

Analysis of the treatment of the police informer in different legal systems

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Abstract

Increasingly, the use of different means of investigation is enabling the authorities to clarify the facts and to arrest the perpetrator of the crime more quickly and effectively, within the different means of investigation available to police authorities, one of which and the most common in all countries is the police informer, being a person of particular importance during the police investigation, as he or she provides confidential and essential information in order to learn important facts about the crime and its perpetrators.

The problem with this research tool is that it is not uniform in its treatment, in different countries, the informant is treated differently, and as a result of this, the product or the investigation that is offered to the judges, as a result of these confidences, is different.

Likewise, when working with police informants, it is very important to take into account a series of precautions so as not to violate any human rights, as well as not to being manipulated by the informer.

As an example of the above, this article studies the treatment of police informants in different countries, considering the legislation of each one, sentences and documents that establish the guidelines for the use of police informants.

Keywords: informant; means of investigation; Procedural Criminal Law; validity of the police investigation; comparative law.

Introduction

Access to information by our Security Forces and Corps is essential to protect the free exercise of rights and freedoms, as well as to guarantee citizen security, since without information, the first pre-procedural investigations cannot begin, which will clarify the criminal acts and their corresponding authors. The information obtained will be the basis for the formulation of the necessary hypotheses, which will allow the successful completion of the investigation initiated; all this with the aim of preventing/repressing criminal activity, maintaining public safety and providing sufficient evidence to allow the incrimination and subsequent conviction of those responsible.

The emergence of criminal phenomena such as organised crime - linked to the use of new technologies – the specialization of its components in specific areas, as well as

the gradual disappearance of borders, means that we are faced with a new criminal reality that requires new means of investigation to enable an effective response to be made to detect and eliminate them.

The maintenance of the necessary citizen security through the respect of the guarantees and fundamental rights of the citizens, is one of the institutional goals that every State of Law must pursue, so the most adequate and proportionate response to the seriousness of the current criminal situation must be sought. It is evident that the traditional means of investigation are not sufficient to fight organized crime, and this is due to the degree of sophistication that criminal and terrorist organizations possess, so that the traditional techniques of investigation do not produce the required result, placing us in the need to develop and implement more novel and specific techniques of criminal investigation.

The present study deals with the figure of the informant, and extraordinary means of investigation that is totally accepted by the jurisprudence that has not received an adequate normative development that specifies the how and the why of this research tool or source of evidence, so it is necessary to delimit the concept, limits and the links of this means of investigations with the rest of the evidences.

The informer is an extraordinary and genuinely police research tool and, by its very nature, a means of obtaining information that will enable the discovery of the facts and the perpetrator of the crime, and even the discovery of preparatory acts that have not yet led to the consummation of the crime. This is a means of investigation that has been used regularly and repeatedly over time which, according to GIMENO SENDRA 'constitutes a common forensic practice in all States and times but, in ours, without legal coverage'.

Thus, in view of the uncertainty surrounding the figure of the informant, considered to be an essential means of police investigation in the fight against crime, and specifically in order to dismantle and provide relevant information or organized crime, it is necessary to establish the limits of his or her actions by studying similar figures, as established by scientific doctrine and case law, as well as a necessary study on the treatment of this figure in our comparative law; all of the above with the aim of facing criminal proceedings with total guarantees, obtaining evidence that will allow the presumption of innocence of the investigated party to be reduced, limiting the cases of criminal responsibility for agents who collaborate with confidential sources, as well as ensuring the integrity of the informer during his or her collaboration.

Treatment of the informant in Germany 'Der Informant, V-Person or V-Leute'.

- Regulation.

There is no specific regulation of the figure of the informer in German law, since the German legislator understands that he will be considered a witness and consequently, the general rules and regulations contained in the Law shall apply to the witnesses. And this justification is based on the dissociation of the figure of the informant with the public power, turning them into simple witnesses, even more, when the information they offer can be misleading¹. German case law has also expressed itself in the same way, specifically the Judgment of the Federal Supreme Court of 22 February 1995, in which it establishes the unnecessary need to regulate the figure of the *V-Mann*, the criteria established for the infiltrated policeman regulated in § 110 being applicable to him. This makes it a frequent practice for police officers-coordinated by the Public Prosecutor's Office – to go to *V-Person* to request infiltration work in order to obtain information. This possibility is included in the *Richtlinien für das Strafverfahren und das Bußgeldverfahren* (Angale D)². This *Richtlinien* sets out the basis for the informant's actions, which it provides:

Employment guidelines. The *Richtlinien* provides that the use of the informant may only be resorted to when there are considerable difficulties in establishing the facts and, in any event, as the last resort of the investigation: as the last available means³.

Confidentiality. Confidentiality must be guaranteed in the field of 'serious crime', organized crime, drug and arms trafficking, counterfeiting of currency and crimes of state protection. However, for less serious offences, it will be necessary to assess the circumstances of each case in order to establish the necessary confidentiality measures, except for minor offences where the confidentiality of the informant is not protected.

These precautions in relation to keeping the identity of the informant confidential shall lapse if the informant knowingly provides erroneous information, if the lack of confidence in the informant is confirmed, if the informer has participated in criminal acts, or if the relevant institutions consider that the informant is guilty of the activities for which he has provided information. At this point, it is particularly relevant to highlight the control that the prosecutor carries out on confidentiality by deciding through a *Generalakten* report, in which he reports on the participation of the informer in the facts, motivating, if necessary, the decision to maintain his anonymity.

