

ABSTRACT OF THE THESIS

1. Introduction

In recent years, society has become increasingly globalized; both legal institutions and illegal groups have seen their geographical range of action and sphere of influence grow while the effect they receive from other places multiplies simultaneously.

Thus, organized crime has become globalized, leading to the expansion and modification of these organizations which, according to Jean Baudrillard, constitute a phenomenon of novel characteristics that change the traditional relationship between right and wrong. This type of criminality makes use of new technologies in the same way as do legal entities, to procure maximum benefits with these resources.

The situation in Spain illustrates this phenomenon, which, while in the opinion of Judge Baltasar Garzón is not one of the worst, it indicates the tremendous permeability of present society to different criminal organizations from other countries.

“During the year 2003, some two hundred and thirty-four criminal groups were operating in Spain. About fifty per cent of these were¹ composed of Spanish nationals and, in lesser numbers, there were also groups from Colombia, Rumania, Morocco,

¹ Baltasar Garzón: Un mundo sin miedo. P.228

Russia, Great Britain, and Nigeria, making a total of twenty-six nationalities”.

This globalization can also be understood as an extension of their criminal activities, also increased because they are carried out in different countries, benefiting at times from the difficulties involved in pursuing transnational offences.

Judge Baltasar Garzón also refers to the main criminal actions carried out by these groups and lists the following:

“...drug trafficking, money laundering, false instruments, trade of human beings in order to prostitute and exploit them, frauds, robberies, counterfeiting, extortions, illegal trade of vehicle kidnapping, tax frauds, stolen goods trafficking, murders, forgeries, arms and explosives trade and illegal inmigration.²

Today many of these activities are carried out simultaneously and in coordination in more than one country, as the criminal bands take advantage of the situation. These groups “evolve with the times and make use of new technological and information resources, audiovisual, electronic and digital means, as well as innovative infrastructures, transports and weapons. They also employ sophisticated forms of concealment or simulation to elude police action and to progress in their criminal action”.³

An attempt has been made to respond to this globalization by means of an international development of Criminal Law, but this is only the beginning; from isolated activities and collaborations between university professors and judges or groups of judges there have sprung symposiums and international expert committees plus an increasing international awareness: some prominent examples are the European arrest warrant. Or the setting up of the International Criminal Court (for certain offences, although not including those committed by criminal organizations). Consequently, in spite of the dimensions of the

² Baltasar Garzón, *ibídem*.

³ Baltasar Garzón. *Ibídem*

problem, we are unfortunately a long way from, for example, Baltasar Garzón advocates⁴

“I defend the creation of a new body incorporating all legal, political, supervisory, informative and operational functions, so that under a single direction and with some departments -but not too many—all the international community’s efforts opposing organized delinquency may be developed and coordinated under the direction of the UN Secretary general or the criminal prevention programme director.”

These actions against organized crime should be planned from a global point of view, but incorporating specific research, knowledge, methods and results, that are also designed with multidisciplinary approaches, that take advantage of experiences already tested in order to depart from these initiatives to obtain results in the combat against organized delinquency

2. Work hypothesis.

Given the globalization encountered in each international, cultural and socio-economical framework, situations and problems interact and present increasingly greater similarities in different countries, especially where the socio-economical sphere and political integration coincide. This could lead to the hypothesis justifying the analysis of the experience of legal, judicial and penitentiary institutions in Italy in recent years in the conflict against “Mafioso” type organizations (Mafia in Sicily, “Ndrangheta” in Calabria, Camorra in Naples); with the new techniques of investigation, proceedings and more specifically, the study of the use of the so-called “pentiti” as a means of getting to know, disband and penalise these organizations by esteeming it to be potentially useful to extrapolate to other similar geographic and social ambiances, as is the case of Spain.

There is no doubt that the history and “culture” of criminal organizations in different countries can be quite heterogeneous, and that important differences separate Italian Mafioso groups, ETA, GRAPO, Al Queda, Russian mafias, and many others that are rapidly growing, but our work hypothesis is

⁴ Baltasar Garzón: *Ibidem*, p. 232

based on the fact that the phenomenon of globalization and of technical progress makes these organizations converge functionally and structurally, and also that the means, strategies and tactics used to combat them both on a national and an international scale, can and should share common psychosocial and juridical aspects and principles.

