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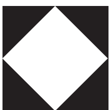
Resozialisierung | Opferschutz | Restorative Justice

Charles J. Scicluna | Myriam Wijlens [Eds.]

Rights of Alleged Victims in Penal Proceedings

Provisions in Canon Law and the Criminal Law of Different Legal Systems



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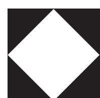

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Foreword

Cardinal Seán O'Malley O.F.M. Cap.

From the time that Pope Francis established the Pontifical Commission for the Protection of Minors and Vulnerable Adults, the Holy Father has made clear that the response to victim-survivors of sexual abuse must be among the Church's highest priorities. In the course of ongoing work with local churches and religious institutes, the Commission Members have witnessed extraordinary responses to this call from around the world. We also continue to see how much more needs to be done.

A priority for responding to victims begins with a clear and honest acknowledgement that we have so often tragically failed them. This recognition is particularly important for expressing genuine sorrow, true contrition and a firm amendment to change. These grave crimes are deeply offensive to all people, but even more profoundly so when committed by a Catholic priest who uses his position to gain access to vulnerable children and adults. Justice requires us to hold and fulfil a commitment to defend the rights of those who have been harmed. Further changes to process and procedures are also needed, particularly a genuine willingness to listen in personal encounters so that the voices of victims are heard by the leadership of our Church. Concrete action to promote and defend the rights of victims is critical to bringing about justice and, we pray, their well-being and healing.

The December 2021 seminar organised by the Pontifical Commission for the Protection of Minors on the rights of victims in penal procedures brought together more than 60 experts in civil and canon law, theology, psychiatry and the social sciences, who presented a critical approach to the status quo in canon law and provided recommendations for new criteria and standards. We are grateful to Prof. Dr. Myriam Wijlens for her significant time and effort given to planning and coordinating the seminar, to Archbishop Charles J. Scicluna as co-editor of this publication, as well as to the academic and secular professionals who participated in the seminar, because their understanding of the depth and breadth of the impact abuse has on a person provides important assistance in the work of the Church.

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The Commission's support for the development and implementation of guidelines for the protection of minors and vulnerable adults emphasises that local policies must assign priority to victims of sexual abuse. The Dicastery for the Doctrine of the Faith placed this first in their *Circular Letter*[1] on these guidelines (2011) as a clear sign of the primary concern for helping victims of sexual abuse to find assistance, healing and reconciliation.

Decisive and timely action is essential when the Church receives a report of sexual abuse. Sexual abuse is a very personal reality marked by a deep sense of betrayal and profound suffering. The lack of a caring and effective response from representatives of the Church can be just as damaging as a negative, hostile response. Too many victims have been further victimised by egregious errors in the manner they were received by Church leadership or by being ignored.

It is our hope that this documentation of the seminar proceedings will be helpful for an understanding of the importance of the Church assigning priority to the defence of victims and a pastoral, supportive response when reports of abuse are brought forward.

Biography

Cardinal Seán O'Malley, O.F.M. Cap., was named Archbishop of Boston in 2003 and was made a cardinal by Pope Benedict XVI in March 2006. In 2010, Pope Benedict appointed Cardinal O'Malley as Apostolic Visitator for the Archdiocese of Dublin, following the release of the Dublin Archdiocese Commission of Investigation (Murphy Report) concerning Church authorities' handling of allegations or complaints of child sexual abuse by clergy in the Archdiocese of Dublin. In 2013, Pope Francis appointed Cardinal O'Malley to the Council of Cardinals and, in 2014, as President of the Pontifical Commission for the Protection of Minors.

1 Congregation for the Doctrine of the Faith, Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics, available on: https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html access 18.02.2023.

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The Rights of Alleged Victims in Penal Proceedings

Introduction to a Seminar

Myriam Wijlens

> "I am conscious of the effort and work being carried out in various parts of the world to come up with the necessary means to ensure the safety and protection of the integrity of children and of vulnerable adults, as well as implementing zero tolerance and ways of making all those who perpetrate or cover up these crimes accountable. We have delayed in applying these actions and sanctions that are so necessary, yet I am confident that they will help to guarantee a greater culture of care in the present and future".[1]

Serious allegations of sexual abuse of minors by clergy in the Roman Catholic Church have been the cause of deep wounds and tremendous pain inflicted upon the most vulnerable in its own midst. Independent investigations, be they commissioned by either Church or State authorities, reveal that not only the sexual abuse itself, but also the handling of the abuse by those in leadership caused serious harm and call for fundamental reforms as well. Responses and interventions in relation to allegations of abuse should not only prevent a secondary victimisation in the sense that they do not inflict additional pain, open old wounds or create new ones, but they are to be conducive in themselves to the healing of those concerned. Whereas the Church operated for a long time in addressing the abuse cases with a hermeneutics of what might be labelled as "protecting the reputation of the Church", a radical change in mentality towards a hermeneutic of "care" is necessary and it must be characterised by an accompaniment that benefits all, and in particular the victims. A hermeneutics of care is asked for because of the dignity of the persons is involved.

An important part of that healing process concerns the administration of justice. The question arises: how can the judicial system itself contribute to

1 Francis, Letter of His Holiness Pope Francis to the People of God, August 20, 2018, https://www.vatican.va/content/francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html, access 10.03.2023.

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the healing of those harmed in view of the dignity of the persons and with a hermeneutic of care? This question is not only of relevance for the canonical judicial provisions, but it also concerns judicial systems throughout the world.

Over the past twenty years the Catholic Church has received developments concerning the knowledge and scope of sexual abuse of minors in the area of substantive law. Examples are:

- the widening of the notion of minor from having completed the sixteen years of age to eighteen years and including persons who are considered by law to be equivalent to a minor;
- expanding the content of the delict from sexual abuse of minors to include the production, exhibition, possession or distribution, by whatever means, of child pornography whether real or simulated, as well as the recruitment of or inducement of a minor or a vulnerable person to participate in pornographic exhibitions;
- changing the perspective of considering the sexual abuse of a minor not just as a violation of an obligation related to celibacy by a cleric, but considering the sexual abuse as a violation of the dignity of the other person, and finally
- amending the time for prescription, which in civil jurisdictions is often referred to as statute of limitations, from expiring not any longer after five years from the day the delict stopped being committed, to twenty years from the time the alleged victim completed its eighteenth year of age and adding the possibility of derogating from prescription altogether in some cases.

The examples show that over the past twenty years there has been an ongoing learning process with regard to the understanding of sexual abuse of minors and its implications leading to relevant changes in the domain of the substantive law. A similar process of learning about sexual abuse cases and the way to respond to them within the canonical penal proceedings commenced much more recently.

1. The Pontifical Commission for the Protection of Minors

Aware of the need to continuously improve its engagement in the area of safeguarding and protecting minors, Pope Francis established the Pontific-

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al Commission for the Protection of Minors (PCPM) in the Vatican on March 22, 2014 and commissioned it to propose to him personally the "most opportune initiatives for protecting minors and vulnerable adults".[2] In order to comply with this specific task, the Pope appointed sixteen members to the second commission (2018–2022) originating from all continents and with rather different professional backgrounds and ecclesial vocations (eight of whom are women). This commission decided to establish three working groups. Group one had to attend to "Healing and Care" with a focus on victims / survivors and their families. Group two was commissioned to concentrate on "Formation and Education" especially of those who engage in ministry or hold leadership positions that imply a responsibility for the safety of children and vulnerable persons. Group three, which was composed of a child psychiatrist and four lawyers, one of whom a canon lawyer, focused on "Safeguarding Guidelines and Norms".

Recognising the urgency of attending to canonical penal law matters, the Working Group "Safeguarding Guidelines and Norms" organised in December 2019 on behalf of the PCPM and after consultation with the Dicastery for the Doctrine of the Faith the seminar "Promoting and Protecting the Dignity of Persons in Allegations of Abuse of Minors and Vulnerable Adults: Balancing Confidentiality, Transparency and Accountability".[3] It addressed five major topics: 1) the seal of confession in relation to mandatory reporting of child sexual abuse; 2) the pontifical secret; 3) accountability and transparency in canon law and international law, 4)

2 Francis, Chirograph of His Holiness Pope Francis for the Institution of a Pontifical Commission for the Protection of Minors, March 22, 2014, https://www.vatican.va/content/francesco/en/letters/2014/documents/papa-francesco_20140322_chirografo-pontificia-commissione-tutela-minori.html, access 10.03.2023.
For more information about the PCPM: http://www.protectionofminors.va/content/teladeiminori/en.html, access 10.03.2023.

3 The contributions presented during the seminar are published in the language of presentation (English or Italian) in *Periodica* 109 [2020] 401–676. A translation of each contribution in English or Italian can be found on https://www.iuscangreg.it/seminario-tutela-minori, access 10.03.2023. All studies are also published in a Spanish translation: Myriam Wijlens / Neville Owen (eds.), Confidencialidad, Transparencia y Accountabilty: La dignidad de las Personas en los procesos de denuncia de abuso sexual. PPC Editorial 2021, https://cepromelat.com/producto/confidencialidad-transparencia-y-accountability/, access 10.03.2023; as well as in Polish: Myriam Wijlens / Neville Owen (eds.), Nadużycia seksualne w Kościele a tajemnica spowiedzi Wydawnictwo wam 2022, https://wydawnictwowam.pl/sites/default/files/naduzycia_seksualne_st_0.pdf, access 13.03.2023.

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accessibility to jurisprudence and 5) the rights of victims in canonical penal procedures.

2. A Seminar on Rights of Alleged Victims

The study presented in the 2019 seminar, which focused on the “Rights of Victims in Canonical Penal Processes”[4] along with the findings from independently conducted investigations, highlighted the crucial need to recognize and address the role of victims in the entire canonical penal judicial system. This system should support victims from accessibility to file a complaint, to receiving care after the court proceedings have been concluded. Based on these findings and after consultation with the Dicastery for the Doctrine of the Faith, the Working Group organized a second seminar entitled “The Rights of Alleged Victims in Penal Procedures”.[5] The seminar took place in Rome in December 2021.[6]

The purpose was to provide canon lawyers in leadership positions as well as experts in penal law from different judicial traditions such as the common, civil, and Germanic law with an opportunity to discuss together the role and rights of alleged victims of sexual abuse as minors in their respective judicial systems in light of internationally recognised standards, and to see what reforms in the canonical system might be asked for.

Although due to its scope and nature canon law is not bound by international treaties or conventions, it was felt that an exchange could provide

4 Charles J. Scicluna, The Rights of Victims in Canonical Penal Processes. *Periodica* 109 [2020] 493–503.

5 The term “alleged” victims was chosen to recognize on the one hand that the persons who suffer from sexual abuse as a minor are truly victims, while on the other hand the presumption of innocence of the accused till a verdict has been issued is respected.

6 The Working Group “Safeguarding Guidelines and Norms” existed only during the second mandate of the PCPM (2018–2022). It was composed of Ernesto Caffo (professor of child and adolescent psychiatry, founder and president of *Fondazione S.O.S – Il Telefono Azzurro Onlus*- Italy), Benyam Dawit Mezmur (professor of children’s rights law, former chairperson of the UN Committee on the Rights of the Child – Ethiopia / South Africa), Neville Owen – Co-Chair of the Working Group (former senior judge of the Court of Appeal of the Supreme Court of Western Australia, chairperson of the “Truth Justice and Healing Council” created by the Australian Catholic Bishops Conference to respond to the Royal Commission on institutional sexual abuse), Hanna Suchocka (former Prime Minister of Poland, former Ambassador of Poland to the Holy See, professor of constitutional law and human rights – Poland), and Myriam Wijlens – Chair of the Working Group (full professor of Canon Law, preliminary investigator in canonical penal trails – The Netherlands / Germany).

