how much the perpetrator should be punished (victim's turn), is nothing but an institutionalization of revenge.

https://doi.org/10.7770/rchdcp-V13N2-art2990

together with the prosecutor, in the exercise of the public criminal action[20]. Thus, while some jurisdictions allow the plaintiff to become a "*joint or autonomous plaintiff*", others allow him/her to intervene as an "*ancillary plaintiff* ".

On the one hand, the joint plaintiff is recognized as having absolute autonomy to bring the accusation in parallel to (and independently of) the prosecutor's actions. This model, which in comparative law is adopted by countries such as Spain (art. 100 LECrim)[21], has been criticized by a sector of the doctrine on the grounds that its adoption would undermine the principle of equality[22]. The existence of two accusations against a single defense has historically been a legislative option rejected by countries that are part of the continental European model, whose procedural codes recognize a single public accusation, monopolized by the Public Prosecutor's Office (paradigmatic, Germany and Italy)[23].

On the other hand, the ancillary plaintiff is characterized by the fact that it allows the victim to act in a dependent and accessory manner to the public accusation: he/she can only intervene in this capacity if the public prosecutor has performed the public criminal action. Moreover, his/her procedural action will be limited, in its essential aspects, by the content and scope of the official accusation. The ancillary plaintiff collaborates with the public prosecution, while exercising control over the actions of the Prosecutor's Office[24] -that is his/her main mission-, without prejudice to his participation in the process to seek his compensation and achieve effective reparation.

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20. See MAIER (2003) pp. 646 and ss.; LLOBET (2012) p. 226; Sanz (2008) pp. 66-68.

21. Regarding the scope of this figure, it is interesting to note the pronouncement contained in the Ruling of the Spanish Supreme Court (2nd Chamber), No. 476/2007, of May 3rd: "(...) formally, the private prosecutor is the main party, not being an ancilar but a litisconsort in relation to the Public Prosecutor's Office, so that in relation to the procedural activity, opening of the trial, determination of its object or assumptions of the conviction, the particular accusation is in a situation of equality, being regulated by the same requirements as the official represented by the Public Prosecutor's Office".

22. MAIER (2003) p. 664. Of another opinion, GÓMEZ (2014) p. 269, who taking as a reference the Spanish procedural reality, affirms that "equality and the right to a process with all guarantees (due process) are not affected by the number of persons who occupy the prosecution, nor the number of accused persons".

23. An analysis on compared law on the matter can be found in GÓMEZ (2014) pp. 131 and ss.; DE HOYOS (2016) pp. 86 and ss.

24. MAIER (2003) pp. 624 and 625; ROXIN (2003) p. 533; GÓMEZ (2014) pp. 151-152; PLANCHADELL (2016) pp. 52-53. Likewise, in Brazilian doctrine, FARIAS (2015) pp. 177-178 and 180, who points out that the prosecutor's accusatory work is subject to an external control that is carried out both by the court, when it orders to complete or correct the indictment; and by the victim, when make use of the powers that the law recognizes to try to correct deficient, inaccurate or omissive accusations. On this last point, the aforementioned author points out the clear tendency to allow the victim to control the right of the Public Prosecutor's Office to accuse, although the remedies vary according to the different legislative options.

In Europe this model is followed, with different nuances, by the German Code of Criminal Procedure, -which recognizes the figure of the "accessory actor" or *nebenklage* (§§ 395-402 StPO)[25]-, and the Portuguese Code of Criminal Procedure -which contemplates the figure of the *vítima-assistente* (arts. 68-70 CPL)[26]-; while in Latin America there is a tendency to recognize a mixed legislative formula -derived from the Model Code of Criminal Procedure for Ibero- America (art. 789) -; while in Latin America there is a tendency to recognize a legislative formula of mixed projection -derived from the Model Code of Criminal Procedure for Ibero America (art. 78)- that covers both forms of intervention and leaves the victim the option of becoming a *joint plaintiff*, or acting as an adhesive or *ancillary plaintiff*. Thus, among others, the procedural laws of Argentina (art. 87 CPPF), Guatemala (art. 116 CPL), Costa Rica (art. 75 CPL) and Panama (art. 85 CPL), allow the victim, in crimes of public action, to "*initiate criminal prosecution or join the prosecution already initiated by the prosecutor".*

The model of the *ancillary plaintiff*, which some authors recognize as the preferable legislative option[27], guarantees the participation of the victim in the exercise of the public criminal action, while neutralizing the risks of inequality attributed to the model of the *joint plaintiff*. It also provides practical advantages in two ways: on the one hand, the control exercised by the co-defendant victim helps to "de-bureaucratize the actions of the Prosecutor's Office" (whose general routines may not be adjusted to the specificities of a particular case)[28], while offering greater guarantees of transparency[29]. And, on the other hand, it is considered that this procedural condition of assistance to the prosecution, offers greater incentives for the victim to collaborate in the clarification of the facts, which has a positive impact on the effectiveness of criminal prosecution[30].