¹ Vid. Kleinkencht, T. y Meyer-Gossner, L.; "*Strafprozessordnung*", Ed. Beck, Múnich, 1997, § 110a n^o 4

² In this annex we find the *Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren des Bundes und der Länder über die Inanspruchnahme von Informanten sowie über den Einsatz von Vertrauenspersonen (V-Personen) und Verdeckten Ermittlern im Rahmen der Strafverfolgung*, where the limits and cases in which the confidant can be used in Germany are stated.

³ The use of informants is prohibited, as they may never be minors (Article 3.4)

This ensures anonymity and therefore the police act accordingly when making their report.

The Undercover Confident. This is the name of the person who is not a police officer from whom the infiltration is requested. German doctrine considers that there is a link between the informer and the police, which allows the State to be held responsible for the actions of the informer, and that it is as a result of this causal link that the actions of the informant can be held responsible for the State⁴. Therefore, the police will try to keep a direct control of the operation, interfering with the fundamental principle of the German Right of self-determination of information as a consequence of this infiltration mechanism; therefore, it is regulated that for the use of *V-Person*, the requirements established for the undercover agent, contained in 110 § of the StPO, will have to be taken into account⁵.

According to § 58 of the StPO, witnesses must be subject to the principle of confrontation by the parties, separately and alone, however, as we have seen above, the case law admits that the police conceal the identity of an informant (*der verdeckter ermittler*) if the disclosure of the identity of the informer would pose a serious danger to the security of the informant. So, the statements of the informer will be collected by the police officer and this will be heard by the court (§ 251.II StPO)⁶. That is why it is encouraged that the infiltrator is a police officer, in order to avoid false information offered by the informant, that the information is biased or that the informant himself offers information to the criminal organization about his infiltration.

Compensation. The payment of the informant for his cooperation will be made by the police officer who has direct contact with him; this police officer, who belongs to the Landeskriminalamt of the region (federal criminal police)⁷, must have withheld the relevant taxes before making the payment.

Witness protection. In addition, the German legislature has regulated witness protection by the Law of 11 December 2001, amended in 2007, *Das Zeugenschutz-Harmonisierungsgesetz (ZSHG)*; this law covers police measures for the protection of witnesses and can be effective even at the stage of criminal enforcement.

⁴ Vid. Henrich Haas, H.; "*V-Leute im Ermittlungs- und Hauptverfahren: neue prozessuale Aspekte*", Ed. Centaurus-Verlagsgesellschaft, 1986, pages from 20 to 28.

⁵ Vid. Roxin, C.; "*Strafverfahrensrecht*", Ed. C.H. Beck, Munich, 1995, page. 66.

⁶ Vid. Delmas-Marty, M.; "*Criminal proceedings of Europe (translated by Pablo Morenilla Allard)*", Ed. Edijus, Zaragoza, 2000, page. 117

⁷ Landtag Nordrhein-Westfalen [Internet]. Der Minister für Inneres und Kommunales hat die Kleine Anfrage 826 mit Schreiben vom 8. Februar 2013 namens der Landesregierung beantwortet "Antwort. Bezahlung von V-Personen" [cited 4 december 2020] Available at: <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD16-2055.pdf>

- Procedural budgets.

As a starting point, it is necessary to highlight a peculiarity of the study of German comparative law in relation to investigation: the judicial police is subject to control by the public prosecutor- due to the purpose of the German legislator during the 19th century, creating the figure of the Staatsanwaltschaft public prosecutor- with three objectives: to avoid an inquisitive process, to facilitate an objective institution that takes charge of the investigation, controlling that all the guarantees are fulfilled and a legal control at state level of the police investigation⁸. In this way, the public prosecutor's office becomes the guarantor of criminal investigations⁹ by monitoring the investigative measures taken by the police, although it is true that in practice, the police can investigate to a certain extent without a prosecutor's mandate in the face of initial suspicions of a criminal act, the prosecutor, will subsequently have to intervene in investigations by deciding whether the results obtained are sufficient to promote public action¹⁰.

On their behalf, German case law does allow the officer to testify as a reference witness about conversations with a person, and German law further entitles the officer to decide whether the informant will testify as a witness or not¹¹. In turn, the prosecutor has the ability to say whether he wishes to introduce the informant as evidence and therefore disclose his identity when introducing him as evidence so that he can be contradicted by the defence¹².

The use of the undercover agent is covered in § 110 and following of the StPO, which establishes in its § 110.a the use of clandestine investigators – undercover agent- for certain criminal acts, such as drugs trafficking, weapons, money counterfeit, etc., although in the end it leaves the door open to the use of this means of evidence in the investigation of any crime.

If the undercover agent were to carry out any act that could involve interference with the fundamental rights of the person under investigation, he would have to request a judicial authorization. In urgent cases, the authorization of the Prosecutor would be enough.

⁸ Vid. Roxin, C.; *“Rechtsstellung und Zukunftsaufgaben der Staatsanwaltschaft”*, Ed. DRiZ, 1969, pages. 385 to 389.

⁹ This is how it is collected in the § 161 del StPO.

¹⁰ Vid. Boss, H.; “Germany” in Maciá Gómez, R. (Director); *“Systems of criminal proceedings in Europe”*, Ed. Cedecs Editorial S.L., Barcelona, 1998, page. 27.