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valuable insight, in particular because -as the seminar confirmed- developments in the civil jurisdictions regarding the role and rights of victims are also resulting from an increasing understanding of the medical and psychological impact of the judicial system on victims. An example of this can be found in the studies on secondary victimisation through the application of judicial proceedings. Canon lawyers must also engage with evolving forensic, medical and psychological insights and study how these find an application in civil judicial penal systems in order to discern to which extend consequences must be drawn about a possible necessary adaptation of the canonical penal proceedings. Another reason for taking developments into consideration lies with the fact that in concrete canonical penal cases the outcomes of civil penal procedures are taken into consideration. Hence, the court personnel in canonical cases need to know how to read and evaluate the materials and outcomes of cases adjudicated in the civil penal realm.

3. *Participants – Working Method*

The seminar was held in in the Congress Centre of Villa Aurelia in Rome from December 12 to 14, 2021. The aim was to facilitate constructive and fruitful exchanges and deliberations between experts working in the area of victims' rights in canon law and judicial systems from different legal traditions in light of internationally recognised standards. Despite the challenges posed by the COVID-19 pandemic, almost all sixty invited participants from around the world were able to attend in person, with only a few participating online. The working languages were English and Italian, and a simultaneous translation was provided.

The expertise present can be grouped into seven domains: 1) victim / survivor of sexual abuse in the Church, 2) professors in judicial penal proceedings from the common, civil, and Germanic legal systems, as well as experts familiar with internationally agreed standards on the rights of victims in different penal proceedings, 3) professors of canon law; 4) staff members from relevant dicasteries of the Roman Curia, 5) diocesan bishops, most of whom are canon lawyers and have experience in conducting penal investigations as well as in governing a diocese. Two of the bishops present are cardinals who are also members of the Council of Cardinals advising Pope Francis; 6) canon lawyers who have a vast experience in conducting canonical penal procedures and who hold leadership positions

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in their respective dioceses, and finally 7) members of institutes of consecrated life who due to their leadership position or because of being a canon lawyer have a vast experience in the canonical penal proceedings as it applies to persons in consecrated life.

The organizers of the seminar consciously and deliberately decided that all participants should begin by listening to a victim / survivor who shared the experience of suffering due to canonical penal procedures or their application. All participants were invited to approach the discussion on canonical penal procedures by tuning their ear, heart, and mind to those who have suffered within the Church.

To facilitate an intensive exchange, the speakers were invited to submit their manuscripts before the sessions so that they could be translated and made available to all participants with the request that they read them before the actual session. Additionally, before the seminar began, respondents, mostly consisting of canon lawyers, were selected from among the participants. They were asked to identify the most remarkable and relevant aspects of the experts' presentations on their respective judicial system in view of canonical penal procedural norms.

During the seminar itself, the speakers presented the most important thoughts of their study in only fifteen minutes. The respondents could reply for ten minutes. The floor was then opened to all participants for a thirty-minute active participation in sharing and deepening their knowledge from their own expertise on the subject presented. The seminar closed with a reflection about noteworthy and outstanding aspects learned from the presentations and discussions, paving the way to identifying possible consequences for canonical penal proceedings.

4. The Content of the Seminar

After a word of welcome by the president of the PCPM and Archbishop of Boston, Cardinal Seán O'Malley O.F.M. Cap., the seminar began by listening to the testimony of a victim / survivor from France, who reported about the experience within a canonical penal procedure. In consultation with the victim, the experience was translated in Italian and delivered by a female colleague. The testimony was presented in the first person singular. It revealed several serious obstacles and difficulties the victim / survivor had faced in the different phases of the proceedings. They included finding a canonical advisor, because most of them are clerics and/or not specialized

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in penal law; the way the person had been invited for giving testimony; the need to travel to another part of the country for the hearing and the financial and emotional burden this caused the victim; the location and kind of room in which the hearing was conducted; how and what kind of (suggestive) questions had been posed; the accessibility to the psychiatric report written about the victim / survivor to the canonical advisor, but not to the victim / survivor; the kind of information about the procedures that was and was not shared with the victim / survivor; the encounter with priests in the procedures and the experience of being treated in general. The narration caused all present to become aware both of canonical provisions and gaps as well as of shortcomings in the application of existing canonical provisions.

Having listened to the victim, the seminar then continued with a presentation by a professor of canon law concerning the canonical provisions of the rights and possibilities for alleged victims to participate in canonical penal proceedings according to the current canon law. The speaker limited his presentation to canonical penal processes. This was followed by a presentation of an overview of rights of victims of sexual abuse listed in different international treaties, directives, conventions etc. Subsequently, experts from several different jurisdictions presented how in their respective country the rights of victims in penal proceedings unfold. The presentations were grouped by way of legal traditions: from the common law tradition the reports came from Australia, Philippines, India, and the USA. This was followed by presentations from the civil law tradition: Argentina, Spain, France, and Italy, and it concluded with presentations from Germany and Poland. An expert from Nigeria shared his expertise in a response. The seminar concluded with a discussion about the potential implications for canonical penal procedures.

The scholars who generously shared their insights had been chosen for their expertise. A number of them had familiarity with the existing canonical provisions and outlined differences between the current canonical provisions and those of their own jurisdiction. Certainly remarkable is how the internationally recognised standards unfold quite differently in different jurisdictions around the world. Hence, the seminar allowed for a sharing of the different provisions in the different jurisdictions around the world as well. As a result, the canon lawyers did not only learn from the civil lawyers from different jurisdictions; the latter reported that they appreciated learning about provisions in other judicial systems in so many

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other countries. It was considered to be a unique opportunity. The interaction thus proved to be extremely rich and insightful.

5. The Outcome

The seminar closed with a reflection by Archbishop Scicluna[7] about the question: *Quo vadis* – where shall we go from here? Having listened to all presentations and discussions he asked: what lessons can be learned and what can be received and implemented in the current canonical provisions? What needs to change?

In his presentation Scicluna emphasizes that whatever is being undertaken must be done in a framework of accompaniment of the victim, because of a duty to care. He underscores that this framework finds its rationale in the purpose of canon law: *salus animarum suprema lex*. This principle governs the rights of victims to be protected from harm and the community's duty to care. He explains that the canonical provisions may not be limited to penal processes in the strict sense of the word, that is, from their formal opening to the definitive sentence. Rather, he argues, the duty to care requires attending to disclosure, investigation, process, and aftercare or support. He also addresses possible remedies for victims and accused to challenge decisions made about the conclusion of the preliminary case – e.g., if no penal process will follow, or what kind of process will be used, administrative or judicial.

Scicluna reflects as well on the relevance of the public nature of penal procedures to contribute to the public good. He calls for a more in-depth study of provisions that some countries such as those in Germany and Poland make, leading him to repeat the proposal he already made in 2019: the possibility to introduce a *procurator partis laesae* as a representative of the victim in the penal procedure. Furthermore, he lists a number of rights that the presentation of the legal provisions in the USA provided and suggest that they can be possible points of orientation for further steps. Another aspect that he considers worthy of reflection concerns the possibility to provide for a professional psychosocial procedural accompaniment of victims in some judicial systems.

7 Archbishop Charles J. Scicluna, former promotor of justice of the Vatican's Dicastery for the Doctrine of the Faith (2002–2012) and current president of the College for Recourses in Cases of Reserved Delicts at the same Dicastery (since 2015).

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In light of the presentations, Scicluna draws attention to the expressed need for specified training for all professionals in penal matters as stipulated in some conventions and national judicial provisions. The training relates to material and procedural aspects and includes forensic sciences and legal medicine. Besides training in canon law in general, such a specialized training could be envisioned for those involved in canonical penal matters.

In reflecting on where to go from here – *Quo vadis* – Scicluna proposes that a Task Force be established. The Task Force should study the rich contributions presented and the intense conversations held during the seminar, with the aim of identifying areas of convergence and differentiation. It can then determine which elements can be integrated into canonical provisions. The Task Force could distil a set of principles for policy that empower victims throughout the process.

Finally, Scicluna proposes to investigate the possibility of issuing an instruction similar to the instruction *Dignitas connubii* for conducting marriage nullity cases issued in 2005. It could be completed within a relative short timeframe and could be easily adapted as new insights arise.

6. The Current Publication

The current book publishes almost all studies presented during the seminar. Two canon lawyers, Bishop Mark Bartchak (USA) and Aidan McGrath O.F.M. (Ireland), participated in the seminar by reacting to one assigned paper to them. For the publication of this book, both generously offered to revise their initial reflections by including observations in light of all the studies and discussions of the seminar. Their contribution is of specific value because their reflection is based on their extensive personal experience in conducting and / or participating in canonical penal cases. Hence the book contains besides ten studies originating from experts on international standards for victims in penal proceedings and on legal provisions for victims in penal proceedings in different judicial systems, four studies with canonical reflections: one outlining the status quo of the current legislation and three offering reflections about possible and necessary aspects to be taking into consideration for reforms of penal canonical provisions in the near future.

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7. Gratitude

Gratitude is expressed first and foremost to the victim, who by narrating painful experiences incurred during the canonical proceedings made all participants aware of the need to be attentive listeners and to adopt a disposition of accompanying and caring when reflecting upon the existing canonical norms.

Immense thanks is extended to the experts who generously presented high quality studies and who engaged in deep conversations with all participants.

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Biography

Prof. Dr. Myriam Wijlens was born in The Netherlands. She is an ordinary professor of canon law at the Catholic Theological Faculty of the University of Erfurt (Germany). Mandated by Church authorities she conducted numerous canonical penal preliminary investigations. Pope Francis appointed her as a member to the Pontifical Commission for the Protection of Minors (2018–2022) in which she served as moderator of the Working Group "Safeguarding Guidelines and Norms". On behalf of the Dicastery for Christian Unity she serves on the Faith and Order Commission of the World Council of Churches and on ARCIC. Pope Francis appointed her 2021 as Consultor to the Synod, where she serves on the Coordinating Commission for the Synod on Synodality.

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The Rights of Alleged Victims in Canonical Penal Procedures

Current Penal Procedural Canon Law

Gianpaolo Montini

Abstract

The aim of this article is to present the rights enjoyed by alleged victims in current penal procedural canon law, especially, their rights to 1. participate in the judicial penal process; 2. intervene in the administrative penal process; 3. autonomously claim reparation of damages.

Keywords: canonical procedural law; injured person; injured party; reparation of damages; *Vos estis lux mundi*; child sexual abuse

At the foremost, it is appreciable that the organisers of this seminar have felt the need for an evaluation of the "rights of alleged victims in penal processes" to be introduced by an exposition of what is *currently* provided in the current law of the Church on the topic *(ius conditum)*, lest the ecclesial process may become an object of amendment proposals *(ius condendum)* or, worse still, of severe criticism before actually being known ("ne ignorata damnetur", as Tertullian admonished).[1]

The exposition of the law in force in the Church can also constitute a good and solid basis for dialogue, discussion and inspiration in the expositions that follow on the *standards* of protection envisaged in some international conventions or directives as well as on penal legislation in particular judicial areas *(civil law, common law ...)* or in specific nations.

This exposition will therefore be limited to the law *in force*, excluding any reference to innovations that could be considered useful, appropriate or necessary for current practice.