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25. In German criminal procedural law, the "accessory action" allows the victim to actively intervene in the criminal proceedings and to exercise accusatory actions in the case of certain particularly serious criminal acts, contemplated in a *numerus clausus* regime in § 395, ap.(1) StPO (murders, homicides, injuries, sexual offenses, among others) In this regard, ESER (1992) pp. 24-26; ROXIN (2003) pp. 533-537.

26. This same model is followed by the Brazilian Code of Criminal Procedure (arts. 268-273).

27. MAIER (2003) p. 664.

28. MAIER (2003) p. 661.

29. The guarantee of transparency is one of the functions that the German doctrine attributes to the figure of the accessory actor (*nebenklage*). See PLANCHADELL (2016) pp. 52-53, y the cited German references.

30. This "utilitarian use of the victim by the criminal justice system" has been highlighted by a sector of the doctrine. It is assumed, that "the victim is the main entry point for criminal acts into the formal control system", so that, if the objective is to increase the effectiveness of crime control, the victim must have sufficient incentives to use the system. When the State reduces the inconveniences of the victims' participation in the process, and guarantees them a greater degree of their (legiti

If both models are contrasted with the normative design of the ancillary victim in the CPL, it seems clear that the Cuban legislator has opted for the second of the commented variants: our "*ancillary of the accusation*" shares essence with the German *nebenklage*, and is the national equivalent of the Latin American *ancillary plaintiff*.

3. The ancillary victim in the CPL: his/her actions in relation to the "object of the process" and the "object of the debate"

The notes of accessory nature and dependence, typical of the ancillary plaintiff, do not prevent him/her from enjoying "a certain procedural autonomy" to express some level of dissent with respect to the procedural conduct of the State prosecutor[31], but the extension of his/her powers in this area, will depend on the legislative configuration and, ultimately, on the interpretation assumed by the operators of the criminal justice system. Neither art. 459.4 in fine CPL, nor the other concordant precepts, make explicit the limits of the procedural action of the ancillary victim with respect to the introduction of factual elements that make up the object of the process, nor with respect to the legal criteria and requests that are part of the so-called object of the debate (legal qualifications and petitum)[32]. The legislator has limited himself to saying, that the intervener must formulate provisional accusatory conclusions in which he must "*reaffirm the position assumed by the prosecution*"; but, even if he/she maintains this position of reaffirmation, does the ancillary have any margin of movement to qualify the platform of facts, the legal thesis or the requests that fill the prosecutor's *position* with content?

On the one hand, the key seems to lie in the meaning attributed to the term "*position assumed by the accusation*", with respect to which there are two possible interpretations. According to the first criterion, of restrictive projection, it could be understood that the ancillary victim is obliged to reproduce absolutely, like a carbon copy, the prosecutor's accusatory conclusions, without the possibility of introducing any kind of dissent with respect to the factual and legal aspects of the accusation. On the other hand, a broader understanding allows us to consider that art. 459.4 *in fine* CPL only highlights the obligation of the victim to ratify the interest of the prosecutor

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mate) interests from the penal system itself, it encourages their cooperation in the clarification and prosecution of crime. HERRERA (1996) p. 121; MONTESDEOCA (2021) p. 71.

31. MAIER (2003) p. 654, recognizes that "the ancillary plaintiff can enjoy a certain procedural autonomy". Likewise, SANZ (2008) p. 67, understands that the possibilities of autonomous exercise of the claim of the ancillary plaintiffs "are very varied, depending on the specific regulation that has been established".

32. The distinction between the categories "object of the process" and "object of the debate", and their practical performance in terms of the powers and limitations of the parties and of the jurisdictional body, has been sufficiently clarified in the Cuban doctrine by MENDOZA (2002). Of interest, also, LÓPEZ and BERTOT (2013).

in the clarification of the act and in the establishment of liability and, the imposition of the corresponding legal consequences (in line with his ancillary position)[33].

