

COVID-19 AND CRIMINAL JUSTICE. EUROPEAN SUGGESTIONS TO PROTECT THE MOST VULNERABLE SUBJECTS

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Summary

The current sanitary emergency is not an unexpected event. At the beginning of 2020, COVID took the world by surprise; now, at the end of 2021, it is a problem we have to live with. The pandemic changed the notion of vulnerability, and it is necessary to equip support structures for the weakest subjects. The thesis is also confirmed in the relationship between criminal authority and people who, for various reasons, come into contact with it and who, due to the health measures, are in a situation of particular isolation and potential danger in terms of their own psycho-physical integrity. The concept of vulnerability takes on a new meaning: public authority has to take charge of the claims derived (albeit indirectly) from the health emergency. The inert conduct of states is reprehensible: it causes irreparable damage to individual rights, protected by supranational sources.

Keywords: COVID-19; vulnerability; criminal justice; domestic violence; prison law; European Convention of Human Rights; Istanbul Convention.

1 INTRODUCTION

The endemic vagueness¹ of the term “vulnerability” obliges us to consider, firstly, a vocabulary definition: it is the attribute of the person exposed to the eventuality of

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1 Barbara Fawcett, “Vulnerability: Questioning the Certainties in Social Work and Health”, *International Social Work* 52, no. 4 (2009): 473-484, defines vulnerability as a *notoriously vague term*.

being physically or psychically² attacked. It is impossible to enumerate the potential phenomena that could generate a person's inability to defend themselves from aggressive natural or human factors, from disadvantageous conditions determined by particular individual characteristics, or from the discriminatory application of certain social or legal rules.³ Therefore, it is difficult – if not impossible – to achieve the aim of identifying good solutions to overcome the disadvantages of people found in contexts of weakness.⁴

For this reason, it is necessary to narrow the field of our investigation, to deepen the notion of vulnerability with regard to the relationship between the individual and the criminal justice system, and to examine the repercussions determined by the COVID-19 emergency on people who have had contact with the authority responsible for ascertaining crimes or executing sentences.

The concept of vulnerability imposed itself in European law, with reference to particular weak subjects:⁵ the attribute in question is used on the basis of parameters and criteria that can be obtained, from time to time, from the rules and by reason of the objectives pursued by the European institutions.⁶ The concept is elusive and its amplitude, on the one hand, allows it to be adapted to different areas of social life but, on the other hand, does not permit an easy definition.⁷

A common feature of the various definitions is the reference to the possible risk for vulnerable people:⁸ in other words, it is necessary to consider whether the person is exposed to a danger to himself and whether he has the resources to deal with it.⁹

Another factor deserves attention. Normally, European law applies vulnerability to criminal justice in order to safeguard victims or witnesses;¹⁰ due to the current

2 Jonathan Herring, *Vulnerable Adults and the Law* (Oxford: Oxford Scholarship Online, 2016), 6.

3 Enrico Diciotti, “La percezione e i problemi della vulnerabilità”, *Etica & Politica* 12, no. 1 (2020): 239-252.

4 Enrico Diciotti, “La vulnerabilità nelle sentenze della Corte europea dei diritti dell'uomo”, *Ars interpretandi* no. 2, (2018): 13-31.

5 Weak subjects are not only victims of crime: European Court of Human Rights, 26th March 1996, *Doorson v. Netherlands* requires protecting vulnerable witnesses *in* the trial and *from* the trial.

6 Marco Bouchard, *Sulla vulnerabilità nel processo penale*, www.dirittopenaleuomo.org.

7 See Mike Brodgen, and Preeti Nijhar, *Crime, Abuse and the Elderly* (Milton Park: Willan Publishing, 2013), 44; Catriona Mackenzie, Wendy Rogers, and Susan Dodds, eds., *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford: Oxford Scholarship Online, 2014).

8 Dolores Morondo Taramundi, “Un nuevo paradigma para la igualdad? La vulnerabilidad entre condición humana y situación de indefensión / A New Paradigm for Equality? Vulnerability as Human Condition and a State of Defencelessness”, *Cuadernos Electrónicos de Filosofía del Derecho* 34 (2016): 209.

9 It is possible to distinguish between the internal and external dimensions of the concept: on the one hand, there is the ability to deal with the risk; on the other, there is the individual exposition to the danger. See, Cristina Churruca Muguruza, “Vulnerabilidad y protección en la acción humanitaria”, in: *Vulnerabilidad y protección de los derechos humanos*, eds. Cristina Churruca Muguruza, and Maria del Carmen Barranco Avilés (Valencia: Tirant lo Blanch, 2014), 45-70.

10 See Hervé Belluta, *Il processo penale di fronte alla vittima particolarmente vulnerabile*:

pandemic, we need to expand our horizons in order to give voice and protection to those who, in contact with the criminal authority, are in a more marked position of fragility because of the effects of the measures connected to the health emergency.

This will be the approach to the theme: the objective – *i.e.*, the protection of vulnerable peoples – requires we frame the risk factors and, from their identification, to understand the possible solutions to safeguard the weakest subjects: it is the *finalistic method*, used by the European judges.¹¹

It is correct to say that the more serious the danger to someone's integrity (not just physical), the more urgently and effectively protection must be accorded to them. Therefore, it becomes a priority to understand who can be defined as a vulnerable subject: looking at our investigation topic, the perimeter of the analysis will be limited to contacts with criminal justice in the COVID-19 era; thus, it will be possible to give concrete solutions for the best protection of the weakest people during the pandemic emergency.