¹¹ BGHSt 40, 211, 216 (Zeuge vom Hörensagen, rule against hearsay evidence). Las BGHSt o *Die Entscheidungen des Bundesgerichtshofs in Strafsachen*, are the Court's decisions on criminal matters from the German Federal Court. son las decisiones que emite la Corte en material criminal del Tribunal Federal Alemán.

¹² Vid. MADLENER, K.; “Speed and efficiency in German criminal proceedings” in RODRÍGUEZ RAMONS, L. (Coord.) y BUENO ARÚS, F. (Coord.); *“Criminal law and criminology as a basis for criminal policy”* Ed. Dykinson, Madrid, 2008, page. 840 and 841.

In turn, the identity of the undercover agent may remain hidden even after the investigation of the proceeding has been completed. It may, however, be refused if there is a rational reason why the removal of the identity would endanger the life, physical integrity or freedom of the informant or other persons, or if it is simply justified to use the informant as a future source.

With regard to the benefits or incentives used to be able to introduce the collaborator as a means of evidence in the procedure, in the first place, we would have the StPO (Die duetsche Strafprozessordnung), the German code of criminal procedure, which includes three levels of witness protection.

First level of protection. At this level, protection is provided to promote the testimony of the witness at the hearing, supports by § 68 StPO, which includes the concealment of data relating to domicile and identity. In any case, such a witness must specify how he or she came to know about the unlawful acts. Moreover, the defendant can be expelled during the testimony of such a witness if there is a fear that the witness's testimony will be influenced by the presence of the defendant, pursuant to § 247 StPO.

Second level of protection. It would take such measures as may be necessary, provided that the first level measures are not sufficiently effective to ensure that the witness is heard at the hearing. In this case, and with base in the § 223 stop, the judge will be able to take declaration of reserved form so that it could be read by posteriority at once of the oral hearing, although in the above mentioned incriminating declaration the contradiction beginning of the test will have to be respected; reserved declaration that will be able to be of application not only in the cases of illness or inability to appear at once of the hearing, but also when other foreseeable impediments happen, that is to say, when it is presumed that of the practice of the above mentioned declaration at the oral hearing could result risks to the witness.

Third level of protection. This is a set of mechanisms for accountability of the police by that: it excludes a witness to the process; his or her identity remains completely hidden; the statement of that witness is replaced by the testimony of reference of the police officer. To access to this set of measures of an exceptional nature, there must exist a real danger to the State or one of the federal states and even "a real danger to the life or health of the witness. It is also possible, if his exposure endangers the possibility of other activities of him such as an investigator in secret."¹³

¹³ Vid. Schlüchter, E.; 'Criminal Procedural Law'; (Translated by *Esparza Leibar, I. y Planchadell Gargallo, A.*)" Ed. Tirant lo Blanch, Valencia, 1999, page. 125.

- Procedural benefits for the informant.

With regard to the possible procedural benefits that are of application to the informant for collaborating with the Administration of Justice, we meet firstly with the § 129, sixth paragraph of the StGB (German Penal Code), that enables to the Judgmental authority to attenuate and even exclude the penalty, when the author of the fact had conducted a series of acts – of voluntary and sincere form-, tending to prevent the continuation of the association and the illicit activities. This procedural benefit may be extended to those persons who voluntarily and over a long period of time disclose information in order to avoid crimes of which they are aware of. Here the German legislator wanted to guarantee the cooperation of the informant by determining that specific cooperation is not enough, but that it will be necessary to have more extensive cooperation in order to guarantee the information of the informant¹⁴.

The same applies to § 129.a del StGB, which deals with the information of terrorist organisations, with regard to particularly serious offences in the context of a terrorist association or criminal association¹⁵. In relation to drug trafficking, the Narcotics Act (Betäubungsmittelgesetz), in which § 3 there is a procedural benefit regarding to the mitigation or suspension of the penalty. In this regard the prosecuting body may, at its discretion, mitigate or waive the penalty laid down for drug trafficking offences, when the informant, by means of a voluntary communication, has actively and decisively contributed to the investigation, favouring the discovery of the fact by disclosing the competent authority what he knows at the appropriate time. The specific conduct required is the disclosure of useful information, at a time when the crimes of drug trafficking and narcotics, listed in § 29 to 30 of the said Act, can still be prevented.

And regarding organized crime there is the Kronzeugengesetz. This rule prevents that when a person has committed crimes related to Kronzeuge organized crime and decides to cooperate with the authorities by providing information necessary to prevent crimes and arrest those responsible, the penalty may be reduced, up to the limit of Kronzeuge's exemption from criminal liability. This award-winning figure is totally banned for the crimes of genocide, murder and manslaughter.

Treatment of the informer in France 'Informateur o Indicateur'.

In France, significant legislative work has been done in recent years to regulate this figure in order to provide a process with guarantees. In 2002. The Ministry of the Interior drafted the *charte de traitement des ifnormateurs*¹⁶, which contains 28 articles setting out the limits and functions that should govern informer-police collaboration.

¹⁴ The same treatment for the participant is laid down in the fifth paragraph of the article 129 on StGB.

¹⁵ The Reform of the Criminal Code on 29 August 2002 introduced a procedural benefit, under similar conditions, for terrorist and criminal associations abroad.

¹⁶ A document similar to the Instructions issued by the Secretariat of State for Security in Spain.

