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"The deficit of socialisation as a cause of victimisation and objective imputation: at the same time a question of re-socialisation".

My name is Carlos Bardavío Antón, I hold a PhD in Law at the University of Seville. I am a lecturer in Criminal Law at the International University La Rioja (Spain). And I am criminal lawyer in Bardavío Lawyer as director law firm. My thesis, recently published by reknown legal Publisher Bosch, focused on: "Cults in Criminal Law: A dogmatic study of cult-associated offences", (Las sectas en Derecho penal. Estudio dogmático de los delitos sectarios, Bosch, Barcelona, 2018). This presentation is titled "The socialization deficit as a cause of victimization and objective imputation: both a matter of resocialization" in the course of which I will aim to summarise the conclusions I reached during my PhD research.

This research delved into the study of cults and their treatment in criminal law, from the standpoint of the "perpetrator of conscience", "perpetrator by conviction" and the enemy while confronting them with criminal cults and with any type of organization that is harmful to the general public. The criminal doctrine pertaining to *the perpetrator of conscience, the conflicts of conscience or the conscientious objection* usually finds normative arguments in favour of a diminished or exempted responsibility, in contrast to the perpetrator by conviction on which greater responsibility is claimed, to the extent that in the last decades a sector of the doctrine has elevated some cases of the perpetrator by conviction to the paradigmatic category of enemy, which is the object of a particularly forceful normative argument: the criminal law of the enemy.

In this research, the respective typologies were outlined normatively and there is a common undelying element: the socialization deficit. The question discussed is how this deficit works, to whom it can be attributed and what impact it has on criminal responsibility. As a general rule, this deficit can be attributed to personal freedom, in other instances it can be attributed to a third party (as coercive persuasion) or to the same norm (deficit of normative communication).

Therefore, the freedom of conscience or religion was first analysed from the prism of free behaviors, which allowed us to frame the problem and to establish a previous distinction between perpetrator of conscience, by conviction and enemy, reaching the first of the surprising insights: by confronting of all of them it has been possible to verify that there there are reasons in all to mitigate, exempt from responsibility or charge with the maximum penalty without affecting the conceptual nucleus of each one of them, as an enemy or "perpetrator by conviction" or "perpetrator of conscience" can be so as a result of prior coercive persuasion attributed to a third party, i.e. to the cult leader and / or to the behavioral dynamics of the group.

Hence the focus on the "perpetrator of conscience", "perpetrator by conviction" and the enemy in cults which is an area very marginally studied by criminal doctrine, but from the prism of coerced behavior and socialization deficits attributed to a third party: coercive persuasion and behavioral addiction. The lack of interest in appropriately protecting an inherent right of the person has been brought the fore: *the right to the building of conscience and the marked relevance of the horizon of expectations* guided by the System when it is restricted or eliminated.

And, finally, we examined *the contingency of free and coerced sectarian behaviors* in the coercive groups as criminal organizations and in criminal responsibility and participation, resulting in a new approach which I have called the "victim-perpetrator" to mean that certain victims participate unconsciously, unlike other active members, of their own coercive persuasion, and later on they become perpetrator of coercive persuasion on other adepts.

So the task appeared compelling from the science of criminal law, or as pointed out by my Doctoral Thesis director POLAINO NAVARRETE «because not only does it require to specify the distribution of "the cake" of the crime which takes place within a surreptitious and messed up organization (i.e.: a question *ad extra*, the relationships of all the parties with each other), but also to set out the responsibility basis of the criminal organization itself (i.e.: a question *ad intra*, the organization itself as a crime). Or, to put it in the wise words of Ernst-Joachim LAMPE, the boundaries between the "unjust systemic" and the "unjust system"».

In a nutshell, I translated psychology, psychiatry and sociology sciences evidence into legal concepts as this is the language judges, courts, the police, prosecutors and law

makers understand in all countries. The key conclusion is the following: Coercive **persuasion is a form of violence**, akin to other violence which are foreseen in European Criminal Codes such as domestic violence, workplace violence, or violence against minors. It is a more specific type of violence, very distinct and different from traditional violence, such a knife threat, assault or aggression: it is a more subtle, gradual and indirect type.

It is subtle because the victim cannot sense the attack which makes it a more severe type of violence; gradual because it takes time for it to materialise – it does not need to be a long period but persuasion techniques are applied over a period of time; and thirdly, it is an indirect type of violence which implies a certain degree of unconscious involvement

from the victim. In other words, it is not a simple type of intimidation or threat whereby the victim is fully aware of the attack.