2 SUGGESTIONS FROM THE ECHR AND ISTANBUL CONVENTION

Always with a view to set our approach to the research subject, it is useful to identify the regulatory parameters from which derives the obligation for national authorities to protect the weakest people.

Different sources concur to safeguard the fundamental rights: the protection of the vulnerable is an objective of common interest, pursued by international, European and domestic law. Not all supranational sources define the content of the rights with precision, but they require respect for them and refer to other (national or international) sources that describe them in a more specific way.¹²

For example, European Union law demands respect for fundamental rights and refers to prescriptions found in the European Convention of Human Rights, the Charter of Nice and national constitutions.¹³ In turn, these norms have to be implemented with the domestic or supranational rules or, better, with the interpretation of the national or international law offered by internal or European courts.¹⁴

aspirazioni (comunitarie) e aporie nazionali, www.la legislazione penale.eu.

11 For example, this method was recently followed by the European Court of Human Rights, 27th May 2021, *J.L. v. Italy*.

12 Daniel Augenstein, "Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law", *German Law Journal* 14, no. 10 (2013): 1917-1938.

13 For example, with reference to the framework decision on European Arrest Warrant (Article 1, paragraph 3). See Nina M. Schallmoser, "The European Arrest Warrant and Fundamental Rights: Risks of Violation of Fundamental Rights Through the EU Framework Decision in Light of the ECHR", *European Journal of Crime, Criminal Law and Criminal Justice* 22, no. 2 (2014): 135-165. More generally, Michele Caianiello, "To Sanction (or not to Sanction) Procedural Flaws at EU Level? A Step Forward in the Creation of an EU Criminal Process", *European Journal of Crime, Criminal Law and Criminal Justice* 22, no. 4 (2014): 317-329; Marcello Daniele, "La triangolazione delle garanzie processuali fra diritto dell'Unione europea, Cedu e sistemi nazionali", *Diritto penale contemporaneo* 6, no. 4 (2016): 48-60.

14 Ruti Teitel, "Transnational Justice Globalized", *The International Journal of Transnational*

Thus, a set of normative and jurisprudential sources safeguard the individual rights: the standard of protection to be ensured must be the highest possible on the basis of concurring sources;¹⁵ at the European level, this is confirmed both by Article 53 of the Nice Charter and by Article 53 of the ECHR.¹⁶ Thus, we refer to the Istanbul Convention and ECHR as promoters of the highest standard of protection, also referred by the European Union law.

For greater detail, we suggest a combined reading of Article 3 ECHR – from which derives the obligation for states parties to protect the psycho-physical integrity of the population and to avoid dangerous situations – and Article 51 of the Istanbul Convention, providing for a risk evaluation made by the internal authority to safeguard the victims of gender-based crimes.

It is well-known that the obligation imposed by Article 3 ECHR shall be triggered provided a dangerous situation is *predictable*¹⁷ and the risk to a person's integrity is *concrete*.¹⁸ For the correct application of this conventional principle, state parties have to draft rules that are able to ensure the adequate protection of the population, especially those individuals most exposed to risks for their safety. At the jurisdictional level, the national authority must safeguard victims of attacks on psycho-physical integrity during investigations and trials: in particular, full investigations must be warranted,¹⁹ the police must act immediately,²⁰ victims must have easy access to the police or aid structures,²¹ internal courts must ensure procedural fairness to protect the defendant²² and the injured;²³ and lastly, national authorities have to adapt their systems to protection standards established by international rules in the defense of fundamental rights.²⁴

On the other hand, Article 51 of the Istanbul Convention requires state parties to identify potential risk factors for victims of gender-based violence, to assess the

Justice 1, no. 2 (2008): 1-4.

15 It is possible to talk about a European public order, expressing the common values on which European culture and identity are built: for some considerations on contiguous topics, see Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", *Human Rights Law Review* 14, no. 3 (2014): 487-502; Giuseppe Martinico, "Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts", *European Journal of International Law* 23, no. 2 (2012): 401-424.

16 One can speak of the *best protection clause*. See Nina Louisa Arold Lorenz, Xavier Groussot, and Gunnar Thor Petursson, eds., *The European Rights Culture. A Paradox of Human Rights Protection in Europe?* (Leiden-Boston: Martinus Nijhoff Publisher, 2013). According to Jonas Bering Liisberg, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?", *Common Market Law Review* 38, no. 5 (2001): 1171, the significance of the Article 53 of the Charter of Nice is identical to that of the Article 53 ECHR.

17 Recently, European Court of Human Rights, 5th November 2020, *Ćwik v. Poland*.

18 See European Court of Human Rights, 14th January 2021, *Kargakis v. Greece*.

19 European Court of Human Rights, 2nd March 2017, *Talpis v. Italy*.

20 European Court of Human Rights, 18th October 1998, *Osman v. United Kingdom*.

21 European Court of Human Rights, 27th May 2014, *Rumor v. Italy*.

22 European Court of Human Rights, 27th October 2020, *Ayetullah A.Y. v. Turkey*.

23 European Court of Human Rights, 13th October 2020, *Zakharov e Varzhabeytan v. Russia*.

24 European Court of Human Rights, 16th July 2013, *Mudrić v. Moldavia*.

possible lack of protection with reference to each risk factor and to prepare adequate measures to prevent dangerous situations for the victims.²⁵ In other words, the Convention obliges state parties to take any necessary legislative or other steps to ensure that an evaluation of risk is carried out by all internal authorities in order to manage the risk and provide coordinated safety and support if necessary.²⁶

In short, the obligation of risk assessment to protect victims of gender-based crimes derives from Article 51 of the Istanbul Convention; this evaluation must foresee legislative measures aimed at safeguarding the most vulnerable subjects, including during investigations or trials for violent crimes; the inertia of national authorities must be sanctioned on the basis of Article 3 ECHR.

