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Crime Victims' Rights in the European Constitutions and the Scale Metaphor: Focus on the Recent Proposal to Amend the Italian Constitution

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INTRODUCTION

This paper deals with the rights of crime victims from a comparative perspective, starting from a recent proposal to amend the Italian Constitution.

Part I highlights that the dynamic European path of recognition of victims' rights has so far taken place despite the absence of explicit provisions in the constitutions of the most populous member states, in accordance with the dominant legal principles of the second half of the 20th century.

Part II examines the progress of a proposal to reform the Italian Constitution and discusses the details of its wording. This proposal turns out to be a relevant opportunity for comparison with the United States, where a similar trend of amending state constitutions is underway, and there is a stated aim to amend the federal Constitution as well, providing explicit protection for crime victims.

Part III acknowledges that there are some points in the (second version of the) Italian constitutional reform proposal and, more broadly, in the claims of proponents of the motley world of the Victims' Rights Movement (VRM) that deserve attention, especially outside the delicate dynamics of criminal proceedings.

The reasons for skepticism are mainly outlined in Part IV of the paper and the conclusion (Part V) is that a prudent approach should prevail. It seems appropriate to further ponder and then at least postpone a reform that does not really appear necessary today and rather could prove to be unfortunate.

PART I: CRIME VICTIMS IN THE EUROPEAN CONSTITUTIONS

The start of the contemporary season of victims' rights protection in Europe[1] is often traced back to the European Union's Council Framework Decision 2001/220/JHA of March 15, 2001 ("on the standing of victims in criminal proceedings"). Then followed the European Union Directive 2012/29/EU of October 25, 2012 ("establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA"), which is likely to be updated and enhanced in the very near future. Alongside European Union legislation, the 1950 European Convention on Human Rights and its interpretation by the Strasbourg Court have played a significant role.[2]

This articulated framework has led to a substantial increase in the rights of crime victims in recent decades, both inside and outside criminal proceedings. These are rights of various kinds, starting with the right to be informed, based on the principle that awareness of one's rights and of the conditions for making them effective is a prerequisite for their successful protection. Rights enhancement has practically taken place in all states, which have transposed into domestic legislation—it is an often indispensable step

[1] For an updated overview of European victims' rights law, *see* Gian Marco Caletti's paper in this Volume of the Review.

[2] *See*, *e.g.,* the "ECHR Case Law Monitoring" of "Victim Support Europe," a non-profit international association: https://victim-support.eu/news/echr-case-law-monitoring/. For a more general overview, *see* also the "Court's Knowledge Sharing platform (ECHR-KS)": https://www.echr.coe.int/knowledge-sharing.

because of the non-direct applicability in member states of at least some of the EU regulations—many of the European recommendations.[3]

Despite this trend, in many constitutions of European states (and even in the European Convention on Human Rights) there is no explicit mention of crime victims and their rights. For the most part, criminal justice provisions seem to be an expression of the Enlightenment-liberal tradition, which focuses on the guarantees of the accused. In accordance with this tradition, the criminal code and criminal law more generally are the "Magna Charta of the criminal."[4]

The liberal matrix of contemporary European constitutions is consistent with their dating, which in many cases goes back to the decades following the dramatic experience of World War II. In that period, a process of democratization of Europe developed gradually and at different times.

Some states adopted a constitution immediately after the end of the world conflict: for instance, Italy (1948), which this paper devotes special attention to, but also Germany, the other main defeated European nation, which in 1949 adopted the "Basic Law of the Federal Republic of Germany," only later extended to the entire German territory, after the fall of the Berlin Wall. It was precisely the dissolution of the Soviet Union and, more generally, of the so-called Eastern Bloc that was crucial in launching, in the early 1990s, a new constituent season for several Eastern European countries.

In other cases, the constitution immediately followed illiberal experiences of different political stripes. For instance, the Constitutions of Greece (1975)[5] and Spain (1978) both date back to the fall of military dictatorial regimes in the 1970s.

One has to look to the Constitutions of countries such as Switzerland and Portugal to find an express mention of the role of crime victims.

In the Swiss Constitution, in force since Jan. 1, 2000, the provision is found in the section on the criminal law authority of the Confederation and the Cantons and is located in article 124, entitled "Aid to Crime Victims": "The Confederation and the Cantons shall ensure that persons who have suffered harm to their physical, mental or sexual integrity as the result of a criminal act receive support and are adequately compensated if they experience financial difficulties as a result of that criminal act."

The 1976 Portuguese Constitution marked a pivotal shift toward a democratic transition following a prolonged period under a conservative dictatorship. Article 32, that expressly mentions the crime victim, is placed under the part on fundamental rights and duties, particularly on personal rights, freedoms, and guarantees. However, this article is specifically dedicated to the guarantees in criminal proceedings and provides, among other things, that "Victims have the right to intervene in the proceedings, as laid down by law" (paragraph 7).

Currently, the constitutions of Europe's most populous states do not explicitly protect or even mention crime victims, but this situation may soon change. In Italy (after repeated similar attempts in the past), a proposal to

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[3] Instead of recalling scholars' studies, it seems more useful to refer to an official page of the European Union, which provides, for each member state, an up-to-date listing of the rights of crime victims: https://e-justice.europa.eu/171/EN/victims__rights__by_country.

[4] F. von Liszt, *Über den Einfluss der soziologischen und anthropologischen Forschungen auf die Grundbegriffe des Strafrechts* (1893), in *Strafrechtliche Aufsätze und Vorträge*, II, Guttentag, Berlin, 1905, at 80.

[5] In the Greek Constitution there is a reference (only) to "war victims," "entitled to the special care of the State" (article 21, paragraph 2).

amend the Constitution,[6] with the explicit aim of formally recognizing the role of the crime victim is currently under consideration in Parliament. Support for this proposal has come from a wide range of political parties, from right-wing to left-wing groups, with only reservations from centrist parties. In the Senate Committee where the discussion began, a draft amendment to the Constitution was recently proposed to include the following provision in article 24: "The Republic shall protect the victims of crime."

