

Urban environment and right to silence in the criminal law. The Italian perspective (in the book, in the fact) *

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Summary: 1. Facts. – 2. Law in the book, law in the fact. – 3. A double reading of Italian regulation “against” noise pollution. – 4. Recalibrate the noise pollution criminal protection in perspective of the case *Moreno Gómez v. Spain*. The sequence right to respect for home, privacy and silence. – 5. *Summa capita*. Six final propositions.

1. Facts. – Many Europeans believe that the noise pollution caused by traffic, industrial and recreational activities is one of the main environmental problems in urban areas. It is believed that about 20% of the Western European population suffered from noise exceeding the precautional level indicated by scientists and health experts, beyond which has been recorded sleep disturbances, psycho-physiological disorders and even damage to the cardiovascular system. The Eurobarometer survey on the environment of 1995 shows that the noise is the fifth cause of concern, in order of importance, to the local environment (after traffic, air pollution, the protection of the landscape and waste management) but it is the only for which has growth the numbers of complaints from the public since 1992¹. According to ISTAT (Italian national statistics institute), slightly later (1998), 34.7% of Italian families claimed to suffer somewhat or very noise. In the center of the metropolitan areas the percentage aroused to 49%².

There are, however, opposite signs.

Noise pollution – so *Noise in Europe* (2014)³ – is less experienced problem than other forms of pollution, but not for the reason why it is less serious or not serious. Conversely «is a major environmental health problem». In the same way of the other forms of environmental pollution, noise pollution has adverse health effects and high social and economic costs. The report estimates that the noise pollution undermines children’s learning abilities, causes the premature death of about 10,000 people each year and sleep’s disorders for over 8 million people. In 2015, another ISTAT research showed that the number of complaints about noise offence or different kind of misconduct constantly grows but controls fail and falling down despite most part of (ever less) inspection discovers that at least one of the thresholds of noise is exceeded (54.5% for service or commercial activities, 42.4% for productive activities, to 38.7% for temporary activities and to 46% for the other types of noise sources).

Shortly. European data clearly says that noise pollution is widespread and extremely dangerous to health, basically undervalued compared to other forms of environment pollution. In Italy, although, it is constantly the number of complaints, drop down controls. In the urban environment, the predominant source of noise depends to recreational activity⁴, as loud music and squall coming from pubs, restaurants, clubs and discos, broken bottles, traffic at late night, spontaneous concerts. In large part of cases, these “local” phenomena are linked to the so-called movida (or bad-movida, it depends on the point of view) that produce devastating impact on the surrounding environment (and on the residents). It focuses on these consequences very interesting

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¹ Cfr. other material information http://ec.europa.eu/environment/noise/evaluation_en.htm

² http://www.istat.it/dati/catalogo/20040728_02/

³ *Future policies on noise pollution* (<http://www.eea.europa.eu/publications/noise-in-europe-2014>).

⁴ Ottoz – Rizzi – Nastasi, *Recreational noise: Impact and costs for disturbed residents in Italy* (the paper is being published and has been presented at the same European Meeting of la Red Vivre La Ville en Europe!, Madrid, 25-26 march 201).

and innovative study carried by a research team of Turin University. Moreover this paper⁵ shows, for one hand, that residents exposed to “recreational noise” suffer cardiovascular and stress related diseases, for the other, that «because of noise pollution 72% of the households in the sample considered to sell the house, 35% had a real estate expertise and nearly 80% think that noise negatively affects the estate value».

2. Law in the book, law in the fact. – To study a specific profile of legal system there’re different choice, that aren’t necessarily alternative. We can blend the different perspective:

- one way is to look at the regulation, in the book, consider how it has been crafted by the legislator (commonly the Parliament), without consider different factors, empirical one first of all. This methodological approach is largely prevalent in mostly of European countries, linked to the legacy of civil-law, established by the Roman Empire and renewed by c.d. “positivism”.

- A different way is to examine the regulation in the fact, searching to evaluate how it really works. Is more fascinating method but less precise because is not easy to measure the legislation impact. We haven’t an objective scale. Is difficult to distinguish which is the effectiveness of the regulation by the personal view of the researcher about what should be the relationship between legislation imprinting and output. Is a typical field of knowledge in which is huge the strength of Leonardo da Vinci’ quote: “our ideas are our glasses”. A bunch of years later, some philosophers say that our perception of reality is part of reality construction.

3. A double reading of Italian regulation “against” noise pollution. – *In the book*, we’ve three different level of normative references: civil law; administrative law, penal law. Civil law and penal law don’t contain specific regulation. The only rule that expressly and exclusively targets noise pollution is in the act n. 447 given by the Parliament in the 1995. These rule (art. 10), should be applied whenever the noise is translated in mere exceeding the maximum or differential noise limits set by the laws. *In the book*, should be an important instrument to strike noise pollution. In the fact it doesn’t work at all. *According the rule of law*, the breach of this rule should be investigated by the city police. The Mayor should inflict the fine, more or less according the gravity of breach. *In the fact*, the database of High Court of Justice reports only two judgements in the last twelve year. *According the rule of fact*, the local Police doesn’t investigate; Mayor doesn’t inflict fine.

I don’t know where is the egg, where the hen. It may be that noise pollution is considered less important than other environmental issues and, therefore, the investigation is focused on air pollution and water pollution; it may be that local politician are not aware of the problems or familiar with the effects of noise, that have nothing spectacular: noise is insidious not catastrophic⁶. Certainly it’s material the contribute given by maladministration and even corruption⁷.