If the purpose of the legislator has been to rescue and strengthen the role of the victim, recognizing him/her an authentic right of procedural participation in order to minimize secondary victimization and favor his/her reparation, it seems that the second position is the only acceptable one, since "forcing" him/her to reaffirm *in integrum* an omissive or biased accusation would imply his/her re-victimization.

3.1. Powers of the ancillary victim with respect to the introduction of facts

The materialization of the constitutional right to effective judicial protection of the victim, who becomes an ancillary of the prosecutor, implies that the victim can collaborate with the prosecutor in the exercise of the public criminal action and exercise control over its adequacy to the general interest. From this perspective, the victim must be able to correct any "deviations" of the prosecutor's accusation by introducing corrections or nuances to contribute to the correct determination of the act that harmed him/her, its legal-penal significance, or the legal consequences derived from it.

However, the fact that the ancillary victim does not have to act - in all cases and necessarily - as the *alter ego* of the Prosecutor's Office, submissively and resignedly assuming all the points of his accusatory conclusions, does not imply that he/she enjoys of absolute freedom with regard to the introduction of the criminally relevant facts. On the contrary, whoever decides to become an ancillary prosecutor must respect the criminal procedural object outlined by the prosecutor in the first of his conclusions of accusation[34]. As has been said, the victim may qualify the act charged, but without introducing aspects that determine its essential modification[35].

This limitation - which is analogous to the one the Court must observe by virtue of the *principle of correlation between the accusation and the sentence* - is a consequence of the terms in which the right to effective judicial protection of the ancillary victim must be understood, based on the condition that he or she holds in the procedural

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33. As recognized in the doctrine of civil procedure, the intervener or simple ancillary intervener is that subject who, without holding the ownership of the disputed material subjective right, has an interest in favoring the success of the party to which he/she intervenes. GIMENO *et al.* (2021) pp. 344 and 505.

34. The remarks made in this section are concerned with "facts of personal relevance". With regard to the factual issues exclusively related to the civil consequences derived from the crime, the victim does enjoy absolute freedom: they relate to the victim's private right to reparation (restitution, restitution or compensation) and are the subject of civil proceedings joined (no longer compulsorily) to the criminal proceedings.

35. To understand when a substantial alteration of the imputed fact has taken place, from an overall perspective that takes into account the guarantees derived from the accusatory principle and the right to defense, see LÓPEZ and BERTOT (2013) pp. 100 et seq.

https://doi.org/10.7770/rchdcp-V13N2-art2990

design. The legislator has decided that the aforementioned constitutional right, with respect to this new subject, is specified in an accessory and dependent intervention, the purpose of which is to collaborate with the prosecuting party and control its actions. To the extent that this intervener does not exercise the criminal action (which continues to correspond, exclusively, to the prosecutor), he/she is not allowed to present his/her "own" criminal act[36].

The fact that the ancillary victim can introduce nuances to the act charged, leading to a proposal for a legal-penal qualification of greater intensity than that proposed by the prosecutor, does not have a negative impact on the defendant's right to defense, because he will have been imposed this position from the beginning and can resist it using the same defensive faculties (of allegation and evidence) that the law allows him/her to confront the State prosecution[37]. The accused is in a worse position when the initiative to incorporate aggravating nuances to the imputed act comes from the Court -by means of the formula foreseen in art. 546 CPL-, since, in this situation, he/she can only defend himself/herself with mere verbal allegations, as can be deduced from art. 548 CPL.

3.2. Powers with regard to legal qualifications and the request for punishment

To address this issue, it should be recalled that both the legal qualification and the criminal claim (request for punishment and other measures) are aspects whose decision falls exclusively within the jurisdiction of the Court. This is so, because the application of the rules, that describe the criminally relevant facts and their consequences, involves the exercise of *ius puniendi*, and this power is the exclusive prerogative of the judges.

Insofar as these elements do not form part of the object of the proceeding (but of the debate), the victim may present his/her own qualification criterion and request the legal consequences - criminal and non-criminal - that he/she considers applicable to the act charged, which he/she may qualify and complement, but not alter in

36. A practical consequence of this, is that the abandonment of the prosecution of the action by the prosecutor (withdrawal of the accusation) determines the extinction *ipso iure* of the legal position of ancillary occupied by the victim, so that if the victim has an interest in continuing with the accusation, he/she must opt to become a private prosecutor (arts. 436 and 142-h CPL).