The following paragraph will describe the parliamentary process that culminated in the proposal currently under consideration by the Italian Senate. Its original version had a different wording and its placement within the Constitution was different as well. The current draft is the result of a discussion enriched by the hearing of experts that took place over several days in the second part of 2024. As will be seen in the following parts of the paper, opinions seem to be rather divergent. In contrast to the enthusiastic supporters of the initiative there are more than a few prominent critical positions.

PART II: THE PROPOSAL TO AMEND THE ITALIAN CONSTITUTION

As mentioned, the Italian Senate is now dealing with a proposal to amend the Constitution whose examination in the Constitutional Affairs Committee began in October 2023. More precisely, initially there were four separate proposals (Nos. 427, 731, 888, 891) from as many political parties, belonging to both the majority—the first proposing party is Prime Minister Giorgia Meloni's—and the opposition. Given the homogeneity of each proposals, a (first) unified text was composed in December 2023.

The first draft intended to amend article 111 of the Constitution, which is placed in the second part, where there are the details of the organization of the Republic, that is, in short, the functioning of Italian institutions. Article 111 is situated, even more specifically, among the rules on the Judiciary and was already significantly reformed in 1999 to affirm the principles of due process, which in the criminal sphere result in a marked preference for the adversarial model[7], a model that has previously influenced the formulation of the Code of Criminal Procedure of 1989.

Compared to the more concise formulation of the principle enshrined in the Fifth Amendment to the U.S. Constitution, on due process article 111 of the Italian Constitution is more analytical.

As a general rule, in all court trials the parties shall confront each other on an adversarial basis, on an equal standing before a third-party and impartial judge. The law shall provide for a reasonable duration of proceedings (paragraph 2).

With regard to criminal proceedings in particular, the protagonist is undoubtedly the accused, to whom are granted rights to be informed, to translation and, more generally, rights of defense, with special attention to the rules concerning evidence (paragraphs 3, 4 and 5).

Promoters of the reform proposal believe that this prominence of the accused is anachronistic, i.e., it fails to recognize the role that should be

[6] A fairly recent English translation (dated 2023) of the Italian Constitution is available on the Senate website: https://www.senato.it/sites/default/files/repository/Costituzione_INGLESE_2023.pdf.

[7] *See*, *e.g.,* R. Orlandi, *The Italian Path to Reform: Italy's Adversarial Model of Criminal Procedure*, in *The Italian Law Journal*, No. 2, 2019, 565 ff.; from a more general and mainly theoretical perspective, M. Caianiello, *Adversarial and Inquisitorial Criminal Procedure*, in *Elgar Encyclopedia of Crime and Criminal Justice*, Edward Elgar, Cheltenham, 2023, 46 ff.

accorded to the victim today in light, in particular, of the European legislation of the very last decades. Thus, at first, it was proposed to introduce the following provision after paragraph 5: "The Republic shall protect the victims of crime and the persons damaged by crime," intending to refer also to persons who have suffered harm as a result of the offense.

A total of 14 experts with different expertise spoke at the Senate Committee hearings.[8] Both those in favor and those who pointed out critical issues, in many cases, made detailed suggestions on how to improve the proposed amendment to the Constitution.

Predictably enthusiastic was the stance of those who can be traced back to the Italian VRM: mainly attorneys with significant professional experience in serving victims and representatives of victims' associations; two of these experts in favor of reform are former members of the judiciary.[9]

Very skeptical was the opinion of the Professors of Criminal Law and Criminal Procedure who spoke—three academics who have also pursued prestigious careers as attorneys—as well as, predictably, that of a criminal defense attorney who is member of an international association ("Hands off Cain")[10] that works to protect the human rights of convicted persons and in particular for the abolition of the death penalty around the world.

Intermediate and entirely devoid of partisan "interests" appeared the position of the constitutional law scholars heard. Although with some differences in approach, the constitutional law Professors gave the impression of welcoming the parliamentary initiative without negative preconceptions. However, in the majority, they urged the Senate to consider a different placement than article 111. On the one hand, this suggestion appears to be motivated by the perception of a risk of altering the delicate balance of criminal proceedings. On the other hand, it still seemed more consistent to place a provision concerning a generic protection for a category of persons in the part on principle statements.

The Committee therefore moved toward rewording the provision and placing it elsewhere, i.e, in the first part of the Constitution, which deals with the rights and duties of citizens, particularly in the title on civil relations. Therefore, in article 24 it is proposed to add a new paragraph 3 with the following wording: "The Republic shall protect the victims of crime."

The parliamentary debate recalls Professor Michael Vitiello's recent book on the VRM.[11] The hearings brought out some issues that, on this very topic, the Italian constitutional reform proposal "gets right" and some others that "gets wrong" or otherwise suggest special prudence. The following paragraphs will list and examine the main counterposed arguments.

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[8] The full video recording of the hearings (of Giuseppe Santalucia, Maria Brucale, Felice Casson, Luca Lupária Donati, Enrico Amati, Lucia Vastano, Stefano Maccioni, Agatino Cariola, Marco Bouchard, Alessandra Guarini, Vittorio Manes, Anna Lorenzetti, Maria Agostina Cabiddu, Alfonso Celotto) is available on the Senate website (on the same page where one can also find the different versions of the reform proposal): https://www.senato.it/attualita/archivio-notizie?nid=82908.

[9] Basically neutral (neither against, nor particularly in favor: "we are [...] indifferent"), on the other hand, is the stance of the most representative association of Italian judges (ANM): to its President, Giuseppe Santalucia, an explicit highlighting of the victim in the Constitution is not essential.

[10] *See Hands Off Cain*, https://www.handsoffcain.info/.

[11] M. Vitiello, *The Victims' Rights Movement: What It Gets Right, What It Gets Wrong*, New York University Press, New York, 2023.

PART III: "WHAT IT GETS RIGHT." THE IMPORTANCE OF RIGHTS OUT OF THE "SPOTLIGHT"

It is time to see, in more detail, which arguments in favor appear most plausible, at least at first glance. The appreciable aspects especially concern the second version of the proposal, because the first one represented an unfortunate choice in particular (but not only) with regard to its placement in the criminal proceedings part of the Constitution, as will be better discussed below.