In this letter, the need to establish a register of informants¹⁷ was raised for the first time, as a mandatory prerequisite to start the collaborative relationship. In this line the police officer, who is collaborating with the informant, cannot derive any personal advantage from such collaboration, and in turn, it is stipulated that in contacts between the informer and the police officer, another police officer must be present¹⁸.

However, the main standardization effort was carried out by the Perben II Act of 9 March 2004, which emphasized the unification of economic criteria for establishing collaboration between the informant and the police officer. This law introduces a far-reaching amendment to Article 15-1 of Law 21 January 1995¹⁹ (subsequently amended by the Law of 3 June 2016), stipulating that the figure of the confidant must be remunerated; to this end, the police, the gendarmerie, and customs services, which are authorised to carry out judicial investigations²⁰, may pay compensation to any person outside the public administration who has provided them with information on a criminal act or the identification of its perpetrator. Remuneration will be fixed jointly by the Ministry of Justice, the Ministry of Interior and the Ministry of Finance.

This provision was implemented by ministerial order of 20 January 2006²¹, article 1 of which stipulates that remuneration shall be set by the Chief Executive of the National Police, the National Gendarmerie or the Chief Executive of Customs and Excise, depending on the police force that is working with the informant. The amount to be established will be discretionary and no appeal can be made against it. In addition, the payment must be produced with a receipt signed by the informant, and this receipt must be kept confidential and protected by the unit that is collaborating, with it. All remuneration offered to informants is kept in a file managed by the central office of information sources (*Bureau Central Des Sources*), which is part of the inter-ministerial technical assistance service (SIAT) of the central directorate of the National Police²².

The latest published investigations indicate that the National Police (specifically the Inter-Ministerial Technical Assistance Service), maintains a Central Source Office

¹⁷ The Perben Law II 2004, made an effort to collect measures that offer a true confidential treatment to the informant, for all this, one of the first measures that it collects, is that, when registering a informer in the database, the informer is collected by a 4 letter code that is obtained from the name, gender, and date of birth of the informant.

¹⁸ Acces to this document is limited to the police, gendarmerie and customs and indirect rights services only, so the only public information that can be found regarding this document is the versions provided by journalistic sources http://www.lexpress.fr/actualite/societe/flics-indics-les-cousins-terribles_1786761.html (Accessed January 12, 2020).

¹⁹ https://www.legifrance.gouv.fr/affichTexteArticle.do?sessionId=E592AA8B4162E84F0BFC1733C97682D2.tpdila13v_3?cidTexte=JORFTEXT000000369046&idArticle=LEGIARTI000032654945&dateTexte=20170111&categorieLien=id#LEGIARTI000032654945 (Accessed January 11, 2020).

²⁰ The judicial police in France is regulated by Article 28-1 of the *Code de Procedure Pénal*.

²¹ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000458015> (Accessed January 11, 2020) Vid. Giacomelli, M. y Joseph-Ratineau, Y.; "Témoign" en MAYAUD, Y. (Dir.); "Répertoire de droit pénal et de procédure pénale", Ed. Dalloz, Paris, 2016, page. 1325. The justification offered by the above-mentioned authors for the publication of this ministerial order and the Perben II Act was to encourage citizen collaboration in revealing criminal acts that were beyond the control of the State, and in turn to offer a series of security guarantees during their statements.

²² Vid. Roussel, G. y Herzog-Evans, M.; "Procédure pénale", Ed Vuibert, 5TH Edition, Paris, 2014, page. 269.

(*Bureau Central des Sources*), with approximately 1700 registered informants. The Gendarmerie has its own network of informants with more than 1000 in 2011. The file of the Gendarmerie is in the Central Source Office (*Section Centrale de Sources*). The Customs Service had a total of 2000 in 2011²³.

The amounts usually paid for the different types of information range from 100 to 3100 euros, although this will depend on the degree of infiltration by the informant, the police exploitation of this information, as well as the persons arrested, and the material seized at the end of the operation²⁴.

With regard to the procedural assessment of this type of evidence, French case law has stated that the testimony given by the informant to the police officer at the oral hearing cannot be referred to by the police officer as evidence for the prosecution²⁵, only the testimony given by the informant himself is valid, and he may be subject to witness protection as provided for in article 706-57 to 506-62 of the *Code de procédure pénale*.

Regarding to the introduction of the informant as a protected witness, this figure has certain peculiarities in relation to Spanish regulations, since, firstly, this measure can only be applied to an informant who has no doubts or suspicions that he or she has participated in the criminal scheme or has committed any type of crime; the informant must provide sufficient evidence²⁶ and be prosecuted in proceedings in which the minimum sentence requested is three years of imprisonment; all of the above will make it possible to grant the figure of the protected witness whose authorization to the public prosecutor or the investigating judge.

In cases in which the informant, family members or persons close to him/her, on account of his/her testimony in the case, may be subject to reprisals that could seriously endanger his/her physical integrity or life, the Judge for Liberty and Detention may authorise the statement of the witness to be included in a record²⁷, without his/her identity being established or his/her signature being required as a witness²⁸.

Such a declaration may be made in a reserved manner only in the most extreme cases; however as a guarantee for the person under investigation, once he has been made aware of this reserved declaration, he shall have a period of ten days within which to

²³ Vid. Cornevin, C.; *“Les Indics. Cette France de l’ombre qui informe l’État”*, Ed. Flammarion, Paris, 2011, pages. 223 to 225.