3. Objectives.

The chief objective of the present work is, as far as possible, to provide a structural, juridical and psychosocial model to combat, eliminate or reduce organized crime both in Spain and in other countries.

As secondary though not less important objectives, the model would seek to facilitate the following actions:

- a) To encourage collaboration by means of modifications to criminal legislation.
- b) To suggest means to overcome the negative social perception of justice collaborators.
- c) To facilitate the modification of procedural norms to incentivate the figure of collaborator by means of penitentiary benefits.
- d) To provide an effective framework of credibility through preventive and insertion actions on the part of State institutions, offering protection to the persons who collaborate with justice.
- e) To permit the acceptance in court of the declaration of the protected witness who is also charged, as qualified evidence (problems deriving from the value of declarations made by these persons)
- f) To facilitate the convergence of Spanish legislation with the European and international norm, and the alignment with countries having more experience in this field.

It would be utopian to believe that all these objectives could be offered as the result of an investigation, but it is no less true that this type of research project on criminology, legal medicine and penal and penitentiary law should always be based on thorough investigation, which in turn gives rise to ad hoc legislative committees or expert committees from international organizations;

this constitutes the ultimate objective of this document, to be of use in the legal process of the reintegration of criminals in society.

4. Material and Work Method

We consider the study of this phenomenon, using the experience in Italy as a starting point, to be of special interest and cogency insofar as, on the one hand, criminal organizations are delinquent associations of long standing, powerful structure, deeply embedded in society and possessing a wealth of material means, but on the other hand, it would appear that when many “pentiti” abandon the organizations, an important number of successes has been reaped against this organized criminality.

- a) The present document/study proposes to:-
- b) Define the object of study, delimiting concepts such as what the Mafia, the “Ndrangheta” and the Camorra were and what they are today, with a brief reference to the history of criminal organizations in recent years in Italy, including their structure and activities.
- c) Define the concept of “pentiti” or “collaboratore di giustizia”, as well as the concept existing in the Spanish legal system, which could be comparable.
- d) Study this figure in the current regulation of international institutions which contain repercussions in legislations being studied, such as that of the European Union, the United Nations or the Council of Europe.
- e) Study and appraise the results of experience concerning justice collaborators in other countries, especially in Italy. Special attention will be paid to changes brought about by the 13th February 2001, n.45 Statute; the procedural and penitentiary benefits granted to these individuals will be examined, and finally, the efficiency of the policy followed concerning the pentiti will be verified.
- f) Study this figure in the Spanish legal system. Analyse the Spanish current regulation, with attention to articles 376 and 579 of the Spanish Penal Code, contained in Laws of 2000 and 2003, which specifically contemplate this figure in relation to terrorist crimes or drug dealing. Procedural benefits will also be studied (in Spain, a reduction of 1 or 2 degrees in the penalty as well as the possible

application of other procedural and penitentiary measures,(suppression of temporary custody in certain cases). Finally, the practical efficiency of these benefits or rewards will be evaluated, that is, the value conceded by case-law to the testimony of protected witnesses.

- g) Broach the psychosocial problems for the collaborator and his family, and develop psychosocial methods and tests to ensure the best possible results in the cases that arise.
- h) Study cases leading to the modification of the Spanish regulations in this field in the most accurate and realistic form possible.
- i) Apply the most appropriate method of analysis and discussion to result in the proposals of "*lege ferenda*".

Material:

The following material has been used:

- Bibliography.
- Italian, Spanish and international regulations on the subject.
- Study of Case Law

5. Structure

In chapter one, the introduction poses the questions: Does the Spanish legislation on this subject of collaborators of justice satisfy both the present internal needs and International requirements? How does it compare with the Italian system? How effective is it in the fight against organised crime?

Chapter two follows with an analysis of organised crime in Italy from a conceptual and social point of view.