Firstly, it can certainly be said that no one with a minimum of civic-mindedness can consider themself, in general terms, against protection of crime victims and it is also true that criminal law scholars are increasingly focusing on this subject.[12] After all, that of protecting society from offensive behaviors is a primary and stated goal of criminal law.

The latest decision to affirm a general principle on the protection of crime victims, renouncing to affect (at least directly) the balance of criminal proceedings, seems to shift the focus to the more substantive kinds of protection, which indeed are already effective before and especially outside the trial.

There is no doubt that the rights to information and, above all, support of persons claiming to be victims are worthy of protection, regardless (of a conviction and even) of a formal complaint. The 2012 European Directive, in article 8, paragraph 5, already goes in this direction: "Member States shall ensure that access to any victim support services is not dependent on a victim making a formal complaint with regard to a criminal offence to a competent authority."

As several studies on crime victims and restorative justice lead to believe,[13] it is the empowerment process that develops out of the courthouse "spotlight" that seems the most important in order not to leave people who have been victimized alone and trapped to the bitter end in the condition of victim, rather allowing them to gradually come to consider themselves as survivors.

Some supporters of the reform proposal of the Italian Constitution (especially former judge Marco Bouchard) have pointed out that the draft does not provide specific rights, but merely a principle. This view seems to want the constitutional amendment to appear essentially symbolic. This should totally rule out—this is the thesis, which is meant to be reassuring, but, on closer inspection, turns out to be an understatement—concrete effects of particular relevance: in particular, it would be possible to exclude negative implications. However, it is also plausible to argue in the opposite direction. The more uncertain the boundaries of the victim's role are, the less predictable is the limit of interpretation of a very general principle statement and, consequently, also the limit of interventions by the legislature or the judiciary. Such actions could result in a general punitive tightening of the system (more crimes, more convictions and harsher punishments), and it cannot be ruled out that this will occur in correspondence with a weakening of the guarantees of the accused within the trial: a typical scenario of this victim-centered season.

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[12] In Italy, *see, e.g.,* L. Cornacchia, *La vittima nel diritto penale contemporaneo. Tra paternalismo e legittimazione del potere coercitivo*, Aracne, Roma, 2012; M. Venturoli, *La vittima nel sistema penale. Dall'oblio al protagonismo?*, Jovene, Napoli, 2015; D. Falcinelli, *Il diritto penale della* vittima del reato, Dike Giuridica, Roma, 2017.

[13] *See* Kolis Summerer's paper (and its bibliography) in this Volume of the Review.

This objection will be discussed again when addressing the arguments unfavorable to the constitutional amendment. In this paragraph, it seems more appropriate to turn to the second group of considerations of appreciation (of some aspects) of the proposal.

The second version of the draft seems to be preferred also in light of a detailed analysis of its terminology.

The use of the plural, i.e., talking about "victims" (instead of the singular: "victim") seemed inappropriate when the purpose was to affect constitutional principles on criminal proceedings. Article 111 of the Italian Constitution always mentions the accused in the singular and (no less important point) does not define that person (already) as a "criminal," in consonance with the constitutional principle (article 27, paragraph 2) whereby the accused is presumed not guilty until the final closure of the criminal case. For the same reason, it is not correct to talk about victim or victims before the conclusion of the case. Although this is perhaps mostly a formal and symbolic issue, it would be disproportionate to place a plurality of (alleged) victims alongside the accused, according to criminal procedure scholar Luca Lupária Donati. Even some of the supporters of the first draft acknowledged this, including former judge Marco Bouchard.

In contrast, the choice of the plural seems more acceptable in the current version of the proposal, because it is about enshrining the rights of persons as belonging to a category, which, in that context, can be understood in a broader, a-technical, more sociological sense. This option would be consistent with the approach of the current paragraph 3 of article 24 of the Constitution, which uses the plural when referring to other individuals in a condition of "weakness":[14] indigent and low-income people are entitled by law to proper means for action or defence in judicial proceedings.

Deserving approval also is the deletion of the reference to persons who have suffered damage from the crime—the first draft of the proposal mentioned them alongside crime victims—as subjects to be protected in criminal proceedings.

The 2012 European Directive seems to make a separate reference to persons damaged by the crime unnecessary, as if they were really others than the victims. In article 2, paragraph 1, it is provided that "'victim' means: a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; 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."

Hence, there is already an extension of the notion of victim to persons who are not victims in the narrow sense, but who have nevertheless suffered harm from the crime. It appears to be a selective extension, which can be appreciated because it marks discontinuity with the Italian tradition of recent decades. It occurs in several criminal trials, especially those that attract media attention,[15] that the defendants are pitted against numerous public agencies or victims' associations (or consumers' associations and workers' unions): they are not natural persons, but legal persons who can claim to have suffered only rather indirect damages. Despite this, they are still allowed to attend, *de facto*,

[14] In the same article (24) of the Constitution, protection is also provided for another category of "weak" people, i.e., victims of judicial errors: "The law shall determine the conditions and forms regulating damages in case of judicial errors." (paragraph 4).

[15] *See* V. Manes, *Giustizia mediatica. Gli effetti perversi sui diritti fondamentali e sul giusto processo*, il Mulino, Bologna, 2022.

as "private accusers," who have their own right to evidence. As can be easily guessed, their abundant presence is likely to cause an imbalance in the trial, in direct proportion to the "firepower" that adds up against the defendants.

Moreover, it cannot be ruled out that such an imbalance will also result in detriment to victims in the narrow sense or (in cases of death) to members of their families, who may be adversely affected by an exaggerated lengthening of proceedings. For instance, in the case of the collapse of a bridge in Genoa in 2018,[16] the relatives of the 43 people who died publicly expressed their apprehension about the potential involvement of too many actors in the trial.[17] The court of first instance had to examine more than 700 claims from as many individuals and legal persons who asked to take part in the criminal trial,[18] which is still ongoing against 59 defendants.