²⁴ According to Europe 1, reporting an immigrant in an irregular situation is 50.-€ to inform about the situation of a clandestine workout be 300.-€ <http://www.europe1.fr/faits-divers/les-indics-un-secret-jalousement-garde-1287843> (Consulted on January 12, 2020).

²⁵ Sentence of the Court of Cassation, Criminal Chamber, dated May 28, 2014, no.11-81.640

²⁶ Article 706-57 of the *Code de Procédure Pénale*.

²⁷ Figure which exists in France and which, among other functions, is competent to declare the arrest of a person and to order the provisional detention or release of the detainee.

²⁸ Disclosure of the witness’s details at this stage of the proceedings is punishable by up to five years of imprisonment and a fine of 75,000 euros.

appeal in writing to the Trial Judge, who, if the appeal is upheld, may declare the act null and void, with the declaration having to be repeated as a protected witness in the presence of the parties, or the identity of the witness to be disclosed if so requested. For his/her part, the investigated party may request that the protected witness testify by means of technical devices that ensure his or her anonymity and allow for the necessary procedural contradiction, and the witness's voice must be altered in such a way that it is unrecognizable. The assessment of the testimony offered by the protected witness is subject to a legal limitation, namely that a conviction cannot be based on the statement offered by the protected witness as the only incriminating evidence²⁹.

As protection measures for this protected witness we have: to establish the address for the purpose of summonses at the police station that has collaborated with the informant; that no identifying data of the witness appear in the judicial file; to give the informant a supposed identity in those cases where his integrity is at serious risk. The latter procedure is carried out by the Court of First Instance, and may be requested of its own motion, at the request of the public prosecutor or one of the parties.

The procedural benefits available to a judicial collaborator who provides relevant information to the authorities are set out in Article 222.43 of the French Criminal Code, which provides for the possible reduction by half of the penalty for drug trafficking offences, when the collaborator who has committed such offences abandons the criminal behaviour reports it to the relevant authorities and seeks to put an end to the consequences of his illegal action, as well as to identify all the persons who have taken part in the events.

Article 450 provides an excuse for a person who belongs to an 'association of criminals' if³⁰, before any police action is taken, he informs the competent authorities of the list of members of the association and of any other factor that may help to identify it and clarify the facts³¹.

However, one of the most rewarding figures in our comparative law is undoubtedly the one contained in articles 414 and following of the French Criminal Code, which provides for total exemption from punishment for those collaborators who have informed the authorities of facts related to terrorism, crimes against State Security, counterfeiting, etc., and on their behalf, these crimes could have been avoided, and the identification of the guilty parties facilitated.

²⁹ This is stated in article 760-62 of the *Code de Procédure Pénale*.

³⁰ The term used in article 450-1 is: *association de malfaiteurs*.

³¹ For terrorist offences, as set out in article 422.1 of the French Criminal Code, the characteristics are very similar to those established for 'associations of malefactors', since as stated in the aforementioned article: 'Any person who has attempted to commit an act of terrorism shall be exempt from punishment if, having informed the administrative or judicial authority, it would have made it to prevent the offence from being committed and to identify where appropriate, the guilty parties'.

Treatment of the informer in Italy 'Confidenti della Polizia o informatore della Polizia'.

Article 195 of the Italian Code of Criminal Procedure, on the subject of indirect testimony, reiterates the approach adopted by the former Article 349 of the Italian Code of Procedure, which prohibited the judge from requiring police officers to identify informants³², the code itself warning that such conduct would not have any legal consequences for the police officer³³.

Currently, Article 203 of the Italian Procedural Code states that the court cannot force police officers to reveal the identity of their confidential sources if the informer has not been presented as evidence, and therefore the information provided by the informant cannot be used. Nor can the judge compel the informant to testify³⁴.

As a rule, Italian criminal procedure is governed by the principle of adversarial proceedings, and all evidence must be subject to that principle, offering the parties the possibility of offering evidence or contradicting evidence before an impartial judge. In turn, the law allows the accused, among other rights, to examine any witnesses against him and to call witnesses in his favour.

A characteristic feature of this process is the search for the principle of evidence, by virtue of which the evidence for the prosecution and the defence must be shown in the presence of all the parties to the criminal proceedings, with the possibility that they may be challenged and the trial of guilt may no way be based on a witness who did not appear at the oral hearing³⁵.

Notwithstanding the above, there are exceptions established by the Italian legislator, who maintains a more guaranteed position with regard to the clarification of the facts and the prosecution of criminal offences, to the detriment of the rights of the accused; proof of this is that in Italy there is a law on the protection of witnesses³⁶, and in order to it to be applicable to collaborators of justice, two basic requirements must be met: that the collaborator of justice has ended any relationship that could link him/her to the criminal organisation and, secondly that there is collaboration that could be corroborated by other means.

³² In the previous wording of the article, it was stated that: 'The judge cannot oblige the officers and agents of the Judicial Police to reveal the names of the person who have provided them with news, and they cannot receive under penalty of nullity, from the mentioned officers and agents news coming from persons whose names they consider should not manifest'.

³³ Vid. Scarparone, M.; *"Confidenti della Polizia e diritto di difesa"*, in *Giurisprudenza Costituzionale*, 1971, page. 2107.

³⁴ Vid. Tramontano, L.; *"Codice di procedura penale spiegato"*, Ed. La Tribuna, Plasencia, 2012, page. 1975.