The link between these two international rules requires the application of the scheme outlined by Article 51 of Istanbul Convention outside the category of gender-based crimes. The risk assessment²⁷ is a useful tool to implement the concrete execution of the obligations derived by Article 3 ECHR.

The thesis will be demonstrated with reference to three exemplary sectors:

- the situation of victims of domestic violence during the lockdown or other restrictions due to COVID-19;
- the daily life of prisoners during the pandemic period;
- the condition of private parties in criminal trials postponed because of the health emergency.

In all three cases, it is worth considering that nowadays, COVID-19 is not an unexpected event as it was during the spring of 2020: rather, it is a concrete and predictable dangerous situation for a lot of people; following the reasoning set forth by European courts, the national inertia in the face of such a danger is punishable on the basis of Article 3 ECHR, and whoever suffers the violation of their integrity deserves protection according to the paradigm described by Article 51 of the Istanbul Convention, applied as a general rule even beyond cases of gender-based violence.

3 VICTIMS OF DOMESTIC VIOLENCE

In the wave of the first outbreaks of COVID-19, a lot of European countries imposed the lockdown and, with it, isolation, social distancing and the possibility to leave home only for work reasons, groceries or special needs. The measure was effective on certain aspects: in a few months, infections, hospitalizations and deaths due to the virus decreased; however, some suffered negative repercussions in terms

25 See Urszula Nowakowska, "Ocena ryzyka w sprawach o przemoc w rodzinie", in: *Jak skutecznie chronić ofiary przemocy w rodzinie*, ed. Lidia Mazowiecka (Alphen aan den Rijn: Wolters Kluwer, 2013), 259-276.

26 See Ronagh J.A. McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Milton Park: Routledge, 2017).

27 Giuseppe Battarino, *Note sull'attuazione in ambito penale e processuale penale della Convenzione di Istanbul sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, www.penalecontemporaneo.it (2013), notes that the expression *risk assessment* is more suited to the corporate economic sector than to that of the criminal trial.

of unemployment, poverty or psychological disorders.²⁸ Between 2020 and 2021, along with the new waves of the contagion, similar restrictions of citizens' freedom of movement were imposed by many European governments. The facts are well known and do not deserve further attention; it only needs to be emphasized that the closures have been – and still are, where imposed – a risk factor for the victims of domestic violence, forced to stay at home with their attackers.²⁹ Economic stress, instability or reduced options for support have exacerbated family violence during the pandemic, often creating unsustainable situations within the most fragile households.³⁰

This situation created many problems, such as communication difficulties for victims, difficulty for the police in protecting them, or, again, high rates of family crimes.³¹ Among possible solutions, European governments could have invested in serious information on assistance tools during the lockdown,³² in safe-house projects (with physical and psychological assistance and support team for victims, composed by medicals, lawyers, cultural mediators, educators, etc.) or, later, in anti-violence centers for first aid for the injured to inform victims of the possibility to be helped with a access to police, lawyers, hospitals, safe houses, etc.

The COVID-19 emergency amplified social disadvantage and exalted the contexts of vulnerability,³³ which imposed on states the obligation to prepare and respond to the social crisis. In other words, the greater the risk for the individual, the greater the degree of vulnerability – and the greater effort is required for national authorities to support the weakest subjects. As we have seen, this is the rule derived from Article 3 ECHR and from Article 51 of the Istanbul Convention.

The link between the severity of the COVID-19 restriction measures and the importance of the protection that the internal authority should guarantee to the most vulnerable people can be demonstrated through the analysis of the data on family crimes committed in Italy during the pandemic period. An overall reading indicates that during the full lockdown, the number of reported crimes was lower than the corresponding periods of the years without the COVID-19 emergency; however, this does not mean that no crimes committed, but rather that victims did not report the violence they suffered.

28 Dalida Rittossa, “The Institute of Vulnerability in the Time of the COVID-19 Pandemic. All Shades of the Human Rights Spectrum”, *ECLIC* 5 (2020): 820-852 explores the impact of the pandemic emergency on the most vulnerable subjects.

29 Kim Usher *et al.*, “Family Violence and COVID-19: Increased Vulnerability and Reduced Options for Support”, *International Journal of Mental Health Nursing* 29, no. 4 (2020): 549-552.

30 Amber Peterman *et al.*, “Pandemics and Violence against Women and Children”, *Center for Global Development Working Paper* 528 (2020): 1-43.

31 Nicole van Gelder *et al.*, “COVID-19: Reducing the Risk of Infection Might Increase the Risk of Intimate Partner Violence”, *EClinicalMedicine* 21, no. 2 (2020): 1-2.

32 In a similar way to what happened during previous episodes of social isolation associated with health emergencies: see Jennifer Boddy, Amy Young, and Patrick O’Leary, *Cabin fever. Australia Must Prepare for the Social and Psychological Impacts of a Coronavirus Lockdown*, www.theconversation.com.

33 Erin N. Biggs *et al.*, “The Relationship Between Social Vulnerability and COVID-19 Incidence Among Louisiana Census Tracts”, *Frontiers in Public Health* 8, (2021): 1-7.

With reference to the ECHR, from Article 3 comes the obligation for national authorities to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the rights to life and integrity.³⁴ States must apply rules able to safeguard people's safety in the context of any activity – public or not – in which the rights of the individual may be at risk,³⁵ including family life. Internal legislators must draft rules able to ensure the adequate protection for victims of domestic violence. Indeed, the national authority must be aware of the existence of a general problem and its possible complications deriving from particular situations:³⁶ in the interests of our study, domestic violence certainly qualifies as such a problem, and the COVID-19 pandemic is a factor able to complicate it.