37. It should be borne in mind, that the provisional conclusions of the ancillary victim are notified to the accused together with the conclusions of the prosecutor, so that he can organize his/her defense taking into consideration the criteria of the intervener accuser (arts. 459.1 and 461 CPL). Hence, the inappropriateness of using the formula foreseen in art. 546 CPL, when the Court decides to accept the thesis of the ancillary victim. The purpose of the alert contemplated in the aforementioned precept, is to guarantee the principle of contradiction and respect for the right of defense against the surprising introduction of factual and/or legal aspects outside the criminal debate; and it is obvious that in the aforementioned case, this type of situation does not occur.

substantial terms. Thus, the victim may: offer a different qualification of the act and of the degree of involvement of the accused in it; request the appreciation of aggravating circumstances or rules of adequacy not requested by the prosecution; as well as request a more intense legal response than that requested by the prosecutor (higher sanction, more serious sanction, accessory sanctions not requested).

It will surely be in the area of sentencing and other legal consequences, where the vindictive attitudes of the victims will be perceived with greater intensity; and judges should be especially careful to prevent this "thirst for vengeance" from influencing the process of adjusting the sentence. Although there are divergent criteria[38], the ancillary victim seems to be legitimized to influence the process of selecting the criminal response to the victimizing act, given the purposes of this procedural intervention - collaboration and control with respect to the *ius accusandi* - but this influence on the determination and adequacy of the sentence is only legitimate when it responds to the aforementioned purposes, aimed at guaranteeing the general interest. Thus, for example, the position of the ancillary victim, who seeks to avoid the imposition of an illegal sanction (which does not fit the criminal framework of the offense described by the prosecutor), or a disproportionate sanction (that does not fulfill the purposes set forth in art. 29 PC (by defect, although also by excess); or that, contrary to the opinion of the prosecutor, claims the imposition of a protective measure, such as the prohibition of approaching the victim, injured party, relatives or persons close to him/her, provided for as an optional accessory sanction in art. 58 PC.

4. Conclusions

The scope of the procedural action of the victim who chooses to join the prosecution as ancillary (which the legislator has not sufficiently clarified), must be determined through an interpretative exercise that takes into account the specific projection of the victim's right to effective judicial protection; the meaning of an adhesive procedural intervention with respect to the public interest, that underlies the prosecutor's action; and, the meaning and interaction of the procedural categories "object of the proceeding" and "object of the debate".

38. In Portugal, the standing of the victim-assistant (arts. 68-70 CPP) to challenge on appeal the type and scope of the penalty imposed on the accused, has given rise to a long debate, which the jurisprudence of that country has resolved in the sense of understanding that this will be possible only in those cases in which the victim "has a concrete and proper interest (...) because he/she can benefit from the measure of the penalty". Thus, among others, Ruling No. 8/99 of the Plenary of the Criminal Chamber of the STJ, of October 30th, 1999: "the assistant does not have standing to appeal, unaccompanied by the Public Prosecutor, against the type and scope of the sentence imposed, unless he/she demonstrates a concrete interest to act in his/her own right"; and the Ruling of the Court of Appeal of Oporto No. 715, of March 4th, 1999: "the assistant does not have standing to appeal, unaccompanied by the Public Prosecutor, against the type and scope of the sentence imposed, unless he demonstrates a concrete interest to act in his own right". 715, of March 4th, 2015:

The constitutional right of the ancillary victim to effective judicial protection (art. 92 CR in relation to art. 138 CPL) implies allowing him or her *real participation* in the exercise of the criminal action brought by the prosecutor, so that he or she can contribute to the realization of the public interest in the clarification, prosecution and punishment of the criminal acts as a way to guarantee peaceful coexistence (general interest). This *real participation* only materializes if the victim is allowed to carry out a proactive collaboration with the State's prosecutorial work, so that his/her procedural position cannot be understood in terms of absolute chaining to the position taken by the prosecution, because an interpretation of art. 459.4 in fine CPL, in those terms, would be contrary to the meaning of the Constitution.