Unlike, for instance, in Spain,[19] in Italy even victims in the narrow sense have the right to actively participate in criminal proceedings with their own rights to evidence only if they claim restitution. This is consistent with the traditional idea of criminal law as a public subject, which overcomes the archaic model of private revenge of the victim, who is considered (too) emotionally involved.

The hearings revealed that many victims are primarily interested in bringing out the truth,[20] emphasizing that the subordination of their rights to an economic claim is perceived as humiliating. This viewpoint is understandable and warrants consideration. However, as will be discussed in the following paragraph, it seems to be incorrect to invoke equal rights for victims and accused in criminal proceedings.

PART IV: "WHAT IT GETS WRONG." THE FALLACY OF "EQUAL RIGHTS" AND THE SCALE METAPHOR

Proponents of VRM are certainly well-intentioned, and, as mentioned above, the various associations committed to concrete help for crime victims provide services on a daily basis that are extremely valuable. Without undermining the foregoing, what I am going to argue is that there is a fallacy in the VRM narrative on criminal justice that cannot be shared. In both the U.S. and Europe, as the recent Italian Senate hearings show, the principle (it has now become a slogan) that victims should have equal rights to the accused is widespread.

A shining example can be seen by consulting the website of "Marsy's Law,"[21] which promotes the recognition of constitutional rights for crime victims in analogy to the California Victims' Bill of Rights Act of 2008: "Marsy's Law seeks to give crime victims meaningful and enforceable

[16] For a description of the case in English, *see* https://www.bbc.com/news/world-europe-65684334.
[17] *Ponte: via a processo; Comitato, verità oggettiva sia processuale*, EURONEWS (July 5, 2022), https://it.euronews.com/2022/07/05/ponte-via-a-processo-comitato-verita-oggettiva-sia-processuale.
[18] *Crollo Ponte Morandi a Genova, 502 parti civili su 700 escluse dal processo*, SKY TG24 (Sept. 28, 2022), https://tg24.sky.it/cronaca/2022/09/28/crollo-ponte-morandi-genova-processo.
[19] *See* M.L. Villamarín López, *Spanish criminal procedure examined: successes, opportunities and failures in the adaptation to EU requirements*, in *ERA Forum*, 23, 2022, 127–139, https://link.springer.com/article/10.1007/s12027-022-00698-6.
[20] *See also* F. Viganò, *Verità e giustizia riparativa*, in *Sistema penale*, at 4, (Sept. 20, 2024), https://www.sistemapenale.it/it/articolo/vigano-verita-e-giustizia-riparativa.
[21] In the section "About Marsy's Law," where the quote in the main text is taken from, it is also clarified the origin of the name of this project: Marsalee (Marsy) Ann Nicholas, was "a beautiful, vibrant University of California Santa Barbara student, who was stalked and killed by her ex-boyfriend in 1983." https://www.marsyslaw.us.

constitutional rights equal to the rights of the accused." "Providing Equal Rights to Crime Victims" is prominently featured already on the homepage, and even in pictures of public events the same slogan appears in the numerous placards displayed.

Another example can be drawn from the essay of two of the most prominent American VRM advocates, Professors Paul Cassell and Margaret Garvin (included among the panelists at the Symposium to which this paper is related), who summarized the concept by quoting the words of one victim: "All we ask is that we be treated just like a criminal."[22]

During the hearings at the Italian Senate, a similar viewpoint also emerged, for instance, in the words of pro-victims' rights criminal attorney Alessandra Guarini, who wished for the victim "equal dignity as a party."

This is a principle that may even be intuitive, but it is only apparently correct because, on closer inspection, it overlooks the importance of the difference in roles in contemporary criminal procedure of Enlightenment origin. In particular, the VRM seems not to grasp sufficiently that the criminal procedure was created to "protect" the accused, who becomes the "weak" party in that context: roles are reversed compared to the time of the commission of the crime.[23] Thus, the equality of the parties is physiologically conceived between the accused and the (potentially very disproportionate) power of the state, in the context of a "pas de deux"[24] or "tango," [25] where the judge can literally be defined as third (not "fourth". . .) and impartial. A substantial portion of the mutual misunderstandings and divisions between the two opposing sides have their origins in this error of perspective.

In the Italian Senate hearings, the clash of opinions focused mainly on the most common objection addressed to VRM, which indeed also stands out in the American debate: the concern is that policies to protect crime victims could often have repercussions for other citizens. The slogan that what is at stake is only the recognition—*rectius*: the addition—of rights for victims, without taking away rights from the accused, seems too optimistic, naive, almost nonchalant. Similarly, it appears nonchalant to refer to a victim before the crime has been proven: this occurs as much in the (first version of the) reform proposal of the Italian Constitution as in the current wording of the Constitutions of several American states.

Then the scale metaphor appears pertinent. Historically, as is well known, it is a symbolic image of justice, because it recalls weighting in judgment and the idea that each pan is sensitive to the change in weight of the opposite one.

In his balanced analysis of the side effects of the VRM in the U.S., Michael Vitiello has pointed out that the current advocates of the Movement are picking up the legacy of Frank Carrington,[26] whose Law-and-Order

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[22] P.G. Cassell, M. Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, in *Journal of Criminal Law and Criminology*, Volume 110, Issue 2, Spring 2020, at 112, https://scholarlycommons.law.northwestern.edu/jclc/vol110/iss2/1/ (quoting the original sources).

[23] *See*, in particular, L. Ferrajoli, *Nove massime di deontologia giudiziaria*, in *Questione giustizia*, 2012, No. 6, 74–82, especially paragraph 6.

[24] L. Lupária Donati, *L'ascesa della vittima, il crepuscolo dell'imputato. Il pendolo alterato del processo penale*, in *Diritto di Difesa*, at 4 (July 22, 2024), https://dirittodidifesa.eu/lascesa-della-vittima-il-crepuscolo-dellimputato-il-pendolo-alterato-del-processo-penale-di-luca-luparia-donati/#_ftn13.

[25] E. Grande, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, in *Global Jurist*, Volume 9, Issue 4, 2009, Article 6.