In a coercive persuasion scenario, **the victim gradually embraces violence as something positive**. The victim willingly accepts the techniques applied by the perpetrator and facilitates, unawares the risk taking while undermining its free will. That is why coercive persuasion is a distinct type of violence which hits the very core of free will on

a progressive basis to the extent of, wiping it out in the most extreme cases through well known techniques in psychology and psychiatry such as cognitive, volitive, environmental, emotional and information control.

This gradual control starts by undermining free will and finishes obliterating free will, but before reaching that extreme, we have already a criminal outcome. In other words, there is no need for a psychological disorder or injury in order to conclude that there is a criminal offence. By way of example, in a rape/sexual assault offence there isn't always a significant mental disorder or injury; on another example, when an individual changes the victim's lock, the person does not suffer as a result from psychological damage on most cases despite not being able to access his/her property. All offences/crimes entail some psychological damage but criminal codes make a distinction on the basis of criminal outcomes.

In summary, coercive persuasion is an offence/crime which precedes other traditional forms of violence. As such, coercive persuasion can be considered the driving

force of other offences/crimes such as a later psychological damage, a scam, or a seemingly contaminated consent in rape or sexual assault or in cases of traffic in human beings. Coercive persuasion undermines a legal principle liable to strong protection like free will. In earnest, given that coercive persuasion is a type of violence we are not dealing

here with sexual abuse but rape because consent is not obtained in a contaminated manner but this consent is pulled violently. In other words, there is no consent, with the particularity that the victim consents unaware that that consent has been pulled out through violence.

Through this prism, we can understand how the victim agrees to transfer big amounts of money and to conclude that we are dealing with a scam offence. Hence, why judges and courts did not understand why victims would claim to have been subject to con artists while admitting to having consented to it. Nonetheless, under the coercive persuasion as a type of violence approach we understand why the victim behaves in a certain way, despite consenting to actions deemed detrimental to them. We argue that because it is a form of violence the consent is not such, as it has been pulled out of them through the only will of the perpetrator.

Likewise, there is no need for the victim, as seems to be required by the French Criminal Code, to be particularly vulnerable or that a certain weakness is abused. Rather, as it is another form of violence it can be applied to any type of individual. In other words, before any psychological disorder or result thereof emerges, an offence has already arisen – a coercion or duress offence. It is a type of violence which does not derive from direct attack through known violent means like physical or psychological violence (intimidation) but through a specific type of violence (coercive persuasion) which goes unnoticed to the victim and which explains why he/she participates in it. This can be more dangerous than traditional ways of violence as the victim is powerless as it is unaware of coercive persuasion techniques used against him/her. It limits or cancels not only its psychological state but its exogenous free will ability, The freedom system and legitimate expectations thereof is being undermined unbeknown to the victim.

Further, thanks to this framework, we can understand how collective suicides come to be and how we would be dealing with manslaughter/murder therefore and not

induction to suicide as in those cases the victim enjoys some degree of leeway in the decision making.

In this sense, Niklas LUHMANN's conclusions (German philosopher and sociologue on the Theory of Systems) can be applied to underpin coercive persuasion. The victim is introduced in a parallel totalitarian system to the freedom system undermining the ability to perceive the system of legitimate expectations of freedoms. Drawing some parallels mentioned in Criminal Doctrine, Hitlerian youths were indoctrinated from childhood by a criminal. In other words, they were introduced to a totalitarian system which hindered their ability to appreciate ethics and the system of freedoms. Günther JAKOBS, a great German scholar, called it a socialisation deficit attributed to a third party. In other words, coercive persuasion gives rise to a socialisation deficit outcome, and not *per se* to relevant psychological harm associated with abuse of vulnerability.

Coercive persuasion can be applied as a form of violence against any individual without the need to cause psychological harm. It does not undermine the endogenous free Will ability but the exogenous or social free will. Through this model, we can conclude that coercive persuasion violently isolates the individual from the system of freedoms or legitimate expectations, unbeknown to him/her, or better still, unaware of the risk involved in that isolation.

My conclusions urge European law makers to enshrine a distinct offence/crime associated with coercive persuasion which undermines general free will in their criminal law frameworks and define it in a taxative manner including the use of techniques such as cognitive, volitive, environmental, emotional, social, judgement and information control in a layered manner which is more severe than the traditional offence of violent duress or intimidation. Without this, judges, courts and the police will struggle to understand why a victim acts against their best interest or against others'. This type of violence is more severe because there is premeditation involved, irrespective of the vulnerability of the victim but he/she does not feel the violence and hence cannot defend themselves.

Finally, there is a need to decouple coercive persuasion from any psychological outcomes as it leads to a degree of confusion both in the evidence and in its definition.