³⁵ The rights discussed above were incorporated by Law 63/2011, which amended Article 111 of the Italian Constitution and the Italian Code of Criminal Procedure.

³⁶ Decree Law 15.01.91 no 8 (as amended by Law 45/01) and the Interministerial Decree of 26.11.91 apply.

The period for which protection measures may be granted will be from six months to five years, which may be extended, and the list of persons eligible for protection is set out in article 9 of the Inter-ministerial Decree: persons exposed to serious danger as a result of the collaboration, their close relatives, those who live with them, and all those, who are exposed to serious danger as a result of their relations with collaborators.

In addition, article 392.1, b of the CPP (*codice di procedura penale*), regulates the preconstitution of evidence as advance proof of the testimony of the witness, provided that there is a well-founded reason that the witness could suffer from any type of violence, threats, offers or any other circumstance that could impede his/her testimony or that he would give it falsely.

The Judgment of the Supreme Court of Criminal Cassation of October 9, 1992, sentence no.3952, said in this regard that the information provided by the informant may be used in the preliminary investigation phase and for the adoption of precautionary measures (*l'applicazione delle misure cautelari*).

On the other hand, Law no82 of March 15 1991, deals with the protection of those persons who collaborate with the Justice, offering them, depending on their condition, prison benefits and police protection measures, such as their custody in a safe place, new documentation, economic measures (medical expenses or even a periodic amount), as well as measures of labour reinsertion.

As in other countries, in Italy there are also various legal texts that offer certain benefits, depending on the type of crime and the assistance provided, to those who collaborate with the Administration of Justice in clarifying a criminal act, or facilitate its arrest. This procedure is known as the *pentito*³⁷ benefit, according to which the repentant offender provides all the information known to him and which can be corroborated by agreement between the repentant offender and the Public Prosecutor's Office, an agreement which will be submitted to the judge; in turn, all the statements made by the repentant offender must be documented in and 'illustrative record of the contents of the collaboration'. We have examples of this regulation:

Crimes related to politics and armed gangs. Articles 308 and 309 of the Italian Penal Code contain measures for the lifting of penalties, based on good post-criminal behaviour.

Kidnapping of persona for purposes of extortion and witness protection. Law no.5 of February 15, 1991 and Law no. 203 of July 17, 1991 contains in their articles and attenuation of the penalty for those persons who carry out an act of dissociation with

³⁷ Vid. Eloísa Quintero, M. (Coord.); 'Tools to combat organized crime', Ed. National Institute of Criminal Sciences, Mexico, 2010, page 34.

mafia groups or criminal organisations and offer collaboration to the Administration of Justice.

Regulation of narcotic and psychotropic substances, prevention, cure and rehabilitation of states of drug dependence. Article 73.7 of the Act adopted by Decree on October 9, 1990 provides for the obligation to reduce by up to two thirds the penalty laid down in the Criminal Code 'for anyone who applies it to prevent the criminal activity from reaching further consequences, including by specifically helping the police of judicial authority to reduce the means for committing the offence'. Article 74.7 of this rule provides that 'anyone who has been effectively employed in securing evidence of the offence or in reducing the availability by association of instrumentalities for the commission of offences.

Projected crime and procedural collaboration. The articles 4 and 5 of Law no. 15 of February 16, 1980, on the other hand, contain the causes for the lifting of the penalty linked to the effective withdrawal.

Terrorism. Law No. 34 of February 18, 1987 on measures in favour of those who dissociate themselves from terrorism, in addition to encouraging such conduct, also offers several benefits to persons who provide information or collaborate with the administration of justice.

Treatment of the informant in the United Kingdom 'Police informants or Cover human intelligence sources'.

In the United Kingdom there has been a very varied form of crime over time, so obtaining information to prevent and eradicate crime has been a major task that has evolved over time, so it is one of the legislations at European level that offers greater references in its regulatory texts on the use and treatment of human sources as a means of research³⁸.

The first references to the use of confidential sources are to be found in the Security Service Act 1989³⁹, which basically regulates the means of investigation that may be used by the Security Service to prevent and eradicate certain types of behaviour, as set out in section 1 of the Act, which authorises the director of an investigation – with the aim of carrying out the mission entrusted to him - to carry out the investigation work that he considers appropriate and always under his responsibility, without him being able to act in any way outside the law. Therefore, this rule -although not expressly-

³⁸ Vid. Murphy, J.; "Foreword" en BILLINGSLEY, R. (Cord.); "Covert Human Intelligence Sources: The "unlovely" face of police work", Ed. Waterside Press, Hampshire, 2009, page. 11

³⁹ Web page <http://www.legislation.gov.uk/ukpga/1989/5> (Acceded on December 13 2020)

authorised the use of police informants as long as it was necessary for the purpose pursued⁴⁰.

Subsequently, the Intelligence Service Act 1994⁴¹, established that the means of investigation used for the exercise of the functions inherent in the security and intelligence service should be proportionate to the intended purpose. Later, Part III of the Police Act 1997⁴², makes specific regulations on the confidentiality of information sources and their use, but it is not until the Regulation of Investigatory Powers Act 2000⁴³ (RIPA), where we expressly find the regulation of the use of confidential sources in the United Kingdom.