We can define this level of protection as *primary, early* and *general* with respect to violations of conventional parameters. It is possible to distinguish between the obligation of social protection – implying State knowledge of a problem or, rather, of a general risk to the people – and the obligation to take specific protective measures, implicating the knowledge of a specific type of risk: real and immediate.³⁷ Thus, a second level of protection is highlighted in the face of a singular violation on which the internal authority must take action – the protection offered by the judicial or investigating authority.

The need to make this type of safeguard effective requires consideration of some parameters of correctness in ascertaining any violations of the conventional principles. Criminal law becomes an instrument for the protection of victims' rights;³⁸ precisely in this sense, the first obligation of internal authority is to conduct *full and effective investigations*,³⁹ able to frame the facts and identify the potential perpetrators, with

34 European Court of Human Rights, 20th March 2008, *Budayeva v. Russia*. See also, Vladislava Stoyanova, "The Disjunctive Structure of Positive Rights under the European Convention on Human Rights", *Nordic Journal of International Law* 87, no. 3 (2018): 344-392.

35 European Court of Human Rights, 30th November 2004, *Öneryildiz v. Turkey*.

36 European Court of Human Rights, 24th October 2002, *Mastromatteo v. Italy*.

37 Vladislava Stoyanova, "Fault, Knowledge and Risk Within the Framework of Positive Obligations under the European Convention on Human Rights", *Leiden Journal of International Law* 33, (2020): 601-620.

38 The interpreting work put in place by the Strasbourg Court has transformed the traditional concept of criminal law: it once was intended as an instrument aimed at defending society through the action of authority, capable of prejudicing the rights of the recipients of the incriminating norm; nowadays, it is an instrument able to protect the fundamental rights of the individual in concrete contexts in which the public authority remains inert. See Francesco Viganò, "Obblighi convenzionali di tutela penale?", in: *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, eds. Vittorio Manes, and Vladimiro Zagrebelsky (Milano: Giuffrè, 2011), 243-298; Laurens Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights", in: *Human Rights and Civil Rights in the 21st Century*, eds. Eva Brems, and Yves Haeck (Dordrecht: Springer, 2014), 69-129.

39 Juliet Chevalier-Watts, "Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?", *European Journal of International Law* 21, no. 3 (2010): 701-721; Eva Brems, "Procedural Protection: An Examination of Procedural Safeguards Read into the Substantive Convention Rights", in: *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining*

reference to the risk of a real and immediate threat to victims.⁴⁰ In this reasoning, the reference to the Istanbul Convention is evident.⁴¹ Article 49 provides that states shall take necessary measures to ensure that investigations and judicial proceedings on all forms of violence are carried out without undue delay while taking into consideration the rights of victims during all states of criminal proceedings.

The ECHR calls national authorities to conduct investigations with due diligence, but also quickly, with an immediate activation of the police:⁴² the delay in collecting the elements of the investigation can be fatal for the successful outcome of the ascertainment and for the full protection of crime victims.⁴³ Precisely for this reason, the police must be easily accessible to the complainant, who must have the possibility to expose the facts immediately and to benefit from an equally immediate activation of the police.⁴⁴

In fact, national investigators and judges must ensure compliance with international standards for protecting victims.⁴⁵ The goal is ensuring the standard of procedural fairness during criminal proceedings, both to protect the defendant⁴⁶ and to safeguard victims' rights;⁴⁷ it is impossible to assure the injured persons of the answers to their questions without a process preceded by effective and rapid investigations⁴⁸ that is fully respectful of the exploratory function assigned to this segment of the criminal procedure.⁴⁹

The legislative production of the European Union confirms these reflections:⁵⁰ the catalogue of rights recognized to crime victims, firstly with the Framework Decision 2001/220/JHA and then with the Directive 2012/29/EU, must be implemented by an

the Scope of Human Rights, eds. Eva Brems, and Gerards Janneke (Cambridge: Cambridge University Press, 2014), 137-161; David Harris *et al.*, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2018).

40 See European Court of Human Rights, 2nd March 2017, *Talpis v. Italy*.

41 Sara De Vido, "The ECtHR *Talpis v. Italy* Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention?", *Ricerche giuridiche* 6, no. 2 (2017): 7-15.

42 See European Court of Human Rights, 18th October 1998, *Osman v. United Kingdom*.

43 Cristiana Valentini, "La completezza delle indagini, tra obbligo costituzionale e (costanti) elusioni della prassi", *Archivio penale* 3 (2019): 1-23.

44 See European Court of Human Rights, 27th May 2014, *Rumor v. Italy*.

45 On this topic, Ronagh J.A. McQuigg, "Domestic Violence as a Human Rights Issue: *Rumor v. Italy*", *European Journal of International Law* 26, no. 4 (2016): 1009-1025; Ignacio José Subijana Zunzunegui, *El principio de protección de las víctimas en el orden jurídico-penal: del olvido al reconocimiento* (Granada: Editorial Comares, 2006).

46 European Court of Human Rights, 27th October 2020, *Ayetullah A.Y. v. Turkey*.

47 European Court of Human Rights, 13th October 2020, *Zakharov v. Varzhabyeyan v. Russia*.

48 *Mutatis mutandis*, European Court of Human Rights, 23rd February 2016, *Nasr and Ghali v. Italy*.