To facilitate the greatest possible clarity, after some premises, the systematic framework shall be illustrated and followed by an in-depth analysis of some collateral issues at the end.

1 Tertullianus, Apologeticum, I, 2.

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1. Limitations Concerning the Subject of the Article

In advance, it is clearly noted that not all the interventions of the Church in favour of the victims must necessarily find a place *in* the penal process, so as to possibly not render it weighty or deformed.

The following saying is known to all: *Whoever does not distinguish, creates confusion*.

The subject of this article limits *itself to the penal process*, that is to say the development of the penal action, ranging from the summons of the offender to the definitive judgement in the penal case, or rather to a penal *res iudicata*.

This article, therefore, *excludes* the discussion and the issue of participation by the victim in all the *preliminary* stages of the penal process, namely:

1) the *notitia criminis*: cf. in this regard the norms of art. 5 VELM (*motu proprio Vos estis lux mundi*) and the indications in Scicluna 2020: 493–495;
2) the *investigatio praevia* (which does *not* have a judicial nature): cf. in this regard the indications in Scicluna 2020: 495–498.

In all these preliminary phases, the role, position and participation of the victim can be *freely* envisaged, established and regulated by the norms of the competent ecclesiastical authority endowed with *executive* power, namely Bishops, Superiors of Institutes of Consecrated Life and Societies of Apostolic Life, Episcopal Conferences, Dicasteries of the Roman Curia, also through agile instruments, such as instructions, guidelines[2] and directories.

The note just expressed is of great hermeneutical importance for two reasons. The *first* is of a *psychological* nature: it would be misleading to believe that the victim's position is exhausted through his/her participation in the penal process, thus trying to include in it everything that refers to the victim, without distinguishing what belongs to the victim *before* and *in the eventuality* of a penal process and, instead, what belongs to him/her *during* the penal process. Moreover, an impression may form of the victim's position being weak or isolated if one only looks at his or her participation

2 Cf., for example, very recently, John David Poland, Guidelines produced in response to the CDF's Circular Letter of 3 May 2011 complementary to art. 6 §§ 1–2 of the 2010 "Normae de gravioribus delictis". A Canonical Analysis in Light of the Work of the CDF, Editrice Pontificia Università Gregoriana 2021, 259–269, especially on the topic of the reparation of damages to victims.

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in the penal process. If, on the other hand, the participation of the victim in the penal process is considered *one* of the moments that offer attention to the victim, as characterised by the specific nature of the process, that provides us with the right perspective. Let me give you an example in order not to cast shadows of doubt on this premise. Giving information, assistance and protection to the victim is a vast scope that is necessarily and/or appropriately placed outside the penal process.[3]

The *second* reason is of a *structural* nature. While the position and participation of the victim at the preliminary stages of the process, or beyond, are the responsibility of the administrative authority, which can operate according to its own discretion, the position and participation of the victim in the penal process pertain to *legislative* competence and, in particular, to universal legislative competence (cf. can. 1402),[4] which is also bound by a procedural relationship that involves several people, such that the novelty about the position and participation of one person necessarily affects the position and participation of others in a positive or negative way.

Furthermore, the position of the victim as a witness in the penal process is not the main subject of this article: it follows the general norms on the judicial examination of witnesses.[5]

Finally, it is not considered necessary to specify, in this article, norms relating to victims who are minors at the time of the trial. This apparently involves a small minority of the penal processes taking place today, deserve to be dealt with separately, not just because of structural terms, but above all in consideration of those aspects related to legitimacy and interrogation methods.

2. *Some Premises*

As regards terminology, the Church's law prefers, with reference to alleged victims, the terms “injured person” *(persona laesa)* and ‘injured party’ *(pars laesa)*. The first term (‘injured person’) refers to the person who has

3 The information to the victim, for example, on the outcome of the preliminary investigation, provided for in art. 17, § 3 VELM, can be extended more widely (in terms of subject and addressees) with a simple circular or an administrative decree: it does not, in fact, belong to the penal process. Cf., for example, Charles J. Scicluna, Rights of Victims in Canonical Penal Processes, in *Periodica* 109 [2020] 496–497.

4 “The following canons govern all tribunals of the Church, without prejudice to the norms of the tribunals of the Apostolic See” (can. 1402).

5 Cf., for example, Scicluna (n 3), 498.

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suffered a criminal act against him/her by third parties but who does not participate in any penal process; the second term ('injured party') refers to the person who has suffered a criminal act against him/her and is a *party* in a penal process.

In this report, for *purely* practical reasons, that is, in order not to render reading this paper difficult, the term 'victim' shall be used, since it is favoured by an increasing number of international charters and also during this seminar.

The law of the Church knows many forms of reaction to the transgressions of its laws: for our interest we must distinguish penal law (and the corresponding penal process) from disciplinary law (with the corresponding disciplinary procedure). Here, we shall only deal with penal law.

3. *Penal Action*

In the Church, penal action is *promoted* by the competent Ordinary (that is, by the hierarchical Superior with qualified executive power: Bishop, Major Superior, Supreme Pontiff...) and is *exercised* by the Promoter of Justice (an Official of the tribunal).

This means – for our interest – that the victim:

- does not and cannot promote penal action;
- does not and cannot exercise penal action;
- is not a *necessary* party in the penal process.

The reason for such an approach stands entirely in the *public* reason for the penal process: it is exclusively intended to achieve – as much as penal law itself – three ends: the restoration of justice, the reparation of the scandal and the amendment of the offender (cf. can. 1341).[6] It is therefore the *public* good and *public* order that are protected by penal law and, correspondingly, by the penal process. Public good and public order are proper to *all* members of the Church and are not exclusive to any particular individual member.

For this reason, the evaluation of whether to institute a penal process and which penal process to initiate are entirely the responsibility of the

6 "The Ordinary must start a judicial or an administrative procedure for the imposition or the declaration of penalties when he perceives that neither by the methods of pastoral care, especially fraternal correction, nor by a warning or correction, can justice be sufficiently restored, the offender reformed, and the scandal repaired" (can. 1341).

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ecclesiastical Authority: a judicial decision that is not preceded by an originating act kindled by the competent ecclesiastical Authority is affected by an irremediable vice of nullity.

4. The Victim in the Penal Process

Given the clear public approach of penal action in the Church, the problem arises on the position of the victim during the trial, that is, of the person who suffered the crime.

The choice of Church law is twofold: 1) it recognises the victim's *right* to initiate a litigation case for damages suffered from the crime; 2) it allows the victim to move forward with the litigation case for damages suffered within the penal process.

Let us consider the two alternatives separately, which victims are *free* to choose from according to their own discretion.

A. Introduction of the Case for Damages Suffered

A person who considers they have suffered damages from a criminal act may submit a request, for the reparation of damages suffered (patrimonial and non-patrimonial), to the competent ordinary ecclesiastical judge.

The judge can reject the application only for the reasons indicated in can. 1505, § 2, that is, lack of competence of the judge, lack of the *person's ability to stand at trial*, or lack of any basis of the application.[7] This rejection is subject to appeal to the higher tribunal.

An application for damages may be made *before*, *during* or *after* a penal process[8] in which the victim did not wish to participate (as a "party" in the trial).

7 "A libellus can be rejected only: 1° if the judge or tribunal is incompetent; 2° if without doubt it is evident that the petitioner lacks legitimate personal standing in the trial; 3° if the prescripts of can. 1504, nn. 1–3 have not been observed; 4° if it is certainly clear from the libellus itself that the petition lacks any basis and that there is no possibility that any such basis will appear through a process" (can. 1505, § 2).

8 "Omnino certum manet utramque actionem, seu poenalem et contentiosam ad damna reparanda, quae in eodem delicto fundatur, etiam separatim exerceri posse" (SSAT [Supremum Signaturae Apostolicae Tribunal], vote annexed to letter 10.7.1989, prot. no. 19126/87 CP).

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In the eventuality it is presented *before* the penal process (which could also never take place),[9] the case proceeds until its end (definitive judgement), till it becomes *res iudicata*, also through the appeals allowed at the *local* courts of appeal or at the Roman Rota, at the discretion of the victim.

If it is initiated *during* the penal process (or before, albeit in the time the penal process would have been initiated), the judge cannot reject the application: usually the judge suspends the application till the end of the penal process.[10]

If it is presented *after* the penal process, the judge in the case – upon request or *ex officio* – might acquire the documents of the penal process, which are useful for the resolution of the case in terms of the reparation of the offence suffered by the victim.[11]

B. Intervention by the Victim in the Penal Process

The victim shall have the right to intervene in the penal process.[12]

9 "Nullum habetur dubium quod actio contentiosa ad damna reparanda, ex delicto illata, integra manet et exerceri potest etsi causa ad poenam infligendam vel declarandam non introducitur. Esset enim inauditum quod principium de quo in can. 128 […] ad nihilum redigeretur eo quod Ordinarius, ad normam can. 1718, § 1, decernit non posse vel non expedire promovere processum poenalem" (SSAT, letter 17.12.1990, prot. no. 19126/87 CP).
"[F]irmo semper eorundem iure eiusmodi 'causam iurium' utcumque promoveri etiamsi processus poenalis non celebretur. Nam personae laesae iurium tuitio pendere non potest ab Ordinarii decreto" (definitive judgement in a *Poenalis*, *coram* Jaeger, 28.06.2016, n. 9. In: Ius communionis 2019, No. 1, 148–149); "[...] illa [actio] de damnis ex illicita iuris personae laesione exoriente, quae uniri vel consequi potest procedurae poenali (cf. cann. 1729–1730), cui igitur subordinatur; at quae etiam autónoma – uti indirecte concludi licet ex praescripto can. 1731 – esse potest, absente publico processu poenali" (final judgement in a *Romana, Iurium et damnorum*, *coram* Pinto, 26.03.1999, n. 21. In: Romanae Rotae Decisions 1999, 230).

10 Cf., for example, can. 548 *SN*: "Pendente vero iudicio criminali, iudicium contentiosum de actione ex delicto orta suspenditur, usque ad definitionem causae criminalis […]".

11 See, for example, final judgement in a *Poenalis*, *coram* Jaeger, 28.06.2016, n 41, 191. The acquisition of the documents in the case is subject to the decision of the judge.

12 Cf. on all this matter, Gianpaolo Montini, Exegetical Commentary on the Code of Canon Law, Vol. 5, Wilson & Lafleur 2004, 2036–2048.

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This is explicitly provided for in can. 1729, § 1 of the current Code of Canon Law:

> "In the penal trial itself an injured party can bring a contentious action to repair damages incurred personally from the delict, according to the norm of can. 1596".

Can. 1596 generally regulates the *(voluntary)* intervention[13] of a third party in a case and it also applies to the penal process:

> "§ 1. A person who has an interest can be admitted to intervene in a case at any instance of the litigation, either as a party defending a right or in an accessory way to help a litigant.
>
> § 2. To be admitted, the person must present a libellus to the judge before the conclusion of the case; in the libellus the person briefly is to demonstrate his or her right to intervene.
>
> § 3. A person who intervenes in a case must be admitted at that stage which the case has reached, with a brief and peremptory period of time assigned to the person to present evidence if the case has reached the probatory period".