Section 26.8 of Part II of this Act, devoted to surveillance and the use of confidential police *surveillance and covert human intelligence sources*, defines what is to be understood by an infiltrated confidential police source, establishing that it is a person who maintains a personal relationship or one of a similar nature with another person, for the purpose of infiltrating his activities and providing information to the authorities, determining that for us to be faced with a valid confidential source one of these two situations must occur:

- That the said person has expressly used the infiltration in the environment of the person to whom he intends to obtain information, in order to facilitate access to the information obtained by the authorities.
- Or, it reveals the information obtained because it has had access to it, as a result of the relationship maintained by the informant with that person.

Section 26.9.b states that such infiltration may only be carried out when it is proportionate to the purpose being pursued, and provided that in the environment in which it is intended to infiltrate it is not aware of the possible infiltration. For its part, section 26.9.c determines that the infiltration and information offered by the informant will have to be produced in a covert manner, guaranteeing at all times the security of the informant and the means employed.

The code of practice on the use of human infiltrated sources states that the infiltrated informer is acting on behalf of the public authorities, and therefore its use will need to be approved by the relevant authorities. It also says that the infiltrated informant must be effectively monitored, ensuring his or her safety, guaranteeing the legality of his or her actions and his or her control by the authorizing officer.

⁴⁰ Vid. Newburn, T. y Neyroud, P.; “*Dictionary of Policing*”, Ed. Routledge, Nueva York, 2008, page. 220

⁴¹ Web page <http://www.legislation.gov.uk/ukpga/1994/13>

⁴² Web page <http://www.legislation.gov.uk/ukpga/1997/50>

⁴³ Web page <http://www.legislation.gov.uk/ukpga/2000/23>

The authorizing basis for the figure of the undercover informant is the 'manipulation' of a relationship, as one of the agents is interacting for aims and purposes very different from those presupposed by the other and, consequently, Articles 6 and 8 of the ECHR concerning the rights to a fair trial and the right to private and family life are being affected, as the infiltration and manipulation of a personal relationship in order to obtain information is an interference with Article 8 of the ECHR which must be authorized by a competent authority⁴⁴, even if the infiltrated informant does not provide effective information.

The authorities competent under this Act to authorize a situation of an undercover informant are⁴⁵, among others, the 'home office', the Ministry of Justice, the department of transport and the local authorities, subject to court approval (Amendment introduced by the *Protection of Freedoms Act 2012*).

The authorization must be in writing, and minimums are established with respect to the content to be included:

- Reasons why the measure is necessary and proportionate.
- Purpose pursued with the infiltrated informant.
- In the event that the informant is placed in an investigation or transaction, it establishes the nature of the transaction.
- The conduct allowed to the undercover informant.
- Details of any possible collateral interference and the justification for it.
- Confidential information you will have access to.
- Provide a registration number so that it can be tracked later, also detailing the person who authorized, date and time.

The authority that authorizes the use of the infiltrated informant must justify the need for and proportionality of this means of investigations, as established in section 29.3 of the aforementioned Act, carrying out an exercise that weighs up the seriousness of the case, with respect to the interference that will be made in private or family life.

Likewise, a distinction is made between the infiltrated informant the collaborator⁴⁶, the collaborator being the person who offers information to the police authority because he or she has acquired it internally, but this collaboration is not offered continuously over time and the relationship will end once it has been transmitted, without the infiltration being induced by the police.

⁴⁴ Section 28 of the above-mentioned Act sets out the cases in which authorisation may be requested.

⁴⁵ The full list is in Appendix I of the Act 2002 *Regulation of Investigatory Powers*.

⁴⁶ Home Office; 'Cover Human Intelligence Sources' Op.Cit. page. 11.

In turn, since there is going to be an interference in the private sphere of individuals, it is necessary to specify from which individuals it is intended to obtain information, in order to minimize the interference in the personal sphere of individuals and to specify the authorization in a more detailed way. However, it may be that the authorization offered at the time regulated a series of actions in relation to certain persons and that, during the infiltration, the informant, would have had to carry out an unregulated action. This is what the doctrine calls 'incidental action'; action that is regulated and authorized in sections 26.7a, 27 and 29.4 of the before-mentioned Act. In the event of incidental conduct that could be repeated, it would be necessary to include it at the time of renewal in order to expressly empower the informant⁴⁷.

This standard also regulates the need to guarantee and control the information provided by the informant, since he is not a police officer, the information he provides may be biased or based on the personal motives of the informant. Therefore, sections 29.4.a, 29.4. b, 29.5.1 and 29.5.4 detail the mechanisms for supervising and managing the informant, and articulate them through the figure of the *covert operations manager*, who is responsible for day-to-day operations with the informant and must act on behalf of the licensing authority, coordinate and direct the activities of the informant, record all the information provided by the informer and control the security of its source. The authorizing authority must in turn renew the authorization it has granted and draw up a document in which it has verified that the requirements if its initial authorization have been met⁴⁸.

As a consequence of the information provided by the informer, a series of indications will be produced that can be used as evidence in the appropriate criminal proceedings; indicative evidence that is regulated in the *common law* (civil procedure law, section 78 of the *Police and Criminal Evidence Act 1984* and the *Human Rights Act 1998*), being applicable to him the established in the *Criminal Procedure and Investigations Act 1996*.