49 Mariangela Montagna, "Obblighi convenzionali, tutela della vittima e completezza delle indagini", *Archivio penale* 3 (2019): 1-18.

50 See again Daniel Augenstein, "Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law", *German Law Journal* 14, no. 10 (2013): 1917-1938 or Marco Venturoli, *La tutela della vittima nelle fonti europee*, www.penalecontemporaneo.it. See Marie Laure Lanthiez, "La clarification des fondements européens des droits des victimes", in: *La victim sur la scène pénale en Europe*, eds. Geneviève Giudicelli-Delage, and Christine Lazerges (Paris: Presses Universitaires de France, 2008), 143-158.

action of judges and investigators able to give substance to the set of instruments coined at a regulatory level. In other words, both Strasbourg jurisprudence and European Union Law indicate the relationship between the two levels of protection of fundamental individual rights: the legislator is obliged to establish general and abstract rules to protect the weakest people, but the operators of criminal proceedings must concretely apply those rules and prevent specific violations.

If the first obligation deriving from Article 3 ECHR - but also from Article 51 of the Istanbul Convention - for states parties is to adopt rules aimed at ensuring adequate standards of victim protection from a predictable and concrete dangerous situation, during the COVID-19 period, the first interest of national authority must be to identify a meeting point between public health protection and the safeguarding of the psycho-physical integrity of potential victims of domestic violence, forced to stay at home with their attackers. In order to achieve this aim, it is necessary for states to invest more in the protection of the most vulnerable people: for example, it would be good for governments to create programs to implement care facilities for abused women or, more generally, for victims of family crimes. During the pandemic, a good solution to facilitate contacts between the police and people asking for help was the development of apps, able to warn authorities of a danger without making a phone call. For the future, an investment in this direction would be appropriate, perhaps creating a network of relations between the police, citizens and other support structures.

Ad hoc rules and economic investments provide the only way to allow the true protection of domestic violence victims. Otherwise, people suffering from family crimes will not report the violence perpetrated within the walls of their homes due to the forced cohabitation with the offender: such a state of affairs would make the investigation of brutal episodes impossible. For a real, full and effective investigation, an essential factor is to give voice to victims; but, during the lockdown, it is impossible – or, at least, very difficult – if the physical (the cohabitation) and mental (the sense of fear) bond between the injured person and the attacker is not broken.

Ultimately, the COVID-19 emergency demonstrated a relationship between the obligation deriving from Article 3 ECHR, such that, if the internal authority does not adopt an effective regulatory framework to provide general protection for victims, it is impossible for the police to carry out full and effective investigations and for the judge to uphold fair trials of violent crimes. On the other hand, the Istanbul Convention imposes on states to assess the risk for victims of gender-based or domestic violence (Article 51) and to prepare rules of protection (Article 49).

Therefore, it can be assessed that future condemnation is possible for states that will not adapt their rules for the protection of domestic violence victims in the eventuality of new restrictions due to a health emergency. Such a decision would be justified on the basis of Article 3 ECHR, interpreted according to the Strasbourg case law already examined and read in connection with the Istanbul Convention as well as all international law aimed at protecting the weakest people.

4 THE DAILY LIFE OF THE PRISONERS

The definition of vulnerability may be applied to prisoners at the time of COVID-19. Each prison is a potentially dangerous place as overcrowding conditions facilitate the development of outbreaks;⁵¹ it's very difficult - or, rather, it is impossible, given the feature of the prison as a *total institution*⁵² - to avoid gatherings and respect the safety distance between inmates living in cells full of people.⁵³ The less than optimal hygienic conditions hinder the prevention of the contagion; another risk factor is constituted by those working in the prison (correctional officers, nurses, chaplains, wardens, etc.): they have the potential to carry the virus into facilities and back out into their communities.

Many people held behind prison walls face ongoing health problems, including tuberculosis, HIV or respiratory diseases (asthma, emphysema, respiratory insufficiencies, pulmonary fibrosis, etc.). The risk associated with the COVID-19 pandemic is much more real for prisoners afflicted by one or more pathologies: the virus moves silently, many COVID patients are asymptomatic, the evolution of the disease is not always clear and the symptoms may vary from person to person. These characteristics, combined with the particularity of the prison context, increase the danger of the current pandemic period for prisoners.

Given these premises, it is necessary to study the Strasbourg case law in the matter of prisoners' health.

In the case of *Kargakis vs. Greece*⁵⁴ the European Court expressed some criteria for the judge called to decide on issues related to inmates' daily life. More specifically, the Strasbourg judges explained the rights of prisoners in order to have a quick answer to address their health problems. The national judge didn't take a position on the prison life of the applicant but released him on the sole premise that was no danger of the crime's repetition. The person concerned didn't have the opportunity to assert his poor imprisonment conditions, in relation to his state of health, before the domestic authority: this is enough to censure the conduct of the internal judge for the violation of Article 3 ECHR.⁵⁵

Not every violation of the psycho-physical integrity of the prisoners infringes on Article 3 ECHR: it is necessary that a *minimum level of severity*⁵⁶ must be reached in view of the duration of the conduct, the characteristics of the victim and the

51 Justin T. Okano, and Sally Blower, "Preventing Major Outbreaks of COVID-19 in Jails", *Lancet* 395, (2020): 1542-1543.

52 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New Jersey: Penguin Books, 1968).

53 Brenda Vose, Francis T. Cullen, and Heejin Lee, "Targeted Release in the COVID-19 Correctional Crisis: Using the RNR Model to Save Lives", *American Journal of Criminal Justice* 45, no. 4 (2020): 769-779.