The above provisions mean the following for the victim who intends to intervene in the penal process:

1. Through the intervention, the victim *becomes, in all respects, a 'party' in the penal process*, especially, as far as it relates to the probative and discussion phase, as well as the final phase destined to produce a definitive judgement.
2. The victim may exercise his or her right to intervene in the penal process *from the time of summons of the offender till when the case is concluded*, that is, before the stage of the discussion of the case that precedes the judgement session. It is the victim who chooses *when* to intervene. He/she cannot do so during the discussion of the case, and he/she cannot do so on appeal if he/she has not intervened at first instance (cf. can. 1729, § 2).[14]

13 "[...] at interventus partis laesae non itaque habendus est necessarius [...] in casu agi de interventu non necessario sed voluntario" (Rotal decree in una *coram* McKay, 23.01.2008, nn 10–11. In: Ius Ecclesiae 2013, No. 1, 5: 7).

14 "The intervention of the injured party mentioned in § 1 is not admitted later if it was not made in the first grade of the penal trial" (can. 1729, § 2).

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3. The victim, upon termination for any reason of the penal process, continues his/her action for the reparation of damages.[15]
4. The victim has the right to appeal, "even if an appeal cannot be made in the penal trial" (can. 1729, § 3).

There is an exception to the victim's right to intervene in the penal process and it is provided for in can. 1730:

> "§ 1. To avoid excessive delays in the penal trial the judge can defer the judgement for damages until he has rendered the definitive sentence in the penal trial.
>
> § 2. After rendering the sentence in the penal trial, the judge who does this must adjudicate for damages even if the penal trial still is pending because of a proposed challenge or the accused has been absolved for a cause which does not remove the obligation to repair damages".

The *only* reason to deny the victim intervention in the penal trial is the excessive delay that such intervention will cause in the treatment of the penal process.

In the drafting of the canon, some put forward the proposal that the judge could deny an intervention for other reasons,[16] besides the delay: this proposal was rejected. If, therefore, the victim considers that the court has denied the right to intervene for other reasons, he/she may lodge an appeal by means of an incidental cause.

Secondly, it should be noted that the intervention of the victim, in the case mentioned above, is not denied, but *deferred*: the tribunal will, in fact, be the same penal tribunal competent to deal with the case for the reparation of damages, immediately after the definitive penal judgement of first instance. It is evident that in such a case the Acts and the penal judgement will be acquired in the trial.

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15 "Exstinctio iudicii poenalis minime secumfert et etiam iudicio de damnis finis imponatur. Exercitium actionis contentiosae ad damna reparanda ab actore pendet, non ab Ordinario. Id quoque valet, si pars laesa actionem contentiosam ad damna reparanda in ipso poenali iudicio exerceat" (SSAT, letter, 03.11.1990, prot. n. 20879/89 VT, n. 1).

16 One reason given that should have justified the refusal to intervene was that the victim could have access to the documents in the penal process, which must remain secret, because the publication of the documents is only in favour of the accused. The choice of the Commission's consultants was contrary: "Se le prove non si pubblicano, verrebbe meno la stessa ragione del processo giudiziale" (In: Communicationes 1980, No. 1, 195–196).

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The intervention of the injured party in the penal trial is protected by the right to appeal against any exclusion that is considered unjust (cf. can. 552, § 3 SN [*Sollicitudinem Nostram*][17]).[18]

Allowing the victim to intervene in the penal process entails, as a logical procedural consequence, that the victim benefits from all the rights of the 'party' to a trial; it can be mentioned in this regard, *for example*, that the victim has the right to:

- know the accusations and evidence disputed in the summons of the accused (cf. can. 540 SN);[19]
- establish one or more defenders (lawyers) and a procurator (cf. can. 553, § 1 SN),[20] as well as request free legal aid;
- propose exceptions and proof (cf. can. 553, § 1 SN);[21]

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17 The abbreviation SN refers to the Apostolic Letter *Sollicitudinem Nostram motu proprio* dated 06.01.1950 from Pius XII for the Eastern (Catholic) Churches: it is the procedural law of the Eastern (Catholic) Churches that remained in force until 30.09.1991. The promulgated text (in Latin) is in: Acta Apostolicae Sedis 1950, No. 1, 5–120; an English translation is in Paul Pallath (ed), Code of Eastern Canon Law: English Translation of the Four Apostolic Letters Issued Motu Proprio by Pope Pius XII, KottayamOriental Institute of Religious Studies India 2021.
Although the procedural rules of the aforementioned *motu proprio* SN are not formally in force today, they can still be considered binding due to the fact that they emerge as *logical deductions* from the setting of the current canons 1729–1731, canons that *fully* transpose, albeit in abbreviated form (as in the style of the current Code), the setting of the aforementioned *motu proprio*.

18 "Against a decree or sentence which excludes the intervention of the injured party, immediate and separate appeal is made only *in devolutive* manner, which is to be praised within three days, pursued within ten days and is to be most expeditiously decided" (can. 552, § 3 SN).

19 "The object or matter of criminal trial is determined in the joinder of issue itself, with which the judge during the session of the court on the day assigned in the citation indicates the petition of the promoter of justice to the accused and to the injured parties, if they are present" (can. 540 SN).

20 "The injured party, who has been admitted to the exercise of a contentious action, has the right [...] to choose an advocate or procurator, as a true party in the case, but with due regard for canon 376, § 3" (can. 553, § 1 SN), i.e., in the case of late intervention, which therefore obviously takes place according to the Acts.

21 "The injured party, who has been admitted to the exercise of a contentious action, has the right to propose exceptions and proofs [...], as a true party in the case, but with due regard for canon 376, § 3" (can. 553, § 1 SN), i.e., in the case of late intervention, which therefore obviously takes place according to the Acts. Cf. also can. 557 SN.

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– participate in the discussion of the case (cf. can. 569, § 1 SN);[22]
– request an exemption from legal expenses (cf. can. 576 SN).[23]

In a single word, the victim is a 'party' in the penal process in all respects, "as a true party in the case", as underlined in can. 553, § 1 SN.

5. *The Procedural Position of the Victim Who Does Not Constitute a Civil Party in the Penal Action*

This is a rather delicate point.

The principle that operates in this procedural situation is the following: *the victim, to whom the right to intervene in the penal trial is recognised by law, until he/she has actually exercised this right, must enjoy the right to everything that makes it possible to exercise his/her right to intervene in the penal process.*

How, in fact, could the victim intervene if he/she was not informed of the penal process?

The logical and therefore binding declination, as deduced from the right to intervention, is the *right* of the victim to:

1) be informed of the defendant's summons;
2) participate in the citation session.

"Besides the accused, a party who has suffered damage from a delict is to be always cited; this party has the right to bring a contentious action" (can. 547, § 1 SN).[24]

During the summons session (technically referred to as the 'indictment challenge'), the victim can make his or her position known to the judge, which can be:

22 "The promoter of justice, the accused and his advocate, the injured party and the party mentioned in can. 554 and their advocates await the discussion" (can. 569, § 1 SN). Cf. also can. 570 SN.

23 "Only private parties can be bound to pay something under the title of judicial expenses, unless they are exempted (from the burden) according to the norm of canons 441–443" (can. 576 SN).

24 "Praeter reum citanda semper est pars cui ex delicto laesio iuridica est illata, quaeque ius habet exercendi actionem civilem".

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1) simple or qualified absence;
2) disinterest in the penal process;
3) request to be informed of the progress of the penal process;
4) request for admission to constitute a civil party;
5) request to accede to the definitive judicial decision in view of the possible proposal of an (autonomous) case for the reparation of damages.

In case 1) the mere absence or absence accompanied by the formal request not to be further consulted justifies that the tribunal proceeds without the involvement of the victim, whose free will prevails.

In case 2) the judge will take note of the victim's desire not to be involved in the penal trial; the judge will inform the same victim of his/her rights, in the event that he/she deems that he/she is uninformed.

In case 3) the judge will give dispositions and make arrangements with the victim about the timing and methods of providing him/her information on the progress of the trial.

In case 4) the victim will present the *libellus* for his/her constitution as a civil party.

In case 5) the judge will make provisions for the communication of the definitive decision.

In cases 3) and 4) the victim has the right to be assisted by a lawyer and/or a procurator, freely *chosen* by the victim from the register of lawyers and procurators of the tribunal or *requested* as a public defender by legal aid.

In case 5) the judge will have to request a lawyer chosen from the *albo* to protect the *privacy* of all those involved in the process. It will be up to the lawyer (possibly imposed *ex officio* if and unless not chosen by the victim) to assess whether sufficient elements arise from the definitive penal judgement (and the Acts) to propose to the victim the introduction of the case for the reparation of damages.[25]

25 This is the current practice of the Apostolic Signatura when a party has been absent from the trial in a degree of judgement and, after having received news of the final decision, intends to assess whether to challenge it. The party is not directly admitted to knowledge of the documents (his/her request could in fact be instrumental), but his lawyer of trust is admitted. If the lawyer of trust advises the party to file an appeal and this is accepted by the judge, then everything takes place ordinarily, with the party having access to all the acts of the previous instance or instances.

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6. The Procedural Position of a Victim Facing an Administrative Penal Process

There are no *explicit* procedural prescriptions for the victim's participation in administrative penal processes.

The points that are certain – starting from the general principles of canon law – are at least the following:

1) no right exists for the victim to intervene in an administrative penal process;
2) the Ordinary *can* – at his discretion – deny the victim who requests it the opportunity to intervene in the administrative penal process with the request for the reparation of damages;
3) the victim may request access to the final decision in the administrative penal process to then assess whether to request compensation for damages in front of the tribunal of the competent ordinary (request to be resolved as provided above [n. 4] in case n. 5).

But the Ordinary *can* – at his discretion – also allow the victim who requests it to intervene in the administrative penal process with the request for the reparation of damages;[26] this request, if accepted, will, however, be treated by the Ordinary in a manner compatible with the nature and procedure of the administrative penal process.[27]

In one case, in fact, the Apostolic Signatura did accept that the damaged party would request the reparation of damages in a disciplinary process (in the form of an administrative process), holding canons 1729–1731 applicable "at least by analogy".[28] This was the disciplinary procedure against a judicial vicar who had caused, by an illegitimate practice, the nullity of a sentence at first instance, which was declared null, however, afterwards by the Roman Rota, thus forcing the person to pay an additional disbursement for their lawyer. The Apostolic Signatura admitted the request for the reparation of damages, provided that proof of payment of the attorney's

26 Scicluna (n 3), 501, admits it as "praxis *praeter legem*".

27 In other words – as will also be seen in the following example – the victim will be granted the same rights (very limited, actually) as the accused in the administrative penal process.

28 Cf. SSAT, Congressional Decree in a *Disciplinaris*, 29.10.2015, prot. no. 48706/14 VT, in *Ius Canonicum* 1 [2018] 328–331, translated into Spanish *ibid.*, and commented on by Francisca Pérez-Madrid, La vigilancia de la recta administración de justicia por el Tribunal de la Signatura Apostólica. Comentario a algunos decretos recientes en materia disciplinar, in *Ius Canonicum* 1 [2018] 321–354.

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fees was presented, which, however, did not happen because the receipts were not presented.

From the above case, it is clear that a claim for damages can only be connected with an administrative process if the extent of the damages is sufficiently *evident* and will not require elaborate evidence. Moreover, this condition (evidence and availability of proof) is – according to the best doctrine – the same condition that *should be* required to admit a penal case to an administrative penal process, rather than to a judicial penal process (cf. can. 1342, §§ 1–2).[29] The victim's access to redress would thus be on an equal footing with the accused admitted to the administrative criminal process.