The action of the informant begins with the signing of a kind of *contract* that the controlling agent makes him sign, which contains the conditions under which the collaboration must take place with the commitment to observe them and submit to them for the duration of the collaboration. Among the possible clauses of this contract, we highlight: to offer the information in a complete and truthful manner, not to commit criminal acts to obtain information, not to inform third parties of the collaboration, not to encourage or promote criminal behavior, not to take hasty decisions without consulting your controlling agent, to attend meeting and in the

⁴⁷ Authorizations can be issued for a maximum period of 12 months, after which they will cease to be in force, or may be renewed for the same period. Oral authorizations can also be established, as a matter of urgency, which will have a value of 72 hours, if not renewed in writing, will cease to have effect.

⁴⁸ The Town Council of Moray, in Scotland, offers on its website forms for initial authorizations, renewals, cancellations and revisions (http://www.moray.gov.uk/moray_standard/page_67933.html Website consulted December 15, 2020).

event that you commit any illegal act, you will be arrested. If the informer does not comply with the terms of this agreement and any consequences arise from such non-compliance, the cooperating agent shall be exempt from all liability.

The introduction of the witness into the proceeding shall be in accordance with the section 6A.2 Criminal Procedure and Investigations Act 1996, which provides that any witness who in any way supports the prosecution must give the necessary identification details to enable him to be brought into the proceedings, and in the event that this is not possible the party seeking to introduce him must give the necessary details to enable him to testify as a witness. This is a right of every accused person to be able to examine the witness who accuses him, under section 6 of the *Human Rights Act 1998*, and the manner of making such a statement will be that provided for in section 25.11 of the *Criminal Procedure Rules Act 2015*.

However, section 23.4 of the *Criminal Procedure Rules Act 2015* provides for a number of cases in which it dispenses with the necessary contradiction, such as the case where the prosecution considers that the testimony of a witness will cause him/her to incur serious personal risk. In such a case, he must apply for such a dispensation in writing to all the parties to the proceedings, stating in that letter the reason given by the witness which shows any reactions which the accused or persons close to him might have if the statement were made; the relationship between the witness and the accused; explaining that if the witness is contradicted, the information given by the witness may be reduced; and, justifying that such action is not contrary to the interest of justice. Such request will or will not be granted by The Court hearing the case, in which case the witness may be introduced in written forms as he or she did during the pre-trial phase⁴⁹.

Another possibility is to introduce the informant anonymously, as sections 86 to 97 of the *Coroners and Justice Act 2009*, provide that a witness who is to testify in court may do so without having to use his or her identifying information, and may use a pseudonym, modulating his or her voice but, in any event, may not hide from the view of the members of the court.

The police have two ways of *promoting* the declaration of the informer against a given person; a) The *charge*, which is initiated by the arrest of the person involved⁵⁰, or b) through the *laying information*, which is the accusation presented by the police to the court, which can lead to the court issuing a summons for the accused to answer before it⁵¹.

⁴⁹ Section 16.4 of the '*Criminal Procedure Rules Act 2015*';

⁵⁰ Vid. Ormerod, D; '*The police reform act 2002- Increasing Centralization, Maintaining Confidence and Contradicting out Crime Control*' in *Criminal Law Review*, March 2003, page 581.

⁵¹ Vid. Cuadrado Salinas, C; '*The investigation in the Criminal Procedure*'; Ed. La ley, Madrid, 2010, page 235.

As in the rest of the procedural systems in our environment, in the United Kingdom there is also a rewarding figure for the repentant offender who actively collaborates with justice: the *crown witness*, a witness who collaborates with the authorities by issuing a statement against the other perpetrators of the acts and who, through him, obtains sufficient *Queen's Evidence* to make it possible to produce a conviction. In the event of conviction, the crown witness will obtain the *grant of immunity*⁵², with the penalty being reduced in accordance with the agreement reached with the Public Prosecutor's Office *plea bargaining*⁵³. However, the use of such immunities and reductions in sentence is exceptional⁵⁴, since the offender involved must generally be prosecuted by the criminal justice system⁵⁵.

In order to provide greater safeguards for these potential witnesses so that they can testify in criminal proceedings without any interference, section 82 of the *Serious Organized Crime and Police Act 2005*, articulates a series of witness protection measures applicable in the event that the witness has offered evidence of a substantial nature in the proceedings and there is a serious risk against him. The level of protection will be determined by the Public Prosecutor's Office following an assessment issued by the cooperating police officer.

Conclusion

Once we have reached this point, and observing the measures that encourage informants or collaborators to offer information to the authorities, we conclude that on many occasions a kind of distortion is taking place in the criminal process, as there are retractions, contradictory testimonies, etc, since such conducts, can generate procedural benefits through *cooperation paradox*: situations that are generated when leaders of criminal organization – who were their subordinates -, due to the collaboration provided by the leader of such organization.

While it is true, judicial control prevents and controls these possible abuses, guaranteeing equality at the procedural level and providing homogeneity between the legal consequence and the responsibility around it.

⁵² The immunity and protection of the *crown witness* is provided for in the '*Serious Organized Crime and Police Act 2005*'

⁵³ Under section 71 of the *Serious Organized Crime and Police Act 2005*, where full immunity is to be provided, such an arrangement must be approved by the Attorney General.

⁵⁴ According to Owen, T.; 'Blackstone's Guide to the *Serious Organized Crime and Police Act 2005*, in Oxford University Press, 2005, page 48. This type of immunity is aimed at cases of organized crime, although it can also be applied to misdemeanours.

⁵⁵ Committee on the Administration of Justice; '*The apparatus of impunity? Human rights violations and the Northern Ireland conflict: a narrative of official limitations on post-agreement investigative mechanisms*', in CAJ, 2015, page. 12

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