[26] F.G. Carrington, *The Victims*, Arlington House, New Rochelle, 1975.

initiatives were a reaction to the era (1953–1969) of the so-called Warren Court (remembered for its special attention to defendants' guarantees) and were avowedly driven by the aim of "rebalancing" criminal justice in a more victim-sensitive direction, while simultaneously reducing the rights of the accused and convicted, allegedly "mollycoddled" by the system.[27] It is thus in the DNA of the VRM, in its original intent, an approach that recalls exactly the way the balance scale works: one pan is lowered while simultaneously raising the other.

Vitiello's study highlights how the policies inspired by the VRM, in the following decades, actually had critical repercussions or otherwise resulted in an increased harshness of the criminal justice system. For example, there have been notable eliminations or extensions of statutes of limitations for sexual abuse crimes. Still on the legislative side, reforms pushed by the VRM such as California's "Three Strikes and You're Out" law have been one of the symbols of disproportionate punishment and mass incarceration in the U.S.[28] The right of victims to take part in criminal proceedings, which is also central to the demands of the Italian VRM, in the U.S. has gone so far as to condition the sentencing phase, particularly through Victim Impact Statements (VIS),[29] introducing racial and class bias and leading to more harsh punishments, especially in the direction of applying the death penalty.[30]

On the "slippery slope" of victim-oriented criminal law, where punitive furor runs fast, empathy for victims and attempts to bring their voices, their suffering, to the attention of the judges have often resulted in a "no compassion" attitude toward criminals (already toward defendants) and in an opposition to rehabilitation.[31] In Italy, in contrast, the resocialization of the convicted person is the only purpose of punishment explicitly mentioned in the Constitution, in article 27, where the presumption of innocence (until the final conclusion of the judicial process) and the prohibition of inhuman punishment are also enshrined; the prohibition of the death penalty is explicit.[32]

According to recent studies by prominent Italian scholars, enhancing the victim's perspective in the administration of criminal justice can lead to the acknowledgment of an insidious "right to punishment," [33] which seems to be embraced, albeit in a collective (perhaps even more problematic) dimension, in the California Constitution after Marsy's Law of 2008. See, in particular, article I ("Declaration of Rights"), section 28, (a), (5): "Victims of crime have a collectively shared right to expect that persons convicted of committing

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[27] M. Vitiello, *supra* note 11, at 49.

[28] For recent statistics on American incarceration, *see* Ashley Nellis, *Mass Incarceration Trends* (May 21, 2024), https://www.sentencingproject.org/reports/mass-incarceration-trends/.

[29] In Europe, VIS do play an important role particularly in the law of the Netherlands: T. Booth, A.K. Bosma, K.M.E. Lens, *Accommodating the Expressive Function of Victim Impact Statements: The Scope for Victims' Voices in Dutch Courtrooms*, in *The British Journal of Criminology*, Volume 58, Issue 6, Nov. 2018, 1480 ff.

[30] *See* M. Vitiello, *Race, Class, and the Victims' Rights Movement*, in this Volume of the Review, quoting D. Baldus, C. Pulaski, G. Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, in *Journal of Criminal Law and Criminology*, Volume 74, No. 3, 1983, 661 ff.

[31] M. Vitiello, *supra* note 30.

[32] Paragraph 4 states: "Death penalty shall not be admitted." For a cohesive stance of the Italian academic community against the death penalty, *see* the Document for the Abolition of the Death Penalty in the World, presented in 2009, celebrating the 5th centenary of the first "ius criminale" teaching in the University of Bologna, dating back to 1509. Criminal law Professor Stefano Canestrari, then Dean of the Law Faculty, was the promoter of the initiative: *see Criminalia*, 2009, at 407 ff. This stance shows a wide distance with the views of some prominent American supporters of VRM: *see*, *e.g.,* P.G. Cassell, *In Defense of the Death Penalty*, in *IACJ Journal*, Summer 2008, 14 ff, https://ssrn.com/abstract=2181453.

[33] G. Fornasari, *'Right to Punishment' e principi penalistici. Una critica della retorica anti-impunità*, Edizioni Scientifiche Italiane, Napoli, 2023.

criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California. This right includes the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners that are not required by any provision of the United States Constitution or by the laws of this State to be granted to any person incarcerated in a penal or other custodial facility in this State as a punishment or correction for the commission of a crime."

The ostentatious display of harshness and unbendingness toward the offender is, quite clearly, an outcome of the privilege for the point of view of the victim, who is to be protected—this is the approach—with empathy and in an exemplary, symbolic manner, reaffirming the distinction between good and evil, assigning, *de facto*, to the punishment an expressive function.[34]

In criminal proceedings, the "inclined plane" is particularly steep. The victim's—*rectius*: the person claiming to be a victim's—instinctive way of demanding justice is to ask for the conviction of the accused; not any conviction, but one that leads to the actual imposition of a punishment; not the imposition of any punishment, but, preferably, of imprisonment; not the imposition of any imprisonment, but for as long as possible and even this, often, is deemed unsatisfactory.[35] Why does this happen? The answer is simple, and the explanation does not require depicting the victim as a person with evil feelings. Banally, for the victims, the just punishment is not that which is objectively reasonable (in light of all the coordinates of the legal system), but is that which is proportionate to their own personal pain, to the suffering created by the crime. For the victims, their experience is "unique," and when serious crimes are committed, the suffering is always perceived as the most severe possible, as immeasurable. Understandably, victims and their family members experience every rape and every murder as an absolute tragedy. They do not consider it as something to be ranked on a scale involving different levels of seriousness, which is instead exactly what judges are supposed to do with the utmost balance. In other words, there is a direct proportion between the importance given to the victim's expectation of justice and, as a more or less conscious effect, greater harshness of punishment.