The possibility of admitting the victim to the administrative penal process with the request for reparation of damages is also supported by various authors and authorities.[30]

The same possibility of admitting the victim to the administrative process through their request for reparation of damages allows for the recognition of their right to be informed of the progress of the administrative penal process, by analogy to what has been deduced above in n. 4.

29 "§ 1. Whenever there are just reasons against the use of a judicial procedure, a penalty can be imposed or declared by means of an extra-judicial decree, observing canon 1720, especially in what concerns the right of defence and the moral certainty in the mind of the one issuing the decree, in accordance with the provision of can. 1608. Penal remedies and penances may in any case whatever be applied by a decree.
§ 2. Perpetual penalties cannot be imposed or declared by means of a decree; nor can penalties which the law or precept established them forbids to be applied by decree" (can. 1342, §§ 1–2).

30 Poland (n 2), 262; Poland also supports this possibility Cl. Papale. This would also seem to be the opinion of the CDF from the tenor of the observation of the same Congregation reported by Poland: "The document should express more clearly the right of a victim to intervene in canonical procedures as an injured party and, *therefore*, his or her right to bring a contentious action to repair damages incurred personally from the delict, within the same canonical process", ibid. 260 (italics added).

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7. Particular Issues

Now that the fundamental dynamics in force have been established, some specific issues are listed below.[31]

A. Damage Reparation in Canon Law

Legislation as well as doctrine and canonical jurisprudence adopt a concept of damage and reparation capable of coming as close as possible to the concept of reintegration of the injury in private law, leaving the injured party the freedom to request – in fact, the mandatory principle of the request applies – the reparation of any proven damage and of reparation, as well as leaving the judge – in the absence of specific requests from the party – free to choose the most satisfactory reparation.[32]

The jurisprudence of the Apostolic Signatura, for example, admits, in addition to the reparation for damages (so far only in cases of acquittal), the publication of the disposition or of the judgement.[33]

31 Below are the main issues that directly affect the victim's participation in the criminal proceedings, leaving out the countless other issues that will only have an incidental or indirect impact on the issue proposed in this article.

32 Cf. for example, Gianpaolo Montini, Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica., in La giustizia amministrativa nella Chiesa, Libreria Editrice Vaticana 1991, 188–190; Gianpaolo Montini, La responsabilità dell'Autorità ecclesiastica secondo la giurisprudenza della Segnatura Apostolica, in *Ius Ecclesiae* No. 3 [2021] 537–567. See also SSAT, letter, 17.12.1990, prot. n. 19126/87 CP: "In hodierno iure canonico – uti patet – notio damni non restringitur ad solum damnum materiale (cf. exempli gratia cann. 1323, n. 4; 1324, § 1, n. 5°; 1457, § 1; 1546, § 1 coll. cum can. 1548, § 2, no. 2, etc.)".
Cf. also final judgement in *Romana, Iurium et damnorum*, *coram* Pinto, 26.03.1999, n. 5. In: *Romanae Rotae Decisions* 1999, 230.
For an exemplary list of damages whose reparation is permitted in the canonical sphere, that is, psychological, existential, biological, moral and patrimonial damages (emerging damage and loss of profit), cf. Poland (n 2), 263–264. The jurisprudence of the Apostolic Signatura in a recent judgement excluded the canonical relevance of so-called punitive damages, cf. Montini (n 32).

33 Cf. Montini (n 32), with some cautions of course.

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B. Resolving the Issue of Damages Prior to the Penal Process

The question of damages may be settled outside the penal process in several forms.[34] It is explicitly discussed in can. 1718, § 4:

> 'Before he makes a decision according to the norm of § 1 [that is if, and if so it is decided in the affirmative, how to proceed in a penal sense against the accused], and in order to avoid useless trials, the ordinary is to examine carefully whether it is expedient for him or the investigator, with the consent of the parties, to resolve equitably the question of damages'.

Whatever the previous solution reached by the Ordinary or by the investigator with the consent of the suspect (accused) and the injured person, the solution will obviously prevent the injured person from becoming a civil party in the penal process (judicial or administrative) that may follow, since the damages would be prevented by the exception of *res iudicata*,[35] occurring, for example, by reason of the transaction or the compromise reached.[36]

C. Denial of the Damages Trial that is not Related to the Penal Trial

In the systematic part set out above, it was argued that the victim can always take action to repair damages suffered as a result of a crime before, during and after the penal process, and therefore also regardless of whether a penal process has been instituted, which might also never be instituted.

However, it should be noted that a line of doctrine and jurisprudence (even Rotal) exists that seems to deny the right to introduce a case for damages deriving from a crime in the absence of a penal case concerning

34 Cf., for example, Scicluna (n 3), 496–497.

35 Cf. can. 547 § 3 SN: "Intervention of the injured party cannot be admitted, if the case concerning contentious action arisen from the offence has already been resolved through a sentence which has become an adjudicated matter".

36 For an interesting case in this regard, cf. the Rotal decree in *coram* McKay, 25 February 2013, Derechos y reparación de daños. Cuestión incidental: excepción de "pleito acabado", in *Ius communionis* 1 [2017] 141–151. The decree – which admitted the exception and therefore prevented the continuation of the case for "finished litigation"—was then reformed by the interlocutory judgement (so far unpublished) *coram* Jaeger, 25.01.2017, which, arguing on fairness as an interpretative criterion in the case (the case came from a country of *common law*), denied the *lis finita* on the *simple* grounds that an agreement between the parties on damages was signed.

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the same delict, that is, they deny the autonomy of the action for damages from the penal case.

Without denying the existence of this interpretative line, it must be clearly stated that, according to the *iure quo utimur,* the best doctrine and jurisprudence admit the autonomy of actions for the reparation of damages and the infliction of the penalty.[37]

To be honest, it should be noted that the minority line opposed to the autonomy of the action for damages is based on two reasons to be taken into account.

The first is the distinction in force in the canonical sphere between ordinary jurisdiction and administrative jurisdiction: only the latter jurisdiction (Apostolic Signatura) is competent to award damages resulting from an act of an executive nature of the administrative ecclesiastical authority, and, consequently, an autonomous action for damages before the ordinary jurisdiction (Rota Romana) is not admissible.[38]

The second is the competence of the Roman Pontiff in penal matters in the case of the incrimination of Bishops: sometimes the introduction at the Roman Rota of a case for damages against Bishops (cf. can. 1405, § 3, n. 1)[39] appears clearly instrumental to evade the penal jurisdiction of the Roman Pontiff (cf. can. 1405, § 1, n. 3).[40]

37 Cf., for example recently, final judgement in a *Poenalis*, *coram* Jaeger, 28.01.2016, nos. 9 and 41, in *Ius communionis* 1 [2019] 146–147, 148–149, 191; Rotal decree in una *coram* McKay, 23.01.2008, in *Ius Ecclesiae* 1 [2013] 79–91, with note by Adolfo Zambon, Sul risarcimento del danno. Some reflections starting from two “coram McKay”, in *Ius Ecclesiae* 1 [2013] 107–119; Eduardo Baura, Il risarcimento del danno causato da un’autorità ecclesiastica, in *Ius Ecclesiae* 3 [2020] 630–672.

38 Cf. lastly, Rotal decree in a *Iurium*, *coram* Erlebach, 05.06.2018, in *Ius Ecclesiae* 3 [2020] 623–629.

39 “Judgement of the following is reserved to the Roman Rota: 1º bishops in contentious matters, without prejudice to the prescript of can. 1419, § 2 […]” (can. 1405, § 3, no. 1).

40 “§ 1. It is solely the right of the Roman Pontiff himself to judge in the cases mentioned in can. 1401: […] legates of the Apostolic See and, in penal cases, bishops […]” (can. 1405, § 1, n. 3).

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D. The Victim's Access to Legal Aid as a Civil Party in the Penal Process

The victim's access to legal aid (in all its forms)[41] takes place at the request of the same victim and upon a decision by the tribunal.

The judge's decision is based on two elements: the *fumus boni iuris* of the claim for damages, that is, the probability of winning the trial, and the proven economic poverty of the victim or, in any case, the proven inability of the victim to bear the legal costs.[42]

It is not part of the criminal process, but the responsibility of the ecclesial community (ecclesiastical administrative authority, ecclesiastical associations, ecclesiastical foundations, etc.) to eventually provide economic (and legal) support[43] to victims who intend to constitute themselves as parties in the penal process, for which the judge has not considered that there were elements required for the granting of free legal aid, and for which the parties do not consider using the benefit of free legal aid (which involves the choice of lawyer by the judge).

E. The Summons to Court of the Party or Parties Required for the Reparation of Damages

Can. 554 SN explicitly provides that the victim, who is a party in the penal process, has the right to request (and obtain) from the judge that the party who is legally liable for the damage caused by the offender through his crime be brought to trial.[44]

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41 Here, free legal aid means the total or partial exemption from legal expenses, the total or partial exemption of the initial deposit on legal expenses, the free assignment of an attorney (Advocate-Procurator).

42 Doctrine and jurisprudence are common and consistent. All legislation on legal expenses is the responsibility of the diocesan bishop moderator of the tribunal (can. 1649), who also admits a procedure and a limited possibility of appeal. For administrative procedures and hierarchical appeals, no legal expenses are foreseen.

43 This is beyond the scope of this report. VELM seems to ignore this economic aspect, if it is not perhaps included in the expression of letter a) of art. 5, § 1: "The ecclesiastical Authorities shall commit themselves to ensuring that those who state that they have been harmed […] are to be: a) welcomed, listened to and supported, including through *provision of specific services*" (emphasis added).

44 "§ 1. A party who, according to the norm of ecclesiastical law or civil law legitimately received in canon law, must respond concerning the civil damage perpetrated by the offender, has the right to intervene for safeguarding his right in a criminal trial".

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The participation of this party is recognised (and required) by the law in force on the basis of the general norms on the intervention (in such case, *necessary*) of the third party in the case: cann. 1596–1597.

The same right pertains to the victim who acts through an autonomous process for the reparation of damages.

8. *Points of Discussion Following the Exposition*

1. The role of the alleged victim as a witness was emphasised suggestively and rightly so. The exposition preferred, however, a simple reference to this role: 'Furthermore, the position of the victim as a witness in the penal process is not the main subject of this article: it follows the general norms on the judicial examination of witnesses'. The reason for such a preference in this exposition was to deal with the *principal* or *ulterior* rights of the alleged victim besides those recognised by all as witness in the penal process.
2. As regards prescription, it is necessary to distinguish between the penal prescription, which is established by canon law, and "civil" prescription, that is, that for the reparation of damages. The latter is governed by the current civil law in the nation of competence, whose civil legislation the Code of the Church canonises, that is, it receives it as if it were its own (cf. can. 197). It is therefore necessary for the latter to refer to the national civil law.
3. The penal process is not the only instrument available to the Church to oppose the nefarious effects of delicts. If we were to limit ourselves to the judicial field, besides the penal process, there is, for example, the disciplinary process and the process for the reparation of damages. Each of these processes has its own identity which needs to be respected. The penal process is of a public nature; the disciplinary process has a "corporative" nature; the process for the reparation of damages has a private nature. The relationship between these processes is so governed to simplify access, but without confusion.

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§ 2. The injured party has the right to demand that the party mentioned in the previous paragraph be cited" (can. 554 SN).

The identification of the party called with the accused to answer for the damage inflicted on the victim as a result of a crime is the subject of harsh discussions. The least controversial case is perhaps that of the religious institute in the event that the offender is a religious figure, if and to the extent that he has fully renounced his property in accordance with particular law (cf. can. 668, § 5).