54 European Court of Human Rights, 14th January 2021, *Kargakis v. Greece*.

55 See also European Court of Human Rights, 11th October 2011, *Khatayev v. Russia*; European Court of Human Rights, 9th September 2010, *Xiros v. Greece*; European Court of Human Rights, 10th February 2004, *Gennadiy Naoumenko v. Ukraine*; European Court of Human Rights, 27th June 2000, *Ilhan v. Turkey*.

56 European Court of Human Rights, 18th January 1978, *Ireland v. United Kingdom*.

consequences of the event.⁵⁷

By definition, staying in prison brings suffering to inmates: treatment causing abnormal pain violates Article 3 of the ECHR. The Strasbourg Court explained some factors to identify what does not qualify as normal suffering in prison:⁵⁸ such an atmosphere of tension and emotion to condition the work of the authorities,⁵⁹ the systematic nature of violence inflicted on inmates,⁶⁰ the special vulnerability of victims,⁶¹ the (not) justified prolonged application of particular restrictions to prisoners⁶² or the delay in taking the person subjected to violence to facilities with adequate sanitation.⁶³ The criterion of the minimum level of severity allows to distinguish between punishment and torture or inhuman or degrading treatment.⁶⁴

The analysis of the *Kargakis* case forces us to consider a new concept of vulnerability applicable to inmates coerced to live in conditions exceeding the normal level of severity of the prison environment.

During the COVID-19 emergency, the detainees are individuals at risk of contagion, much more than other categories: in many states, there have been considerable efforts to safeguard, for example, students in schools and universities; the debate of the opportunity of online teaching rages throughout Europe; passing to another sector, the simple consultation of the institutional websites of the judicial offices of various European countries show that preventive measures are applied to protect the health of magistrates, lawyers and people who frequent the courts; similar considerations apply to transport, bars, restaurants, places of worship and, of course, hospitals and treatment centers.

This massive effort demonstrates that, nowadays, internal authorities identified the groups most at risk and prepared safety measures: after all, it is the European Convention of Human Rights that imposes the obligation for national authorities to put in place legislative and administrative frameworks able to protect the right to a life of integrity.

An identical effort must be made to safeguard the prison population.

The current pandemic emergency is not compatible with the traditional characteristics of prison life; thus, it is accurate to say that each prison is a potentially dangerous place, and this historic moment could be the occasion to finally review the features of the criminal sanction.

57 See Michael K. Addo, and Nicholas Grief, "Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?", *European Journal of International Law* 9, no. 3 (1998): 510-524.

58 Francesco Cecchini, *La tutela del diritto alla salute in carcere nella giurisprudenza della Corte europea dei diritti dell'uomo*, www.penalecontemporaneo.it.

59 European Court of Human Rights, 1st June 2010, *Gäfgen v. Germany*.

60 European Court of Human Rights, 28th July 1999, *Selmouni v. France*.

61 European Court of Human Rights, 21st January 2011, *M.S.S. v. Belgium and Greece*.

62 European Court of Human Rights, 28th June 2005, *Gallico v. Italy*.

63 European Court of Human Rights, 27th June 2000, *Ilhan v. Turkey*.

64 Grazia Mannozi, "Diritti dichiarati e diritti violati: teoria e prassi della sanzione penale al cospetto della convenzione europea dei diritti dell'uomo", in: *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, eds. Vittorio Manes, and Vladimiro Zagrebelsky (Milano: Giuffrè, 2011), 299-376.

Traditionally, the prison experience is associated with the deprivation or the frustration of social acceptance, material possession, heterosexual relationships, personal autonomy and personal security.⁶⁵

The current pandemic emergency emphasized these aspects due to the isolation, the lack of information and the uncertain link between the contradictory news about the virus and the evolution of the contagion.⁶⁶

To avoid the “no time” reaction⁶⁷ and to limit the inmates’ suffering, it would probably have helped – and it will help, in the event of new closures – to explain the evolution of the pandemic to detainees, offering them qualified psychological support, maintaining or even increasing their contact with family and friends, and using new technologies, as has been the case for other areas of life. Then, the control of the health state of prisoners must be widespread, meaning the inmates must be equipped with prevention tools. The international scientific community defined the measures to avoid or limit the contagion, and they must also be applied in prisons.

The two combined elements of the predictability of the COVID-19 emergency and the vulnerability of detainees oblige national authorities to protect the physical (but also the psychological) health of prisoners: the failure to prepare regulatory measures and jurisprudential responses to protect inmates at risk of COVID violates Articles 2 and 3 of the ECHR, depending on whether the situation endangers the lives or the integrity of prisoners.⁶⁸ The current pandemic cannot be an excuse to worsen prison standards; this emergency must be an opportunity to implement the rights of detainees as well as those recognized to free individuals, a goal imposed by humanitarian international law and European law first and foremost.

5 THE DELAYS IN CRIMINAL JUSTICE DUE TO THE COVID-19 EMERGENCY

The situation of justice offices bears mentioning. It is known that the national authorities must take action, according to correctly interpreted and applied criminal law; thus, they must carry out official, thorough and impartial investigations and, in the case of ascertained guilt, at the end of a fair trial, they must apply proportionate sanctions for any such infringement.⁶⁹ In particular, they must complete investigations

65 Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton: Princeton University Press, 1958).

66 Matthew Maycock, “COVID-19 has Caused a Dramatic Change to Prison Life’. Analyzing the Impacts of the COVID-19 Pandemic on the Pains of Imprisonment in the Scottish Prison Estate”, *The British Journal of Criminology* 62, no. 1 (2022): 218-233.