It is not surprising, then, that even a judge, i.e., a legal professional who is supposed to be attentive to the noble side of the scale metaphor, that of balance, once personally affected by a serious crime, invoked punishment of the utmost harshness. In 2016, Judge Michael Luttig made an emblematic VIS in his father's murder trial: "On behalf of my dad, and on behalf of my mother and family, I respectfully request that these who committed this brutal crime receive the full punishment that the law provides."[36]

Undoubtedly, the Italian legal system shows important differences compared to the American one. However, the presence of similar punitivist trends leads to skepticism about the proposal to include an explicit principle of victims' protection in the Constitution. It seems very telling that one of the

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[34] *See*, among the most recent studies, A. Nisco, *Teorie espressive della pena: un'introduzione critica*, Giappichelli, Torino, 2024, https://www.giappichelli.it/media/catalog/product/openaccess/9791221157970.pdf.

[35] *See* the hearing of Criminal law Professor Vittorio Manes and his paper: V. Manes, *La vittima, eroe contemporaneo*, in *Diritto di Difesa* (Aug. 7, 2024), https://dirittodidifesa.eu/la-vittima-eroe-contemporaneo-di-vittorio-manes/ (especially at 4, quoting Hobbes' thought and, in particular, his idea that conviction resembles justice far more than acquittal).

[36] *See Judge Michael Luttig's Victim Impact Statement*, PRODPINNC (Apr. 20, 2016), https://prodpinnc.blogspot.com/2016/04/judge-michael-luttigs-victim-impact.html.

Italian scholars of criminal procedure most sensitive to victims' rights, Professor Luca Lupária Donati, called on the Italian Senate for particular prudence, essentially for two reasons, temporal and "topographical."

On the one hand, it appears that what initially (until just over 20 years ago: in particular before Council Framework Decision 2001/220/JHA) could indeed be considered a gap in the protection of crime victims is now largely bridged:[37] "our law, especially the procedural legislation, is now almost redundant in favor of the victim"; "there are many provisions, no lack of them"; "rather one wonders if, perhaps, our system, having been lacking toward the victim, instead today has become too 'drunk' on pro-victim procedural provisions."

Examples include reforms such as Legislative Decree No. 212 of December 15, 2015, which implemented a large part of the provisions of the 2012 European Directive. On that occasion, for instance, several rights to information, translation, of defense (with significant derogations from the accusatory model once "particularly vulnerable" persons are involved) and of restitution were provided for the person claiming to be a crime victim. There is a strong similarity to the list of the so-called Marsy's card,[38] which in the US is specular to the well-known "Miranda rights" provided for the accused. Another symbol of Italian VRM legislation is Law No. 69 of July 19, 2019, which introduced the so-called code red, i.e., a set of regulations (further enhanced by Law No. 168 of November 24, 2023) that created a fast and preferential pathway for cases of domestic and gender-based violence, similar to what happens in emergency rooms for patients in need of immediate relief. The list could go on[39] and also be supplemented with examples of pro "victim" case law, such as the radical deformation of the crime of sexual violence by courts.[40] Moreover, it seems extremely important to consider that the principles of European law, even in the absence of explicit transposition into state law, rank higher than Italian national law; they actually supplement the Italian Constitution. According to article 117 of the Italian Constitution,[41] domestic legislation that does not comply with European law is unconstitutional.

On the other hand, for Lupária Donati, the idea (of the first version of the proposal) of mentioning the protection of victims in the part on criminal proceedings "certainly generates more problems than positive aspects," starting with the choice of the plural in order to disproportionately pit victims against (potentially) a single accused, as seen. More generally, in light of the

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[37] For an overview, *see also* H. Belluta, *Il processo penale ai tempi della vittima*, Giappichelli, Torino, 2019 (some chapters are in English: at 127 ff., 143 ff.).

[38] *See*, with regard to California, https://oag.ca.gov/victimservices/marsy.

[39] For example, Law No. 4 of January 11, 2018, amended the Italian legal system by providing specific measures to protect orphans of domestic crimes while at the same time limiting or eliminating some rights of perpetrators.

[40] Article 609-bis of the criminal code has been interpreted to completely bypass some of its explicit actus reus elements, making it sufficient to prove a lack of consent. *See* G.M. Caletti, *Dalla violenza al consenso nei delitti sessuali. Profili storici, comparati e di diritto vivente*, Bologna University Press, Bologna, 2023, https://buponline.com/prodotto/dalla-violenza-al-consenso-nei-delitti-sessuali/. Even in the field of criminal negligence it is possible to notice a special protection of the "victim" in the Italian case law. Especially in past decades, there have been many convictions for negligent homicide or negligent bodily injury due to a lack of consideration of the principle of self-responsibility in cases with conscious exposure to danger by the "victims" themselves. *See, e.g.,* M.L. Mattheudakis, *Prevedibilità e autoresponsabilità della vittima: uno sguardo critico e propositivo alla casistica*, in M. Helfer, A. Melchionda, K. Summerer (edited by), *Rischio e responsabilità penale in montagna. Gestione e prevenzione in prospettiva comparata*, Giappichelli, Torino, 2023, 91 ff.

[41] Paragraph 1 states: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and the constraints deriving from EU legislation and international obligations."

reforms that have taken place especially in the last decade, he concluded that "we do not need, today, any further imbalances in criminal proceedings." adding that even a placement elsewhere in the Constitution of an explicit enshrinement of crime victims' rights might be unwise.

Lupária Donati is also right when he points out that, rather, it would be necessary to strengthen the extrajudicial assistance networks, which in other European countries, for instance in France,[42] are more developed than in Italy.

Similar critical considerations were voiced by the two Criminal Law Professors who intervened in the hearing, Vittorio Manes[43] and Enrico Amati,[44] who deemed the principle statement of the first version of the proposal superfluous (for the same reasons provided by Lupária Donati) and dangerous to the traditional guarantees of the criminal justice system, not least because it potentially leads to more criminal law (e.g., through the controversial "positive obligations to criminalize") or to harsher criminal law.

That it is not "only"—it would be no small matter, anyway—loosening the guarantees of defendants in criminal proceedings that is at stake is well demonstrated by reforms such as the aforementioned so-called code red, which, in addition to new rules on criminal procedure, introduced a new offense (to tackle the phenomenon of so-called revenge porn:[45] article 612-ter of the criminal code) and it also established harsher punishments for the main crimes related to gender-based violence; a greater harshness of punishment that appears to lack any really valid grounds. The punishment for domestic mistreatment (article 572 of the criminal code) increased from two to six years' imprisonment to three to seven years' imprisonment. The punishment for sexual violence (article 609-bis of the criminal code) increased from five to ten years' imprisonment to six to twelve years' imprisonment. The punishment for stalking (article 612-bis of the criminal code) increased from six months to five years' imprisonment to one to six years and six months' imprisonment.