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4. In the eyes of many, canonical jurisdiction today suffers from the suspicion of not being impartial. That is true. This holds not only for the penal process: often the respondent party feels discriminated against by the ecclesiastical judge, who seems more prone to declare the nullity of marriage; often the alleged victims and, at times, the accused "feel" the ecclesiastical judge is not impartial. The remedy lies in rigorous respect for deontology by the operators of the ecclesiastical tribunal, in all cases.
5. Knowledge of praxis and canonical jurisprudence is a universal desire. One could meet this by producing a *vademecum* for penal processes based on the model of the instruction *Dignitas connubii* (2005), an exceptional instrument for the processes of marriage nullity.
6. At times the duration of the penal process intertwines with the time for healing of the alleged victim: usually the healing process starts before the penal process and continues after the penal process. The penal process – through the professionalism of the operators – is called to avoid, as the institutional fulfilments unfold, causing damage to the dynamics of the healing process that eventually takes place.
7. Every canonical delict creates scandal, that is, it puts in danger the trust that *one and all* have in the Church. Having to deal with the damage that affects *all and sundry,* it is the promotor of justice who promotes that penal action intended to (ascertain the delict and eventually) punish the offender, thus assuring *one and all* that the Church has reacted to the evil performed and can therefore reobtain the trust of *all and sundry*. The alleged victim stands and operates among *one and all*. If, conversely and in as much as he/she suffered *proper and exclusive* damage, the alleged victim has at its disposal a proper position to intervene in the penal process (*persona laesa*) and, eventually, a proper right to request the reparation of *proper and exclusive* consequences suffered through the delict (*pars laesa*).

Biography

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The Rights of the Victims: International Standards and the Need of a Holistic Approach

Fabián Salvioli

Abstract

This article underlines the importance of pursuing a holistic approach to properly addressing rights violations committed against minors within the framework of religious institutions. To this end, it identifies international standards that must be respected in matters of truth, justice, reparations, guarantees of non-repetition and memory, in order to effectively ensure the rights of victims of abuse within a religious area or space.

Keywords: *truth; justice; reparations; guarantees of non-repetition; rights of victims; child sexual abuse; penal procedures; convention on the rights of the child*

1. *Introduction*

Since its beginnings, international human rights law has generated a very important body of norms, principles and standards that must be complied with by all actors in the international community, mainly states – as full subjects of international law. This new paradigm focuses, fundamentally, on two main duties: the obligations to respect and ensure the exercise of the rights of all people under its jurisdiction.[1]

The individual stands at the centre of international human rights law. The obligation *to respect* human rights requires that states *abstain* from interfering with the exercise of persons' rights. Purely by being people, persons have an intrinsic dignity protected by a nucleus of rights, and public powers are forbidden to violate those rights or to interfere in their full enjoyment.

A cross-cutting element of this legal framework is, naturally, the focus on victims and the protection of their rights. Violations of their human rights call for new public and institutional policies.

1 The concept of "jurisdiction" means in its territory and/or under its control – even outside the territory.

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Human rights violations have a deep impact on the victims – and people close to them –, as such violations are perpetrated by the states and institutions whose purpose should be to generate the conditions for people to enjoy their human rights.

Victims are therefore surprised because in the case of such abuses, they are emotionally subordinated to those in power. After they suffer abuse and their rights are violated, they often feel guilty – and even responsible – for what happened to them.

The general obligation *to ensure* the free exercise of human rights is divided into the following four main duties:

- The first is to take all measures *to prevent* violations.
- The second is *to investigate* the violations committed.
- The third is *to make full reparation* for such violations.
- The fourth is to *take all measures to ensure that the violations are not repeated* (non-recurrence).

Non-compliance with the duty to respect a human right also entails the failure to prevent such violations and to ensure the protection of victims' rights. Both types of general obligations are inextricably related.

The *obligation to ensure* human rights is broadly recognised in international human rights law, and one of its essential components is the obligation of *judicial protection* for the victims in a framework of human rights standards.

All these measures – prevention, investigation, reparation and guarantees of non-recurrence – must be carried out from a perspective that favours the individual, with absolute respect for the victims' rights, making them participate fully in the proceedings, avoiding defencelessness, and especially avoiding their re-victimisation.

According to an established rule of *ius gentium*, a state may not invoke the provisions of its domestic law as justification for its failure to perform the fulfilment of an international obligation it has assumed.[2]

As a result of this principle, there is a customary rule in international human rights law that prescribes that, if a state has ratified a human rights instrument, it must introduce the necessary modifications in its domestic law to ensure the faithful fulfilment of the obligations accepted. Conversely, states must abstain from adopting norms in the future that are

2 UN, Vienna Convention on the Law of Treaties, art. 27, (23 May 1969), available on https://www.refworld.org/docid/3ae6b3a10.html, access 13.09.2022.

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incompatible with the international human rights obligations they accepted to comply.

Therefore, the obligation to ensure human rights also – in addition – requires the adoption of all necessary normative measures to effectively achieve the enjoyment of human rights, which implies – in terms of the rights of the victims of violations – the reviewing of norms and procedural rules in light of international standards ("*conventionality* control"), in order to repeal or reform those rules that are incompatible with the international human rights obligations that bind the state.

2. *The Role of the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence in Relation to Abuses Perpetrated in Catholic Institutions*

The United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence has received a significant number of complaints from different countries around the world, including Belgium, Canada, Chile, Germany, Mexico, Colombia, Argentina and the United States of America, denouncing various acts of abuse committed in churches and other Catholic institutions, as well as the actions of agents of the Catholic Church regarding those acts.

This prompted the sending of an official communication to the Holy See[3] expressing great concern about institutional attempts by the Catholic Church to shield alleged offenders from secular justice, in some cases by receiving them in the Vatican and denying them extradition, or transferring them to places where they cannot face criminal prosecution. Deep concern was also expressed by the Special Rapporteur regarding the official positions of states on not fully complying with the improvement of national frameworks for investigating, prosecuting and obtaining redress for victims

3 UNCHR, Mandats du Rapporteur spécial sur la promotion de la vérité, de la justice, de la réparation et des garanties de non-répétition; du Rapporteur spéciale sur les droits des personnes handicapées; de la Rapporteuse spéciale sur la vente et l'explotation sexuelle d'enfants, y compris la prostitution des enfants et la pornographie mettant en scène des enfants et autres contenus montrant des violence sexuelles sur enfant; et du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains our dégradants, AL VAT 1/2021 (7 April 2021), available on https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26316, access 29.08.2022.

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of sexual abuse. Also concerning are the claims to enforce statutes of limitations in cases of large-scale and systematic abuse.

This communication from the Special Rapporteur is in line with concerns expressed by the Committee on the Rights of the Child when examining the second periodic report by the Vatican City State (Holy See), as well as with concerns expressed by the Committee against Torture when examining the Vatican's initial state report. Concluding observations by both United Nations treaty bodies were issued in 2014.[4] It is also important to highlight the communiqué sent to the Vatican City State (Holy See) by the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and other Child Sexual Abuse Material in 2019.[5]

I have noted with great interest the steps taken since February 2019 by Supreme Pontiff Francis to seriously address the sexual abuse crisis in the Church, as well as the modifications to canon law —which came into effect in 2020. These positive steps have been necessary, meaningful and of great importance, and mark the beginning of a transition that must be consolidated and deepened.

It must be emphasised that the above regulations, even though still valuable as first steps, are insufficient to effectively address the facts of the past, in order to bring justice to the victims of abuse and human rights violations committed in Catholic institutions and by Catholic agents.

I have also raised concerns, jointly, to other states and the Vatican City State, about past abuses committed in Catholic institutions, pointing out the important cooperative role that the Catholic Church can play in clarifying the facts, especially by making available relevant archives that may be in its possession.[6]

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4 CRC, Concluding observations on the second periodic report of the Holy See, CRC/C/VAT/CO/2, (25 February 2014); and CRC, Concluding observations on the report submitted by the Holy See under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict CAT/C/VAT/CO/1, (25 February 2014).

5 UNCHR, Mandat de la Rapporteuse spéciale sur la vente et l'explotation sexuelle d'enfants, y compris la prostitution des enfants et la pronographie mettant en scène des enfants et autres contenus montrant des violences sexuelles sur enfant, AL VAT 1/2019, (2 April 2019).

6 Specifically, the Indian residential school system established in Canada and administered by the Catholic Church from the late 19th century until the late 1960s. See https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27141&LangID=E access 29.08.2022.

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This Special Rapporteur is still receiving persistent complaints regarding the Catholic Church's obstruction of and lack of cooperation on judicial proceedings in several states, which hinder the identification of the perpetrators and the establishment of their responsibility, and impede the full reparation of the victims.

The scope of the abuses and their recurrence over the years require holistic and comprehensive measures to strengthen the rights of the victims, including actions to ensure that the five pillars of transitional justice are achieved: truth, justice, reparations, guarantees of non-recurrence and memory processes.

3. *Victims' Rights in Cases of Large-Scale or Systematic Violations of International Human Rights Law and International Humanitarian Law*

Among the sources of international law are the general principles of law, as clearly stated in the Statute of the International Court of Justice, which is the main judicial organ of the United Nations.[7]

It is a general principle of law, among all legal branches, that *any harm suffered must be duly repaired*. When dealing with large-scale and systematic human rights violations, however, their scope and intensity require a series of additional imperative measures to be taken, as these actions do not only affect the victims themselves but society as a whole.

The first right of victims that emerges in this type of cases is *the right to truth*. This right has a dual dimension – individual and collective –, and the right-holders are: first of all, the individual – victim and close family –, the collective to which the individual belongs, and society – as a whole. In international human rights law, the *right to truth* is to be found in numerous instruments.[8]

Hence, these issues cannot be addressed through criminal or administrative proceedings alone. "*Truth Commissions*" are mechanisms composed by people of high moral standing and credibility in the eyes of victims

7 ICJ, Statute of the International Court of Justice, art. 38 (26 June 1945).

8 In particular: the *International Convention for the Protection of All Persons Against Enforced Disappearance and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. The United Nations' Human Rights Council frames the right to truth in the context of the fight against impunity.

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and society, which must also be put in place through criminal and/or administrative proceedings. When states and institutions decide to establish a truth commission and give full support to its effective functioning, a very positive message is sent to society. Such actions make clear the states' explicit condemnation of the facts and indicate their willingness to deal with those facts, as well as to assume responsibility for and remedy their negative actions.

Truth commissions must be equipped with sufficient human and material resources, as well as with specialised technical teams. Truth commissions must also have the capacity to take a sensitive, supportive and thoughtful approach towards the victims. Truth commissions must have sufficient working time to be able to establish, through a rigorous method of research, the general truth about what happened.

Truth commissions are not intended to establish criminal responsibility, and they are not a substitute for the fulfilment of the right to justice.

Victims also have the *right to justice*. Human rights violations must be investigated and sanctioned when such acts constitute crimes under the domestic criminal law of the states in which they were committed, or when international instruments require them to be criminalised. Applicable penalties must reflect the seriousness of the acts committed, to avoid "*de facto*" impunity.

The investigation and sanction of human rights violations are part of the victims' right to an effective remedy.[9] Failure to investigate and prosecute such violations is a breach of the human rights standards contained in human rights treaties. Impunity for such violations is a negative factor that may contribute to their recurrence. If sanctions are not commensurate with the seriousness of the acts committed, impunity may result.