67 Nina Cope, “‘It’s No Time or High Time’: Young Offenders’ Experiences of Time and Drug Use in Prison”, *The Howard Journal of Crime and Justice* 42, no. 2 (2003): 158-175.

68 With reference to the protection of the mental health see e.g. European Court of Human Rights, 17th November 2015, *Bamouhammad v. Belgium*; European Court of Human Rights, 1st October 2013, *Ticu v. Romania*; European Court of Human Rights, 10th January 2013, *Claes v. Belgium*; European Court of Human Rights, 20th January 2009, *Stawomir Musial v. Poland*; European Court of Human Rights, 18th December 2007, *Dybeku v. Albania*.

69 Mariangela Montagna, “Obblighi convenzionali, tutela della vittima e completezza delle indagini”, *Archivio penale* 3 (2019): 1-18.

and maintain efficient judicial activity, able to identify the culprits and adequately punish them as the Strasbourg Court determines in its jurisprudence regarding the violations of Articles 2 and 3 ECHR.⁷⁰ In short, *procedural obligations* are considered in light of those obligations, imposed on states when a violation of Articles 2 and 3 ECHR has already occurred.⁷¹

Due to the health emergency, the activity of investigators and judges has slowed down: this caused prejudice both on the level of due process and on that of the protection of the lives and integrity of the victims of crime.

The demonstration of our thesis can be obtained from official data on the duration of criminal proceedings.

A good source of information about the efficiency of the criminal justice is the CEPEJ⁷² database: the latest available data refer to 2018 (see *2020 Evaluation cycle*),⁷³ two years before the pandemic. For this very reason, the best approach to test the impact of the COVID-19 emergency on the efficiency of judicial offices is to look at national data.

As an example, we will talk about the situation in Italy.

The statistical office of the Italian ministry uses the *disposition time* to calculate the duration of criminal proceedings: it measures the foreseeable average time for defining judgments and compares the amount pending at the end of the year with the flow of defined procedures in the same time frame. In short, it is a prospective analysis of duration, based on the thesis - unreal, in the pandemic year - that the justice system always maintains the same disposal capacity without any fluctuations; it is not valid for 2020 given the significant reduction in definition capacity due to the health emergency.⁷⁴

A comparison between the defined procedures in 2018, 2019 and 2020 will clarify the context. In 2018, Italian judicial offices (prosecutors, courts of first instance and appellate courts) closed 1.215.519 proceedings; in 2019, 1.184.380; in 2020, only 918.133. In the same years, the open files were 1.243.832 in 2018, 1.226.350 in 2019 and 1.014.611 in 2020; the difference between closed and open procedures was, therefore, equal to 28.313 proceedings in 2018, 41.520, in 2019 and 96.498 in 2020 with an increase of 132,41% compared to the previous year.⁷⁵ The accumulation of

70 See, e.g., European Court of Human Rights, 1st June 2010, *Gafgen v. United Kingdom*; European Court of Human Rights, 15th December 2009, *Maiorano v. Italy*; European Court of Human Rights, 14th March 2002, *Paul and Audrey Edwards v. United Kingdom*.

71 European Court of Human Rights, 15th June 2009, *Branko Tomasic and others v. Croatia*; European Court of Human Rights, 17th January 2002, *Calvelli and Ciglio v. Italy*; European Court of Human Rights, 14th March 2002, *Paul and Audrey Edwards v. United Kingdom*; European Court of Human Rights, 28th October 1998, *Assenov and others v. Bulgaria*; European Court of Human Rights, 22nd September 1995, *McCann and others v. United Kingdom*.

72 European Commission for the Efficiency of Justice.

73 *European judicial systems CEPEJ Evaluation Report, 2020 Evaluation cycle (2018 data)* (Strasbourg Cedex: Council of Europe, 2020), <https://rm.coe.int/evaluation-report-part-1-english/16809fc058>.

74 This is what the first president of the Italian Court of Cassation, Pietro Curzio, exposed during the inauguration of the judicial year 2021 (Rome, 29th January 2021).

75 *DG-Stat data*, Access 21st January 2022, www.dgstat.giustizia.it.

arrears and the increase of pending procedures imply the lengthening of the time to proceed and serious difficulties in giving answers to crime victims; at the same time, these delays make it impossible to guarantee a fair trial for those who have to be tried.

A possible solution has been identified in the use of telematic resources for the management of criminal proceedings. This is a very good idea if it is applied to the handling of bureaucratic formalities: it is not clear why the accused or victims would be denied the possibility of filing a motion or a document by means of a certified e-mail. The solution, however, does not hold up if applied to the concrete conduct of the hearings: in the case of *Dan vs. Moldavia (2)*⁷⁶ the Strasbourg judges pointed out that the observation made by the court about the demeanor and credibility of a witness may have important consequences for the accused; they highlighted the same regarding the possibility for the accused to be confronted with a witness in the presence of the judge who will ultimately decide the case.⁷⁷

In short, the European Court exalted the principle of immediacy, understood as the need to celebrate a trial in the direct contact between the witnesses, the judge and the parties, and in space-time continuity between the debate and the final decision.

A telematic criminal trial risks violating the due process paradigm and the fundamental rights of the defendant and the victim. For this reason, the only solution is to rethink the offices' organization: it is necessary to implement the use of computer tools in the consultation of procedural files, in the documents' deposit, and in the interviews with administrative staff or, more generally, in the handling of bureaucracy. In this way, the queues at the offices will be reduced and the gatherings will be eliminated, with an evident advantage for both public health and offices' efficiency.

