



The credibility of testimony from minors allegedly victims of abuse within the Italian legislative framework



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ABSTRACT

The authors aim to analyze the key aspects related to the testimony of children who might have been victims of sexual harassment and abuse. The issue of medico-legal psychiatric assessment of minors who claim to have been sexually abused is extremely contentious and widely-debated, not only due to the growing spread of such claims, but also on account of the technical challenges it raises. For these reasons, national as well as European law-makers have intervened by enacting new legislation, and scientific communities have established new sets of guidelines aimed at improving the overall conditions under which a child is called to testify as well as the process through which depositions are collected and evaluated, so as to ensure that any assessment of the reliability of the testimony is scientifically grounded. The authors also highlight the importance of regulatory measures meant to minimize the risk that the questioning of a child might negatively affect his or her emotional balance by limiting and lessening stressful conditions and anxiety, which may traumatize and irretrievably scar the child. Moreover, they stress the importance of dealing with the social issue of child abuse by strengthening a preventive set of measures.

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1. Introduction

The phenomenon of abuse against minors has always occurred, but over the past years, it has become alarmingly widespread (WHO, 2013). Media outlets cover stories of children sexually victimized by adults almost daily. According to the American Academy of Pediatrics (2005), sexual abuse occurs when a child is involved in sexual activities that he or she is unable to understand, for which he or she is not ready and cannot give consent, and/or that go against the law or social taboos. The Italian Society of Child Neuropsychiatry (SINPIA) identifies child sexual abuse on the basis of the relationship between the victim and

the abuser: 1) "Intra-familial" abuse occurs if the abuser is a family member of the abused child. Such abuse may be carried out by close relatives (parents, including adoptive and foster ones, stepfathers, live-in partners, cohabitants, brothers) or by members of an extended family (grandparents, uncles, cousins, close family friends). It may involve girls and, somewhat less commonly, boys. 2) "Extra-familial" abuse takes place when the abuser is someone outside of the family setting; this kind of abuse is commonly perpetrated by neighbors or acquaintances and may affect boys and girls. Often times, a state of emotional distress pushes the minor to accept "attentions" he or she finds outside the family. The awareness that minors should be protected from abuse and violence is reflected in national and international legislation through Conventions, Recommendations, and Directives. Among such significant measures are the Council of Europe's framework decision

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on the standing of victims in criminal proceedings, eventually followed by Directive 2011/92/EU “on combating the sexual abuse and sexual exploitation of children and child pornography”, and the European Parliament and Council Directive from 25th October 2012 (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime, which place in the judge’s discretion, without prejudice to the rights of the defense, a personalized approach to enable victims to follow the proceedings (Pascucci, 2016).

With the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), signed on 25th October 2007 and ratified on 19th January 2010, all States of the Council of Europe have made the commitment to strengthen the protection of minors against sexual exploitation and abuse through the adoption of a common set of standards and measures aimed at preventing these crimes, prosecuting the culprits, and protecting the victims (Cesari, 2013; Forza, 2013; Gemelli, 2013).

Over the past decades, growing attention has been paid to the issue of child witness credibility, as reflected in several scientific publications, in the evolution of the jurisprudence, and in internationally laid out guidelines.

Any minor who is an alleged abuse victim constitutes a fragile and anxious witness, primarily when compelled to conjure up painful, traumatic events in a legal setting. Often times, the minor is victim and witness at the same time; thus, sexual abuse charges are based on his or her testimony, with little other corroborating evidence. That is the reason why it proves so difficult to establish conclusively whether the child is telling the truth or whether his or her testimony is skewed by third parties (Rotriquenz & Mazzoni, 2007). In order to help judges fulfill their duty of assessing minors’ testimony and, at the same time, find a way to set their mind at ease, the psychological expert witness profile has been introduced in the United States (Revnitskaia, Ivanina, & Ivanina, 2014), and a preliminary set of guidelines has been put forth (Adams et al., 2016). On the heels of the US’s initiative, scientific societies in Italy have devised a set of guidelines aimed at guaranteeing the soundness of technical proceedings as well as the psychological protection of minors. The most well-known ones are the “National Guidelines”, the “Protocol of Venice” (specifically designed for cases of collective abuse) (Pingitore, 2015) and the “Chart of Noto” (Carta di Noto) from 9th June 1996, updated in 2002, and lastly on 12th June 2011 (De Cataldo Neuburger & Gulotta, 2004, chap. 1). These all include methodology guidelines focused on the minor witness questioning, which counselors need to take into account, namely: (a) resort to as few hearings as possible; (b) make sure that all meetings take place in a way that ensures a level of ease and serenity for the witness being examined; (c) clearly define the ultimate goals of the hearing, taking into account the witness’s age and ability to understand; (d) avoid resorting to suggestive questioning and generally refer to internationally sanctioned questioning protocols; and (e) verify the circumstances in which possible previous questioning may have taken place. Any failure to abide by such recommendations represents a serious methodological flaw.