As mentioned above, victims have the *right to reparation* from the violations they have suffered. The evolution of international human rights law makes it possible to affirm the existence of a very solid legal basis for the right of victims to seek remedies and reparations.[10]

9 UNHRC, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 18 (26 May 2004), available on https://www.refworld.org/docid/478b26ae2.html, access 13.08.2022.

10 See: Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217 A(III) (UDHR) art 8; the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR) art 2; the Convention against Torture and Other Cruel, Inhuman

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While criminal responsibility is subjective, reparations to victims of human rights violations should not depend on the establishment of a criminal conviction. Therefore, states must repair and provide effective remedies as a consequence of the establishment of the violation itself, as state responsibility is objective and arises from proven facts, regardless of whether the perpetrators have been identified or not.

In any case, proven violations automatically give rise to the obligation of full reparation to the victims and/or their families. Full reparation may include an array of various measures, as appropriate.

Where there have been large-scale abuses, a registry of victims must be established and a mechanism of easy registration must be created. Such a registry must remain open over time, as victims of very traumatic events such as sexual abuse, sexual slavery and rape – among others – only denounce their abuse when they find the courage to do so. Sometimes, it takes decades, as has been proven in recent years with the many cases of victims of abuse and rape committed in Catholic institutions in various countries.

Reparations must be holistic,[11] according to the standard of *full reparation* enshrined in international human rights instruments. This requires the abuses to be met with the restitution of the rights violated – if possible –, as well as with measures of rehabilitation (psychological, psychiatric and medical treatment with professionals that the victims trust) for certain types of very traumatic abuse. These measures extend to the people closest to the direct victims. Measures of satisfaction (public acts of acknowledgement of responsibility, public apologies, etc.) are also part of full reparation.

Measures or guarantees of non-recurrence refer to the reform of the norms that gave rise to the violations in the first place, have allowed impunity or prevented reparation being conceded. Non-recurrence also refers to the institutional changes needed to ensure due diligence in the face of any threat of a recurrence of the violations. It calls for the removal from their position of those who have been found responsible for or complicit in

or Degrading Treatment or Punishment (adopted 10 December 1984), UNGA Res 39/46, art 14; and the International Convention on the Rights of the Child (adopted 20 November 1989),UNGA Res 44/25, art 39.

11 The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* refer to five types of measures: restitution, rehabilitation, compensation, satisfaction and guarantees of non-recurrence.

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the abuses, or of those who failed to act properly within the institution in order to investigate and sanction the facts –"*vetting process*".

The fifth element is *memory***.** Memorialisation processes must include the victims' and victim associations' full consent. Such processes must preserve the memory of what happened to the victims and help counteract attempts at denialism.[12] Memory processes cut across all aspects of full reparation.

Such a holistic approach enables society to reconcile itself with the state and its institutions and also enables them to regain the trust that was lost. This ensemble of measures should not be perceived as a threat to the state's institutions. On the contrary, these measures represent a great opportunity to recover the legitimacy of the institutions before society, and it is the only possible way to handle the past with due respect to the victims' dignity.

4. International Standards Regarding Criminal Proceedings for the Prosecution and Sanction of Victims' Human Rights Violations

Fighting against impunity towards crimes that constitute human rights violations is a state duty, especially when the victims were in a position of inferiority and subordination at the moment that the acts occurred. Such is the case with children and adolescents because of their age.

Attacks on the sexual integrity of children are some of the most serious crimes, and the consequences are devastating for them and their closest relatives and friends. They are also unacceptable for society and the international community.

Victims have the *right to justice*. Some elements that guarantee this right are the following:

- Victims must take *active participation* in the process at all moments and phases. The state's institutions must support them empathically and in solidarity.
- When victims provide their testimony, it must be done in a *context that is not intimidating, with psychological and legal support provided by the persons they choose and trust.*

12 See also: UNHRC**,** Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence A/HRC/45/45 (9 July 2020).

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- The criminal investigation *must not incur revictimisation of the persons affected.* Action protocols must be clear in focusing the investigation *on the accused person's conduct and its consequences* and that none of the victims' actions or attitudes can justify sexual abuse.
- Victims must have, through their counsel, *full access* to the judicial and/or administrative proceedings.

Investigations must be conducted in a proper manner, taking into account the context of the facts and circumstances, as well as applying the following criteria:

- *Contradictions and inconsistencies that are eventually present during the narration of the circumstances regarding the facts must not be considered as a lack of credibility*, as the victims are usually overwhelmed and traumatised. Additionally, difficulty in remembering outlying facts could be provoked by the passage of time. The main focus during the testimony must be directed specifically towards the acts of abuse.
- *When a victim has initially denied the abuse but later on admits to having been abused, this must not be considered an insurmountable contradiction.* Plenty of times, stigmatisation and shame, as well as social and family rejection, induce the victims to deny the facts for a prolonged time.
- *Psychological expertise, especially when related to post-traumatic stress,* must be given a high probative value.
- *Circumstantial evidence of such crimes and abuses is of great importance for the proceedings.* As the abuses are mostly committed within the private sphere of the persons involved, perpetrators rely on the absence of testimony.
- *The burden of proof cannot rest solely on the victim.* The person investigating must actively resort to existing documentation and archives and search for other testimonies. In some cases, victims do not have knowledge of the complete name of their abuser, as they only know their first or nickname, which sometimes does not match their official identity. Nevertheless, the Catholic Church has, if diligent, all the necessary means at its disposal to correctly identify the accused person.

Not complying with the international standards indicated constitutes a violation of the victims' human rights.

Finally, victims have both *the right to compensation and the right to justice.* Victims cannot be put in a position of choosing between one or the other. Under no circumstance is it acceptable to conduct agreements

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of a monetary or other nature that include dispositions which make it impossible to accuse or criminally prosecute the perpetrators.

5. Some Recommendations of Good Practices that, if Followed, Effectively Ensure the Rights of Victims of Abuse Within a Religious Area or Space

To establish agile and secure reporting and accusation mechanisms, and disseminate them to the Catholic community by all means available, including at the moment of preaching.

To determine transparent, expeditious and independent mechanisms for the procedures to be followed with respect to the complaints received.

To guarantee the victims' and their representatives full access to the mechanisms mentioned before.

To act (investigate, prosecute, sanction) *ex officio* when there are sufficient elements to presume the commission of the violation of victims' rights, even if no complaint has been filed or presented.

To establish clear and diligent rules of conduct for those in a position of control of the places in which the acts or abuses were perpetrated, as well as to regulate the responsibilities of their superiors. These rules must comply with both the obligation to respect the victims' rights and the obligation to guarantee/ensure those rights, such as preventive and investigative measures, as well as guarantees of non-recurrence.

To determine action protocols in accordance with international human rights standards.

To train investigators, prosecutors and judges to carry out their functions according to human rights standards, eliminating the prejudices and stereotypes that place the responsibility for the abuse on the behaviour of the victims.

To facilitate state national authorities access to the documents required for them to carry forward criminal proceedings.

To refrain from taking any public, private or confidential measures aimed at procuring that the accused persons evade prosecution or justice in the states where the crimes were committed.

To create programs for the victims of abuse on full and comprehensive reparation in accordance with the international standards detailed above.

To ensure the victims' human rights by adopting such measures as may be necessary to bring canon law into line with the legal framework of international human rights law.

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6. Concluding Remarks

The historical evolution of international human rights law has given increasing legal standing to victims of human rights violations, while simultaneously expanding the recognition of their rights both under domestic and international jurisdictions.

States and institutions must comply with their obligations to respect and ensure human rights. These duties derive from the Charter of the United Nations – which is binding for all its states, both full and observer members—,[13] as well as from the principal human rights treaties and conventions, including: the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC).

When the violations of human rights are large-scale and systematic, victims are protected by a set of rights, such as the five pillars mentioned above: the rights to truth, justice, reparations, guarantees of non-recurrence and memory. Some elements of these five pillars also represent the rights of society and thus have the characteristics of both individual and collective rights.

The protection of these rights requires that states and institutions act according to their duties and obligations. One of the most effective ways to comply with such obligations is the establishment of a *formal process of transitional justice* that holistically addresses all of these elements and the protection of the victims' rights. In such a process, victims and their representatives have the right to participate fully in the design, implementation and monitoring stages, and re-victimisation must be avoided throughout all the stages.

A transitional justice process implies precisely that the institutions that decide to carry it out transition from a situation of disregard for rights to a new situation where the rights of the people under their jurisdiction or control are fully respected and ensured, especially towards the victims of systematic and serious human rights violations.

In the event that a comprehensive transitional justice process is not carried forward, institutions are still obliged to *protect and ensure* the human rights identified *supra* – with all the components of each one.

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13 UN, Charter of the United Nations, 1 UNTS XVI, (24 October 1945) arts 55 and 56.

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The general obligation to ensure the victims' human rights entails that those institutions must take all adequate measures to prevent, investigate, sanction and fully repair the consequences of the crimes, as well as to adopt effective policies of non-recurrence.

As regards the victims' right to justice, all administrative and criminal proceedings – including the investigation phase – must be carried out in accordance with the international human rights standards identified above, in order to avoid re-victimisation of the persons affected and impunity for the perpetrators.

Substantive and procedural rules governing criminal and administrative procedures to prosecute human rights abuses must comply with the international human rights obligations; all relevant measures must be carried out in order to achieve this.

Biography

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Rights of Alleged Victims in Penal Procedures in the Philippines

Ma. Liza Miscala-Jorda

Abstract

This paper seeks to give the readers an overview of relevant laws in the Philippines concerning child abuse and child sexual exploitation, with the intention of providing the Church with resources in the development of its canonical procedure in dealing with clerical sexual exploitation of minors and vulnerable adults.

Keywords: victims' rights; Philippine child abuse legislation; reporting child abuse; child protection measures; multidisciplinary approach; child sexual abuse; penal procedures

1. *Introduction*

One of the more elementary principles pioneered by the 1987 Constitution of the Republic of the Philippines revolves around the inviolable separation of Church and State. Fortified by the similarly formidable "non-establishment clause", i.e., the state is prohibited from passing any law favouring one, some or all religions, the aforementioned principle, found in Section 6 of Article II, straightforwardly states that "the separation of Church and State shall be inviolable". To the uninitiated, this principle simply means that neither can interfere with the affairs of the other.

But the principle is not ironclad, or at least it should not be, so as to forbid any form of exception. Much like the freedom of speech, so must the principle of the separation of Church and State bow to a form of allowance because it cannot and should not be used as a shield for impunity.

Talk of such exceptions is made in light of the purpose of this paper. As the State is and endeavours to remain a government of laws and not of men, crimes in these parts, no matter the identity of the perpetrator, do not pay. Even the country's president is not above the law that defines the State and punishes crimes.

Members of the clergy should not be different. Their robes should not be a reason for classification to sift them from the common malefactor in order to warrant different treatment insofar as punishment is concerned. On

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the contrary, they ought to be treated more strictly since their demeanour and character should be beyond reproach and they are looked upon with the highest respect.

In the same manner, a priest alleged to have committed a crime ought to be subjected to the same process and procedure undergone by a lay person. Their robes should not entitle them to treatment unique from the rest. This becomes especially true when the act is unspeakable, like abusing a child.

The Philippines is and remains a relatively child-friendly country, or at least its laws are. Being a signatory to, and having consequently ratified, the United Nations Convention on the Rights of the Child[1], it has, under the international law principle of *pacta sunt servanda,* remained true to its commitment to protect the rights of every Filipino child.