I will present two real examples that can serve to clarify how the approach I propose can provide a better solution to the problem:

First.- The Sirius case in Germany. The facts of this case were the following: a subject persuaded for several years and earned full trust of a young woman. He made her believe that he came from planet Sirius, that he had been sent to Earth to save certain important people who would live on that more developed planet through other bodies and she was one of the chosen ones. The subject convinced the young woman to contract life insurance in his name. He then persuaded her to cause her own death, at which point she would be in a new body and she would get the money back from the insurance upon entering Sirius. The young woman managed to survive.

The German Supreme Court in the Judgment of July 5, one thousand nine hundred and seventy-six (Sirius case) differentiated: "If you hide from the one who is taking his own life, that is really causing death, you have to consider that the one who provokes this error and whose help consciously and voluntarily leads the process that ends or must lead to death, is the perpetrator of a crime against life ... by virtue of his superior knowledge, with which he manipulates the deceived and turns him into an instrument against himself». In other words, the perpetrator was convicted for the crime of attempted murder in "perpetrator meditates" because the young woman was an instrument in the perpetrator's hands.

In our opinion the ruling omits a fact: if the victim became an instrument, this was because the violence of coercive persuasion was applied, in other words, what would have happened if the victim had not executed his own death and would have discovered the perpetrator's plan? The case, like so many others, in the absence of a serious result would not have been given importance, it would still be within the freedom of conscience. This is a mistake because coercive persuasion is not considered as an autonomous crime. That is to say, to persuade someone death is positive or that one is not going to die is already a crime of coercive persuasion that does not require the victim to start executing his own death. This is what legislators and judges must understand.

Second.- The case of the "miguelianos" in Spain, a religious Order accused for being a coercive cult. This case is remarkable because of the judicial prosecution of the

founder of the Order together with other active members on account of the use of coercive persuasion when at the same time the latter are also victims of the same crime committed against them by the founder. The founder and the victims of coercive are charged as they, at a later stage, actively serve in the group to use this technique on third parties (**model of victim-perpetrator!**).

The Court could not prove that the founder and the other charged active members had set up and exploited an associative structure that used violence, alteration or control of the personality of its followers, even if for lawful purposes. With regards to the crimes of sexual abuse, the Court found them guilty for a sexual assault offence with persistent abuse of power and penetration to victim J, but acquitted him for sexual assault to the other victims (I, N and C), and other crimes.

The question is: What differentiates abuse of power (authority) from the sexual abuse offense of "coercive persuasion" as a form of sexual assault or rape?

Surprisingly, some of the elements narrated in the Judgment to support abuse of power through the special relationship to restrict freedom (vitiating consent), are considered - by the most authoritative scientific literature - as akin to the dynamics of coercive persuasion. Yet, this most serious crime does not apply even though these sexual acts occurred when the victim was a minor. Let's see some of the victim's statements:

"I can not say no", "I was blocked", "I was in shock", "I trusted him fully", "to turn him down is to go against the Heaven that everyone wants", "at that time, he was the most wonderful man", "he was my father and my best friend", "I gave him my life to him and that is why he disposed of my life".

Well, these last sentences are those that fill with meaning precisely the autonomy of the unjust of the coercive persuasion differentiated from abuse of power, because it is not a simple superiority that blurs the consent, in other words, it is not obtained through simple superiority, but rather it pulls out the consent which is seriously diminished without the awareness of the victim, unlike sexual assault where the victim understands, at least vaguely, the injustice of the act. Consent is transformed into a positive way of will, hiding the reality that the authority of the leader coming from San Miguel Arcángel

is deficient in that it presents the guarantee that such carnal access is by imperative of the saint, and that it is unavoidable and unfathomable to her any rejection, precisely because of that same divine imperative.

This way of pulling consent as a violent form is based on the distortion of the meaning of communication codes produced by the perpetrator in the victim, for example, drastically changing the positive value of life for the negative of death as in the case Sirius, in other words, where death becomes something positive and inescapable for survival (**distortion of the action**), or as inferred in this case, where sex between the perpetrator and the minor becomes something positive through a divine imperative that the perpetrator introduces in the understanding of the meaning of the concepts of the victim, so that this typical action ceases to be so for the victim, no longer by fundamental error, but through the change of code of strict communication in that environment (from the social and normative system to the criminal system) in an imperceptible, subtle, progressive and indirect way, i.e. violently. This way of introducing the change of meaning is the basis for the objective imputation of a form of violence in sexual aggression.

In conclusion, since coercive persuasion is a form of socialization deficit independent of psychological injuries, which will occur or not, the way to resocialize the victims starts from the disengagement from that deficit society.

Taking all this into account, my Doctoral Thesis argues for a piece of legislation to penalise coercive persuasion that for lack of space I can not elaborate, but I have summarised its foundations here today.

Thank you for your attention and I remain at your disposal for any question you may want to submit to me on carlosbardavio@gmail.com or www.bardavioabogados.com