The fact that even quite articulate sets of regulations such as the one just mentioned often end with the statement that their implementation should not entail new or increased public expenditure reveals the "damned" allure of criminal law, which easily leads to gaining political consensus, exploiting people's emotions, potentially at no cost.

PART V: CONCLUDING REMARKS. DO WE (REALLY) NEED IT (NOW)?

To conclude this paper, it seems useful to summarize the reasons why, all things considered, skepticism must prevail toward the proposal to amend the Constitution that is under discussion in the Italian Senate.

In Italy, there are already many provisions that are shaped by the ideal of protecting crime victims and, even more generally, the community from harmful deeds. Not only that: given that what is proposed is a constitutional enshrinement, it should not be forgotten that the European law on crime

[42] In France there is a structured network ("Fédération France Victimes") of over 100 victim support associations that provide multidisciplinary and professional support to all victims of criminal offences: https://france-victimes.fr.

[43] *See* V. Manes, *supra* note 35.

[44] E. Amati, *La vittima in Costituzione? Una riforma che può alterare gli equilibri del sistema penale*, in *disCrimen* (Oct. 11, 2024), https://discrimen.it/la-vittima-in-costituzioneuna-riforma-che-puo-alterare-gli-equilibri-del-sistema-penale/.

[45] *See* G.M. Caletti, K. Summerer (edited by), *Criminalizing Intimate Image Abuse: A Comparative Perspective*, Oxford University Press, Oxford, 2024.

victims protection is already indirectly embodied in the Constitution through its article 117, as mentioned above.

According to a widespread and widely persuasive narrative, the contemporary Italian criminal justice system is marked by worrisome trends that suggest particular prudence whenever new reform proposals are put forward. In studies by prominent scholars, key expressions to describe this era are, for instance, "Euro-victim-centered" law,[46] victim as "contemporary hero" of "justice by media" ("giustizia mediatica"),[47] "criminal populism,"[48] "maximum criminal law,"[49] "total criminal law,"[50] "media-evo of criminal justice" (a play on words where "evo" recalls the Middle Ages: "medioevo"):[51] in just one summary word, "overcriminalization,"[52] which is further heightened due to the principle of mandatory prosecution.[53] It seems appropriate to point out that the prison overcrowding index is about 133%,[54] and in 2024 the annual record of inmate suicides was broken.[55]

It is not always easy to empirically prove causal relationships between victim-oriented ideals and the effects of tightening criminal law or decreasing traditional criminal justice guarantees, but the considerations developed especially in Part IV of this paper should be sufficient to make understandable an attitude of prudence toward an explicit enshrinement of the crime victim in the Constitution.

It has already been mentioned that the second version of the Italian Senate's reform proposal appears better than the previous one, because it renounces introducing a (problematic) victim protection directly in the proceedings, which would risk (further) losing the features of due process established in 1999. A general principle is thus conceived in the first part of the Constitution, but, to be honest, it cannot really be intended to be merely

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[46] F. Giunta (edited by), *Sussidiario di diritto penale. Parte speciale*, 14, in *disCrimen*, https://discrimen.it/ipertesti/sussidiario-di-diritto-penaleparte-speciale-rev/.

[47] *See* V. Manes, *supra* note 15, at 29–31. The expression "no-limits criminal law" is particularly evocative as well: Id., *Diritto penale* no-limits*. Garanzie e diritti fondamentali come presidio per la giurisdizione*, in *Questione Giustizia* 1/2019, at 86 ff, https://www.questionegiustizia.it/data/rivista/articoli/596/qg_2019-1_14.pdf.

[48] *See, e.g.,* E. Amati, *L'enigma penale. L'affermazione politica dei populismi nelle democrazie liberali*, Giappichelli, Torino, 2020, https://discrimen.it/libri/lenigma-penale/.

[49] N. Mazzacuva, *L'epoca della straripante 'overcriminalization': un possibile (immediato) rimedio*, in *Penale. Diritto e Procedura*, Jan. 18, 2024, at 7 (quoting L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Laterza, Bari, 1989, at 81).

[50] F. Sgubbi, *Il diritto penale totale. Punire senza legge, senza verità, senza colpa. Venti tesi*, il Mulino, Bologna, 2020.

[51] G. Giostra, *Il media-evo della giustizia penale*, in *Sistema penale* (June 14, 2021), https://www.sistemapenale.it/it/opinioni/giostra-media-evo-giustizia-penale.

[52] A. Cadoppi, *Il "reato penale." Teorie e strategie di riduzione della criminalizzazione*, Edizioni Scientifiche Italiane, Napoli, 2022, especially at 39 ff, https://discrimen.it/libri/il-reato-penaleteorie-e-strategie-di-riduzione-della-criminalizzazione/.

[53] Unlike the United States, in Italy the public prosecutor has the obligation to institute criminal proceedings (article 112 of the Constitution).

[54] *See* the official report of the National Guarantor for the Rights of Persons Detained or Deprived of Liberty: https://www.garantenazionaleprivatiliberta.it/gnpl/pages/it/homepage/dettaglio_contenuto/?contentId=CNG16248&modelId=10021.