2. A minor’s testimony: the role of the psychologist

Article 96, Subsection 1 of the Italian Code of Criminal Procedure states that “every individual has the ability to testify”; it therefore entails no distinction among witnesses, not even based on their age. Hence, a defendant’s liability may be based solely on a minor witness’s testimony, which must be rigorously scrutinized for objective and subjective credibility (Cass. pen. Sez. Un. n. 41461/2012, <http://www.foro-europeo.it/home/materie/506-penale/2176-mezzi-di-prove-testimonianza-oggetto-e-limiti-persona-offesa>).

In that regard, Law No. 172 of 1 October 2012 and the Code of Criminal Procedure (art. 498) assert that the judge must resort to the aid of a consultant, usually a child psychologist or psychiatrist. Such professionals must be able to rely on a thorough expertise in forensic

psychology, psychology of testimony and developmental psychology, but they must also be expert users of specific investigative interview protocols (Marinović et al., 2010; Cass. pen. n. 39959/2003). Any lack of specific knowledge may in fact give rise to most serious judicial mistakes, which could, for instance, lead to the acquittal of a guilty defendant or the conviction of an innocent one.

Nevertheless, it must be noted that said experts are not tasked with establishing whether the “fact” has ever taken place as recounted, but whether the minor is fit to testify at all and to what extent his or her testimony can be reliable and credible (Leetch, Leipsic, & Woolridge, 2015). In other words, an expert is not called on to ascertain what really occurred (“judicial truth”), but rather to collect data on which to base the considerations to be submitted to the judge (“clinical truth”). It is up to the judge to evaluate, with proper impartiality and thoroughness, an array of factors (e.g., family environment, emotional background, the ability to recall, possible suggestions or conditioning) before being able to declare a testimony to be credible (Brichetti & Pistorelli, 2012; Gentile, 2015).

Ultimately, the questioning of child witnesses pursues a dual goal: it must guarantee a degree of psychological protection that the child/adolescent needs and, at the same time, ensure the acquisition of useful evidence from proven sources that is instrumental in reconstructing the events and in identifying a culprit (“criminological value”). Such oversight must be put in place with extreme caution, by means of a particularly rigorous examination designed to take into account other elements that might surface from Court records (Cass. pen., n. 29612/2010, *Cassazione penale*, 2011, 3520). In order to establish whether child witnesses are fit to testify, consultants need to assess their psychological profile, the possible presence of mental or behavioral disorders, and their level of maturity. The National Guidelines, under art. 3.3 (Liberatore, 2014), posit that the ability and fitness to testify include “generic” and “specific” competencies on the part of the minor. The former include cognitive skills such as memory, attention, good linguistic and comprehension capabilities, as well as the ability to tell reality from fantasy. Specific competencies consist in the ability to conjure up and recount any given memory as related to suggestive influences.

According to the Italian Supreme Court, a child witness is fit to testify if he or she proves capable of “perceiving pieces of information, connecting them with others, recalling and expressing them in a wider, more complex picture, all of which are to be considered in relation with age, emotional conditions that regulate his or her relation with the outside world, and the quality and nature of his or her family relationships” (Cass. pen. n. 8057/2013, <http://www.ilcaso.it/giurisprudenza/archivio/8613.pdf>).

Therefore, child witnesses may testify if they are proven to have the psychological aptitude, related to their age, for memorizing events and recounting them in a coherent fashion. Such an ability needs to be placed within social, familial, and environmental settings. In fact, especially in alleged cases of intra-family abuse, it is necessary to consider so-called “family dynamics” since charges of abuse leveled at either parent may stem from parental alienation syndrome, a condition that often manifests itself within the context of parental conflict and may lead to false sexual abuse charges.

Declaring witnesses suitable to testify does not necessarily entail a truthful testimony on their part. It simply means that they are capable of telling the truth, provided that they want to do so, through a narrative unswayed by either family or outside conflicts (Fornari, 2008).

In order to thoroughly assess a child witness’s credibility, consultants need to examine the way in which the alleged victim has lived through and re-elaborated the events; this way, it is possible to establish whether he or she has been truthful, twisting the facts, or knowingly lying.

The experts’ assessment includes: (a) the relationship between what happened and what is alleged to have happened, i.e., the relationship between subjective and objective reality; (b) the relationship between what one purportedly knows and what they claim to know, i.e.,

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