The hearings must be organized in person, possibly according to a precise calendar of times and obligations: the goal must be to exploit the times in the best possible way so as to guarantee answers to those who ask for justice. In one word, the COVID-19 emergency requires rethinking criminal justice, and it could be a good opportunity to solve some old problems.⁷⁸ The important thing is to do so with extreme attention to the rights of the people in contact with criminal authorities.

6 CONCLUSIONS

The COVID-19 emergency impacted criminal justice and, therefore, one of the most suitable instruments for giving protection to the rights enshrined in the European Convention. Examining the issues covered in this study led to understanding how the criminal procedure is a means of giving voice to fundamental rights and how, at the same time, the human dimension and individual dignity must be guaranteed in the relationships with the authorities. Given the premise, the current pandemic has negatively impacted the effectiveness of the protection of the rights of the people

76 European Court of Human Rights, 10th November 2020, *Dan v. Moldavia (2)*.

77 European Court of Human Rights, 10th November 2020, *Dan v. Moldavia (2)*, Para. 51.

78 For example, before the pandemic emergency, Italian Supreme Court prevented the defense to deposit documents and motions by means of certified e-mail (e.g. Italian Cassation, 1st Criminal Section, 19th September 2019, no. 38665): the current situation allowed to overcome this inexplicable and anachronistic orientation.

relating to the authorities in charge of investigation, trial or criminal execution. For this reason, these subjects must be assigned the attribute of the vulnerable: they are disadvantaged people given the endemic superiority of the authority with which they relate and given their difficulty in asserting their rights due to COVID-19.

Our analysis made some proposals: increased investments in facilities for domestic violence victims; greater diffusion of individual protection measures in prison - or, more generally, increased investments in prison health or in better daily life of inmates; and better organization of judicial offices, with the implementation of computer resources for the handling of bureaucratic procedures. The pattern to follow derives from Article 51 of the Istanbul Convention, to be applied in general, beyond the restricted sector of gender-based violence.

States are required to carry out a risk assessment to avoid a serious and foreseeable dangerous situation, such as during today's pandemic. The lack in preparing legislative and jurisdictional measures to protect the population against the risk must be sanctioned; to this end, reference to Articles 2 and 3 ECHR is useful because the obligation for the internal authority to safeguard the population - and the weakest, in particular - from concrete and predictable dangers derives from the European Convention. This is the sense of the Strasbourg case law addressing positive obligations for national authorities: they must take measures appropriate⁷⁹ to the danger and proportionate to the objective to be achieved.⁸⁰

The analysis of the concrete context follows the in-depth study of all the elements available to the authority: it is possible to highlight the existence of a risk for the integrity of the people only after gathering all the information on the specific situation and examining it, perhaps with reference to similar situations that already occurred and were resolved in the past. Thus, the working method indicated by the European judges to the national authorities is identified. In other words, the interpreting work put in place by the Strasbourg Court has transformed the traditional concept of criminal law: whereas it once was intended as an instrument aimed at defending society through the action of authority, capable of prejudicing the rights of the recipients of the incriminating norm, nowadays, it is an instrument able to safeguard the rights of the individuals in situations in which the public authority remains inert.⁸¹ This new vision makes it possible to adapt criminal protection to the needs of the most vulnerable, understood as those who are most exposed to (predictable and concrete) risks for their safety that are not only physical.

On the basis of the examined case law, COVID-19 is a predictable and concrete danger not only for the public health but also for various areas of associated life such as the relationship between the individual and the criminal authority. States

79 Jan Kratochvil, "The Inflation of the Margin of Appreciation by the European Court of Human Rights", *Netherlands Quarterly of Human Rights* 29, no. 3 (2011): 324-357.

80 Vladislava Stoyanova, "Fault, Knowledge and Risk Within the Framework of Positive Obligations Under the European Convention on Human Rights", *Leiden Journal of International Law* 33, no. 3 (2020): 601-620.

81 See Laurens Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights", in: *Human Rights and Civil Rights in the 21st Century*, eds. Eva Brems, and Yves Haeck (Dordrecht: Springer, 2014), 94-115.

cannot afford to stand still in the face of this situation. Any inertia must be sanctioned, and in this way, the control of European justice must operate as the last bastion of fundamental human rights.

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Sažetak

COVID-19 BOLEST I KAZNENO PRAVOSUĐE. EUROPSKI PRIJEDLOZI ZA ZAŠTITU NAJBRANJIVIJIH

Trenutačno zdravstveno izvanredno stanje nije neočekivani događaj. Početkom 2020. svijet je zadesila bolest COVID-19, no danas, na kraju 2021., to je problem s kojim moramo živjeti. Pandemija je promijenila poimanje ranjivosti i postalo je očito da treba ojačati sustave zaštite za najranjivije. Ovaj je zahtjev postavljen i u odnosu na kaznenopravni sustav te posebice u situacijama u kojima u doticaj s tim sustavom, iz različitih razloga, dolaze osobe koje se zbog epidemioloških mjera nalaze u posebnoj izolaciji i u potencijalnoj opasnosti po vlastiti psihofizički integritet. Koncept ranjivosti tako dobiva novo značenje: javna vlast mora preuzeti odgovornost i odgovoriti na zahtjeve koji su proizašli (pa makar i neizravno) iz hitnoga zdravstvenog stanja. Interno postupanje državnih tijela je nedopustivo: njime se, naime, nanosi nepopravljiva šteta pravima pojedinaca koja su proklamirana i zaštićena u naddržavnim izvorima prava.

Ključne riječi: *COVID-19; ranjivost; kazneno pravosuđe; nasilje u obitelji; kazneno izvršno pravo; Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda; Istambulska konvencija.*

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