[55] *See* the official report of the National Guarantor for the Rights of Persons Detained or Deprived of Liberty: https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/8e1d79b6573bb764b41bc0baa5baaf64.pdf. At the end of 2024, the exact number of suicides turned out to be 89 (plus 7 suicides of prison officers): https://www.polpenuil.it/langolo-della-stampa/12526-a-piacenza-l89esimo-suicidio-del-funesto-2024-non-ce-speranza-comunicato-stampa.html#:~:text=Un%20detenuto%20tunisino%20di%20soli,appunto%2C%20non%20%C3%A8%20ancora%20finito.

symbolic. It is important to consider that article 24 of the Italian Constitution concerns the protection of rights in the specific context of jurisdiction and not purely in general. It then appears more fair the position of those in the U.S. debate who promote the reform of state constitutions and aim to amend the federal Constitution as well, making it clear that the goal is to enhance existing rights, recognize new ones and not allow the circumvention of principles that otherwise—it is said—might not be taken seriously enough.[56]

But even if it were a matter of accepting a merely symbolic principle statement today, the point is that we do not need it at all right now. The principle, in itself, has the power to appear intuitively right, almost tautological, but any normative amendment cannot be considered out of context. Even the most right thing said or done at the wrong time can produce negative effects.

The enhancement of symbolism in the two most media-attracting cases in recent years of men killing their female partners is of no small concern: the murder of Giulia Tramontano and that of Giulia Cecchettin, both occurred in 2023. On November 25 ("International Day for the Elimination of Violence against Women") 2024, in the first case, the defendant was sentenced to life imprisonment[57] and, in the second case, the prosecutor urged the same punishment, later actually applied, against the other defendant;[58] previously there had been repeated boycotts and threats (even death threats) to his defense attorney.[59]

Similar trends can also be seen outside Italy. In recent months, a great amount of media attention has been focused on the case of a French woman who was sexually abused, on several occasions, by her husband and many other people after being, each time, purposely put into a state of unconsciousness. The woman actively faced the trial, symbolically keeping her husband's last name—despite the woman being the absolute protagonist in the media narrative, this case is known as the "Pelicot case," from her husband's last name—and setting herself as an example of strength and courage for other victims. The press throughout the Western world welcomed the decision (obviously of conviction for all the defendants) as a symbolic moment of justice and hope, although it was pointed out everywhere, with a bit of dissatisfaction, that only the husband was convicted to the maximum punishment possible.[60]

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[56] P.G. Cassell, M. Garvin, *supra* note 22, at 138–139.

[57] *Alessandro Impagnatiello Sentenced to Life Imprisonment for the Murder of Giulia Tramontano,* IL MESSAGGERO (Nov. 25, 2024), https://www.ilmessaggero.it/en/alessandro_impagnatiello_sentenced_to_life_imprisonment_for_the_murder_of_giulia_tramontano-8500192.html.

[58] *Cecchettin Case: The Prosecutor Asks for Life Imprisonment for Filippo Turetta*, AGENZIA NOVA (Nov. 25, 2024), https://www.agenzianova.com/en/news/cecchettin-case-the-pm-asks-for-life-imprisonment-for-filippo-turetta/. *See* Laura Gozzi, *Giulia Cecchettin: Ex-boyfriend Turetta sentenced to life in jail*, BBC NEWS (Dec. 3, 2024), https://www.bbc.com/news/articles/clyjnp74jldo.

[59] *See* the joint statement of the Italian Association of Criminal Law Professors and the Union of Italian Criminal Chambers: https://www.aipdp.it/allegato_news/252_Comunicato-congiunto-AIPDP-UCPI-Sulle_minacce_al_Prof_Caruso_difensore_Turetta_4_12_24.pdf.

[60] *See* the headline of a New York Times article "With Guilty Verdicts, Rape Victim's Ordeal in France Becomes a Message of Hope," which associates the conviction with a message of hope: https://www.nytimes.com/2024/12/19/world/europe/pelicot-rape-trial-guilty-verdict.html. The article points out that the victim's husband, "Dominique Pelicot, 72, who had admitted to drugging her over nearly a decade to abuse her, was the only one to get the maximum sentence: 20 years. The rest were given sentences mostly ranging from six to nine years."

If one considers that the latest accredited statistics do not show a significant increase in crime rates compared to pre-pandemic ones (+1.7% over 2019)[61], then, *a fortiori*, the conclusion that Vitiello reaches with respect to the U.S. should be valid in Italy: "The recent increase in crime rates, after years of declining crime rates, may give the VRM the boost that it needs to push the constitutional amendment across the finish line. That would be unfortunate."[62]

Rather, there should be investment in the invaluable multidisciplinary victim support services, which work on a daily basis away from the antagonistic context of the trial and the media "spotlight." This is a plan that deserves strengthening, undoubtedly also through a significant deployment of public funds.[63] As Lupária Donati, among others, reminded in the Senate hearing, that is the part of the European regulations that should still be implemented. It is in that same context that it is also more plausible to imagine effective protection for victims without the need, at the same time, to strike a balance with the guarantees of the accused.

In contrast to the recurring distortions of the system, a recent reform on restorative justice (Legislative Decree No. 150 of October 10, 2022) emerges as a notable exception. It focuses on attentions to the victim that, by vocation, tend to shift the focus away from the proceedings. It also has the virtue of promoting a "justice without sword"[64] and opposing the criminogenic dogma of "punishment as a doubling of evil."[65] This reaffirms the deeper meaning of the principle of resocialization enshrined in article 27 of the Constitution, which must remain the main point of reference of Italian criminal law.

[61] According to an ISTAT statistical survey (2019–2023), felonies reported by law enforcement agencies to the Italian judicial authority were 2,301,912 in 2019 (the last pre-pandemic year), 1,900,624 in 2020, 2,104,114 in 2021, 2,255,777 in 2022, 2,341,574 in 2023 (the first post-pandemic year): https://esploradati.istat.it/databrowser/#/en/dw/dashboards.

[62] M. Vitiello, *supra* note 11, at 4.

[63] The development of a specific social service, tailored to the needs of crime victims, is suggested in F. Palazzo, F. Viganò, *Diritto penale. Una conversazione*, il Mulino, Bologna, 2018, at 94–95.

[64] G. Mannozzi, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, Giuffrè, Milano, 2003.

[65] M. Donini, *Per una concezione post-riparatoria della pena. Contro la pena come raddoppio del male*, in *Rivista italiana di diritto e procedura penale*, 2013, 1162 ff. For a fairly recent overview of the impact of restorative justice in the U.S., *see* the report by the Bureau of Justice Assistance: https://bja.ojp.gov/news/justice-matters/desk-bja-november-2023.