Having ruled out the strict relationship of submission between the ancillary victim and the prosecutor, it is mandatory to emphasize that the victim cannot exceed the limits derived from the procedural condition imposed by the legislator: that of adhesive or ancillary intervening party. The fact that we are dealing with a typical adhesive intervention implies that the victim is not a full party (he/she does not exercise the criminal action, nor does he/she defend his/her own interest), but a limited party, whose scope of action is marked by the notes of accessory status and dependence on the position of the intervening party or *dominus litis* (the prosecutor).

Since the ancillary victim does not bring the criminal action – she/he cannot plan her/his "own act" - the object of the proceeding follows its usual *iter* of configuration: the prosecutor defines it in the first of his accusatory conclusions, and it is unmodifiable in its essential aspects. Nevertheless, this does not mean that the victim is obliged to assume the hypothesis of the accusation as a carbon copy, because the general interest to which he contributes legitimizes him to incorporate nuances and correct possible omissions or inaccuracies in the act charged by the prosecutor (without introducing aspects that determine its substantial modification), and also to suggest a different qualification criterion, or to request a more intense penal response.

It should be stressed that the aforementioned procedural possibilities of the victim, are not justified by a non-existent material right to criminal punishment of the guilty party, but rather by the interest of the criminal justice system in providing a mechanism that allows him/her to work with the public prosecution, (controlling its adequacy to the general interest) as a legitimate way to achieve its satisfaction. From this starting point, Courts must be extremely cautious in assessing the positions and petitions of this new participant, taking care not to protect purely vindictive interests.

"the issues related to the type and extent of the penalty are part of the punitive core of the State, its ius puniendi, whose defense does not correspond to individuals but to the Public Prosecutor's Office". In favor of this point of view, in the Portuguese doctrine, SIMAS (2011) p. 57. However, this view should be qualified insofar as it seems not to take into account the scope of the procedural interest of the victim acting as ancillary or coadjutant of the prosecutor: functions of assistance to the public prosecution and control over the way in which said official serves the general interest.

When channeling the victim's claims for satisfaction, a balance should be sought between avoiding of re-victimizing situations, the guarantee that there is no impunity, and the restrained and considered application of *ius puniendi*.

To finalize, it is worth noting a general reflection on the impact that the "renaissance of the victim" is having on the procedural situation of defendants and the accused. Although the political-criminal option of including in the "punitive dialogue" those who have suffered the effects of a crime, granting them a relevant participation in the process, is to be welcomed; there is no doubt that this leads to a risky scenario for the rights and guarantees of the defendant/accused, which will require major changes in defense strategies[39]. It is no longer only the traditional question of balancing the guarantees of the "persecuted" with the State's interest in effectively controlling crime (rights of the accused versus the State's interest); but now, the equation has a new variable: the rights of the victim, which must also be protected without undermining the guarantees of the accused (rights of the accused versus the rights of the victim).

Although the recognition of victims' rights does not seek to rethink the legal status of the accused/defendant (which has been one of the greatest achievements of the modern Rule of Law)[40], the fact is that, on many occasions, the operation of those rights will necessarily lead to a modulation -if not a violation- of some right or guarantee of the accused/defendant, justifiable on the basis of the existence of a legal value (the victim's) that is afforded greater protection[41].

Prof. Gómez Colomber summarized, in a very concrete reflection, the current state of things:

"Is it fair, is it unfair? After so many years of a democratic struggle for the rights of the defendants in the criminal process, and now comes the victim and takes them all away? The Criminal Procedural Law is changing and we are at that point still in an evolutionary phase. If the end results in the renaissance of a Criminal Penal Law at the expense of the defendants' rights, we are doing things wrong. However, if we do not do anything for the victims, we might be doing much worse".[42]

The picture is uncertain. The challenges for the State of Right become bigger and bigger and we will have to rise to the occasion, for the sake of all.

39. GÓMEZ (2014) p. 270.

40. SANZ (2008) p. 64.

41. Suffice is to cite, as a guideline, the harsh criticism of the reinforced value that the victim's testimony is acquiring by the mere fact of having such status. Without (formally) abandoning the system of free assessment of evidence, we are moving from a scenario in which "from my word (accused) versus yours (victim)" one could expect "a foreseeable result of acquittal", to another in which the result is "a foreseeable conviction because it has more value". GÓMEZ (2014) pp. 269-270.

42. GÓMEZ (2014) pp. 270-271.

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