In chapter three, International sources of law on this subject are reviewed. In particular we examine Resolution of the Council of the EU of 1996, Recommendation (Rec 2005) 9 of the Committee of Ministers of the Council of

Europe, and the International Convention for the fight against Transnational Organised Crime (Palermo Convention) of 2000.

Chapter four contains an analysis of the Italian system for the regulation of rewards and protection for people who collaborate with the national justice system. This includes a consideration of the history of pentitismo; the study of the 1991 Statute and its application; the challenges posed by the large number of pentiti who have come forward over a short period of time (after the murder of the Judges Falcone and Borsellino); and the subsequent collapse of the system and the new Statute of 2001; the decrees of development of the Statute concerning key issues such as change of identity (temporary or permanent), or the resocialisation of pentiti after trial and sentence, or other specific protection afforded to them.

In chapter five both substantial and procedural criminal rules on the subject in Spanish legislation have been studied. In the Spanish Criminal Code there are two types of articles that can be applied to these situations: the traditional mitigating circumstances, of confession of guilt and redress of damages, and the newly introduced articles for terrorism and organised crime offences. The possible application of the 'Statute for the Protection of Witnesses and Experts (Ley 19/1994)' has also been reviewed as have specific offences against these persons.

In Chapter six, the psycho-social aspects of the protected witnesses situation is studied, and Chapters seven to ten include the discussion and conclusions, bibliography, and an appendix which contains the basic Statutes and International instruments object of study.

6.- Conclusions

The following are the conclusions of the present work:

- a) The evolution of organized crime which, in the present model of globalization, is characterized by the development and interconnection of national and international bands specialising in

activities such as dealing in drugs, arms, people, works of art, insider trading, prostitution, money laundering and false instruments, terrorism, etc. forces both international legal organizations and States to develop, among others, measures that favour and protect the “repentant” who are firmly decided to collaborate with justice.

- b) The repentance of a member of an organized criminal band implies that he, and his family, especially if he is in hiding, are “condemned” to death by the group he belonged to, his property destroyed or confiscated, and his reputation denigrated in the criminal band. This means that becoming a protected witness is an important and dangerous decision, implying for the collaborator and his family measures involving change of identity, residence, means of earning a living, and personality, all of which should be guaranteed by a policy that claims to favour collaborators .
- c) In Spain, the existence of the terrorist bands ETA, GRAPO, and other emerging groups of organized crime necessitate the study and introduction of measures to combat them; to favour and encourage collaboration is one of these measures.
- d) These measures should have as principles a scientific and doctrinal basis, functional, administrative and material guarantees and means that are legally established and verified. The following conclusions refer to these principles from a practical point of view, not only in the case of Spain, but also for any other country in similar circumstances and with the same legislative pretension.
- e) The psychosocial aspects of collaborating with justice are a fundamental condition for guaranteeing that the decision of the subject in his family environment be firm, serious and stable; he will also have to undergo enormous risks, change of identity, residence and way of life, etc.
- f) The principles which have been taken separately and later developed after having been analysed and studied, correspond , in general, to what international recommendations point to today as adequate and

necessary. However, this study has gone beyond the mere selection and formulation of principles; it has analysed and developed with scientific methods and criteria their previous requisites and conditions to assure their efficient application, given the investigation carried out from various points of view, such as the Criminal material Law, Procedural and Penitentiary Law, Criminology, Psychology and Sociology.

- g) It is a fact that certain particularly serious forms of organized delinquency have now acquired an international and cross-border dimension. This is another motive for the coordination and harmonization of preventive, penal, penitentiary and re-insertion provisions, and that they be carried out bearing in mind international homologation criteria. For this reason, the present work has been executed as a European investigation, as mentioned in the preliminary condition.

- h) This document culminates with a series of proposals of “lege ferenda” concerning prerequisites, benefits and procedures for these cases. These proposals have been elaborated according to legal methodology and strictly scientific criteria, in the hope that they constitute, if the legislative power decides to develop this type of policies, a basis and a sound and well documented draft, and as such, a useful reference.