Penal law and civil law contain a relevant number of rule commonly used against noise pollution: *in the book*, aren’t noise pollution rule; *in the fact*, work against noise pollution. They dress the noise pollution but not suit it well, like a coat oversize. So we have a very strange situation: the rule namely against noise pollution doesn’t work. Other rules work but not very well, because were born for different normative purposes. Therefore, the noise criminal protection gets

⁵ Ottoz – Rizzi – Nastasi, *Recreational noise: Impact and costs for disturbed residents in Italy*, cit.

⁶ Cfr. DE SMEDT, *Éloge du silence*, Paris, 1986, p. 17.

⁷ A deep research of the corruption in the Italian local administration revealed among other that the nightlife is one of the typical places of bribery. Often covered with the patina of argumentative stereotypes easy-grip (economic development, recovery of historic centers, the contrast to nomadism night), research indicates corruption as «the “real” reason to tolerate municipalities that the economic interests of operators are carried out by sacrificing the health of residents subjected to intolerable noise of the “movida”. A situation that fuels a conflict between corrupt governments and civil committees whose inevitable outcome is the proliferation of a civil, administrative and criminal cases that perhaps could be avoided if the local controls – non-existent – intervene preventively»: DE FRANCISCO, *Che ambiente a Corruptia*, in *Il malaffare in un Comune italiano*, a cura di R.D’Ambrosio, Molfetta, 2014, pp. 27-28.

into the edge of a criminal code crime (art. 659 cp), old over 80 years, offering unsatisfactory performance in terms of prevention and repression.

This not exciting situation doesn't change in the 2015 with the environmental crimes Act (122). New offences mark the transition to eco-centric notion of environment where the environment itself is protected for its intrinsic value and not only as an outpost of other "final" goods, such as public health. This kind of crime matches "macro-events" of environmental-disaster (452-*quater* Criminal code) or environmental-pollution (art. 452-*bis*) that effect deterioration, permanent or not, of water, air quality, fauna and life of plant/fauna. Studies on noise pollution damage in the cities document particularly immediate and direct impact on health of exposure to noise. In other words, unlike other forms of pollution, that caused hazard and damage for human health related to the impairment of the environmental matrices, noise pollution acts in a different way because it hurts resident's health and wellness without any "measurable" damage for environmental matrices.

4. Recalibrate the noise pollution criminal protection in perspective of the case *Moreno Gómez v. Spain. The sequence right to respect for home, privacy and silence.* – This contest suggests a question: whether it is time to move the center of gravity of the noise pollution (criminal) law from the environment to human health, at least in the sense illustrated by CEDU in the case *Moreno Gómez v. Spain* (application no. 4143/02). The applicant complained of noise and of being disturbed also late in the night by clubs, pubs near her home. She alleged that the Spanish authorities were responsible and that the resulting noise pollution constituted a violation of her right to respect for her home, as guaranteed by Article 8 of the Convention. The Court noted that the applicant lived in an area that was indisputably subject to night-time disturbances that clearly unsettled her as she went about her daily life, particularly at weekends. The existence of the disturbances had been noted on a number of occasions. In the circumstances, there appeared to be no need to require, as the Spanish authorities had done, a person from an acoustically saturated zone to adduce evidence of a fact of which the municipal authority was already officially aware. In view of the volume of the noise, at night and beyond permitted levels, and the fact that it had continued over a number of years, the Court found that there had been a breach of the rights protected by Article 8, notwithstanding the City Council adopted measures intended to secure respect for the rights guaranteed by the Convention but tolerated, and thus contributed to, the repeated flouting of the rules which it itself had established. The Court found that the applicant had suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances and held that the respondent State had failed to discharge its obligation to guarantee her right to respect for her home and her private life, in breach of art. 8 of the Convention.

Following this reasoning the noise penal repression, on the one hand, it can be anchored in the sequence right to respect for home, privacy and silence (defined as absence of noise greater than the the permitted threshold); for the other, it can be correlated to the distortions of the relationship between the person and the environment that deteriorate the live quality of the victim without alteration, reversible or less, of the environmental matrices and are caused by a human behavior troublesome. On this way, could be not "*Pindaro fly*" connects the product of noise from recreational activities with crimes such as stalking.

5. *Summa capita. Six final propositions.* – The proposal – is important to clarify – doesn't intend to exclude the noise pollution from the environment law. It would be a wrong strategy, loser, which would reduce the prospects of protection. Noise pollution would be excluded from the Union

legislative competence, whereas it would be important to update the European Environment Protection. European act 2002/49/CE, that doesn't regulate noise pollution generated by commercial activity, should be reformed by including the recreational noise. But it is no less important that the harmful effects on health, peace of mind and privacy caused by the violation of the right to silence are governed by criminal law in a manner consistent with the concrete manifestations of the offense. On the political-criminal view, the salient aspect of the problem is just to find a form of appropriate protection.

First. The pollution in the urban environment and living environment, usually, doesn't effect macro-damaging event.

Second. Noise pollution is a form of pollution whose danger to resident' human health is not mediated by the alteration of the environmental matrices.

Third. Single or micro-events caused by recreational noise goes beyond environmental law, specifically oriented towards the serious and measurable deterioration, permanently or not, of basic environmental matrices.

Fourth. The offence of art. 659 of penal code doesn't match the case of heavily breach of right of silence impairing one or few person specifically individuated.

Fifth. Mostly events caused by recreational noise are single or micro, notwithstanding they seriously endanger health, rights to silence, to privacy, to respect home.

Sixth. Is it correct to regulate pollution as an environmental problem in all the common aspects with other crimes against the environment; but it is necessary to extend criminal protection to human rights in all aspects harmed by pollution. It is absolutely irrational that this kind of offense haven't specific prevention and punishment just because they result from different epiphany of other pollution damages.