Thus, even prior to its ratification of the Convention in 1990, the Philippines had already declared its role as a defender of the said rights when, under Article 15 of Section 3 of its 1987 Constitution, it expressed its pledge to defend "the right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development". This provision will become the bedrock – the foundation, if you will – of all laws subsequently passed and enacted by the country's legislature concerning the protection of children and their rights.

With children's rights at its fore, this paper is, thus, submitted in connection with the Pontifical Commission for the Protection of Minors' Seminar by looking at the very important topic of alleged children victims' rights in canonical penal procedures. It will discuss the laws and procedures the Philippines currently adopts in addressing the protection and redress of children's and minors' rights. It will further provide some suggestions to the commission as to what it may consider adopting in order to strengthen the protection of minors in canonical penal procedures as well as to develop working partnerships between Church authorities and private non-government organisations (NGOs) dedicated to helping minors.

1 The Philippines ratified the Convention on 21.8.1990, being one of the first countries to ratify it.

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2. *Philippine Laws on Children*

A. 1987 Constitution

The 1987 Constitution of the Republic of the Philippines – the country's most fundamental law to which all enacted laws must conform – contains Articles II and XV, both of which dwell on the protection of children and their rights.

Article II declares the country's principles and state policies. With specific reference to young people, Section 13 thereof provides that "the State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being" and as well as "inculcate in the youth patriotism and nationalism and encourage their involvement in public and civic affairs".

Article XV, on the other hand, involves discussion with the family, with its Section 3(2) declaring that the State shall *defend,* among others, "the right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development".

While obviously not self-executory[2] – i.e., laws must still be passed for them to have any effect – these provisions express a serious tone: protection of children is a serious obligation of the government.

B. United Nations Convention on the Rights of the Child

The country's commitment to advancing the rights of children is manifested through its government's ratification of the United Nations Convention on the Rights of the Child on August 21, 1990. While its current constitution took effect earlier, its ratification of the said convention is a reflection of the country's declaration in its fundamental law to be a vanguard and champion of children against all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development. It is the country's adherence to the international law principle of *pacta sunt servanda* that paved the way to its legislature's enactment and the subsequent passage of numerous laws geared towards the protection of children.

2 "A provision which lays down a general principle [...] is usually not self-executing." (Manila Prince Hotel v. Government Service Insurance System, G.R. No. 122156, [February 3, 1997], 335 PHIL 82–154).

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C. Republic Act No. 7610 and Similar Legislation

Immediately after the country's ratification of the UN Convention on the Rights of the Child, its legislature passed a law to provide comprehensive protection against abuse of children. Known by its long title as "An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation, and Discrimination, Providing Penalties for its Violation, and For Other Purposes", Republic Act No. 7610|was enacted by the Philippine Congress to protect Filipino children from all forms of abuse, neglect and exploitation. Up until the present, the law remains the principal and most comprehensive legislation geared towards the protection of children against abuse and exploitation.

Through time, several other laws were passed which, in one way or another, also touch on the protection of children's rights. Some of these are Republic Act No. 9231, which is an "Act Providing for the Elimination of the Worst Forms of Child Labour", Republic Act No. 9208, which was later amended by Republic Act No. 10364, known by its short title as "The Anti-Trafficking in Persons Act of 2003" and Republic Act No. 9775 or "The Anti-Child Pornography Act of 2009". In March 2022, the President of the Republic of the Philippines signed into law Republic Act No. 11648. When it comes to the protection of children's rights in the Philippines, R.A. No. 11648 is seen to be a significant innovation in legislation, inasmuch as it raises the age of consent from twelve to sixteen. It also amended certain provisions of the earlier mentioned R.A. 7610, raising, for instance, the penalty for trafficking of children under sixteen, among others.

D. Essential Definitions

Before we discuss the above-mentioned laws, it is necessary to first get acquainted with pertinent concepts and definitions and how Philippine law understands them. Of all the concepts taken up in this paper, the legal definition of the word 'child' is of paramount importance. Under R.A. No. 7610, a child is not just anyone below 18 years old. It defines a child as someone who: (1) is *below* 18 years of age; or (2) is 18 years of age or above *but* is unable to fully take care of himself or herself or protect himself or herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition. In other words, even if an

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abused victim may be far above the legal age, a case for child abuse can *still* be filed on his or her behalf provided he or she is unable to fully take care of himself or herself or protect himself or herself from abuse, as the law states.[3]

As for the definition of the term 'child victims', the law categorises them into three groups: (1) *abused* or those subjected to physical, sexual, emotional and psychological abuse; (2) *neglected* or those abandoned or deliberately unattended by their parents or guardians; and (3) *exploited* or those subjected to commercial sexual exploitation, economic exploitation and other exploitative situations.

Among these different categories of child abuse, one appears to be of pressing concern within the Church today – that of child sexual abuse. As such, it is necessary to be acquainted with this particular category of child abuse as Philippine law understands it. Under the law, child sexual abuse is defined as "the employment, use, persuasion, inducement, enticement or coercion of a child to engage in, or assist another person to engage in, sexual intercourse or lascivious conduct or the molestation or prostitution of, or the commission of incestuous acts, on a child".[4]

"Lascivious conduct" here means the:

> intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object of the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person.[5]

The acts described above automatically give rise to a reason for filing a case of child abuse. However, R.A. 7610 does not merely penalise overt acts. Under Sec. 10 (b) Article VI of the same law, it is stated that:

> [a]ny person who shall keep or have in his company a minor, twelve (12) years or under or who is ten (10) years or more his junior in any public or private place, hotel, motel, beer joint, discotheque, cabaret, pension house, sauna or massage parlour, beach and/or other tourist resort or

3 Cf. Republic Act No. 7610, no. 5.
4 Implementing Rules and Regulations of Republic Act No. 7610 [1993].
5 Ibid. nt. 10.

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> similar places shall suffer the penalty of prison mayor in its maximum period and a fine of not less than fifty thousand pesos (PHP 50,000.00).[6]

Thus, any person caught together with a child 16 years old or younger, or one who is at least 10 years younger than him or her can already face a penalty under the law. It is not even necessary for him or her to engage in lascivious conduct, sexual intercourse and the like in order to be made liable under this law. If they are caught together in any public or private place, the perpetrator can be made liable for child abuse. Be that as it may, R.A. 7610 goes on to qualify that "this provision shall not apply to any person who is related within the fourth degree of consanguinity or affinity or any bond recognized by law, local custom and tradition, or acts in the performance of a social, moral or legal duty".

Republic Act No. 7610 and other associated laws will be further discussed below.

3. *Government Efforts to Protect Children: An Overview*

A. Committee for the Protection of Children

As modern types of abuse against children were better understood, in 2011, the Philippines recognised that it would take a 'whole of government' approach in order to effectively reduce child abuse. Thus, the President of the Philippines established a committee of different government agencies to address the problem. By virtue of Executive Order No. 53, the President created what is now the Committee for the Protection of Children (hereinafter the Committee). Its lead agency is the Department of Justice (DOJ) in partnership with the Department of Social Welfare and Development (DSWD) and other government agencies.

B. Protocol for Case Management of Child Victims of Abuse, Neglect and Exploitation

At the onset of its creation, the Committee immediately realised that to effectively reduce, if not totally eliminate child abuse cases, a partnership had to be developed and supported that included the private sector, not

6 Republic Act No. 7610, no. 5.

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just government agencies. Thus, the Committee issued a *Protocol for Case Management of Child Victims of Abuse, Neglect and Exploitation* for the guidance of all government agencies, non-government organisations and other stakeholders concerned. Currently, this protocol serves as the guide on the roles and responsibilities of government agencies and their partners. These roles range from the initial duty to report or refer a child abuse case to law enforcement agencies through the entire process of protection of the child to ensure that child victims are dealt with in the most child sensitive and appropriate manner.

4. *Stages of a Child Abuse Case: Frequently Asked Questions*

Child abuse cases are unique from other criminal cases in that they follow certain protocols and principles different from the rest. As such, various questions and inquiries may often arise. Some of these are:

A. Who Can Report a Case of Child Abuse?

Philippine laws make it clear that *anyone* can report an alleged case of child abuse, albeit the law goes further to specify certain categories of people who are categorically mandated to report situations to appropriate offices.[7]

The law first addresses government employees and enumerates the following government workers considered *duty bound* to report incidents of child abuse:[8]

1) Teachers and administrators in public schools;
2) Probation officers:
3) Government lawyers;
4) Law enforcement officers;
5) Barangay officials;
6) Correction officers and
7) Other government officials and employees whose work involves dealing with children.

7 Cf. Republic Act No. 7610 cf. no. 5.

8 Cf. Implementing Rules and Regulations of Republic Act No. 7610, nt. 10.

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The law also imposes a *mandatory obligation to report instances of child abuse on the private sector.* In section 4 of the implementing rules of Republic Act No. 7610, it is stated that:

> [t]he head of any public or private hospital, medical clinic and similar institutions, as well as the attending physician and nurse, shall report, either orally or in writing, to the Department the examination and/or treatment of a child who appears to have suffered abuse within 48 hours from knowledge of the same.[9]

On that note, while it may be conceded that members of the clergy, who are not among those named by the law mandatorily bound to make a report, it is believed that they nonetheless are morally bound to do so, since the law is quite clear that *any person* may report such cases. In fact, it is the stance of the Committee for the Special Protection of Children that it is one's civic and moral duty to report a child abuse case (cf. Department of Justice, *Child Protection Program*). Since priests are among the most trusted members of the community, they are *expected* to report all cases of child abuse that come to their attention.

B. Where to Report?

To clarify to whom a person must report child abuse, the law specifies a number of different agencies.[10]

These are:

1. Department of Social Welfare and Development (DSWD);
2. Commission on Human Rights (CHR);
3. Local Social Welfare and Development Office;
4. Philippine National Police (PNP);
5. National Bureau of Investigation (NBI);
6. Other law enforcement agencies;
7. Punong Barangay or tribal leader;
8. Barangay councillor;

9 Ibid.

10 Cf. Committee for the Special Protection of Children, Protocol for Case Management, nt. 12, 14.

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9. Any member of the Barangay Council for the protection of children and
10. Barangay Help desk officer.

When a report is received by any of the local agencies listed above, they will, in turn, report the case to the DSWD or to the Local Social Welfare and Development Office or to the PNP, particularly its Women and Children Protection Unit.

C. What Happens After a Child Abuse Case is Reported?

A platinum standard guides all Philippine agencies, both public and private, concerning actions involving children:

> The best interest of children shall be the paramount consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities and legislative bodies, consistent with the principle of First Call for children as enunciated in the United Nations Convention on the Rights of the Child. Every effort shall be exerted to promote the welfare of children and enhance their opportunities for a useful and happy life.[11]

When a report of child abuse is received, the agencies concerned shall undertake actions corresponding to their mandates and in cooperation with other agencies to effectively implement the provisions of R.A. No. 7610 and other child-related laws.

As provided for in the *Protocol of the Special Committee for the Protection of Children*, if the report is made at the barangay[12] level, the Local Social Welfare Development Officer concerned must be contacted for validation of complaint and assessment within 24 hours.

If the main request is assistance in filing a case, the child must be referred to the police for a proper police investigation to be conducted. The child is thereafter referred to the nearest women and children protection unit of the police station concerned or, if none exists, to the medico legal officer or to the city or municipal health officer. The referrals made to

11 RA 7610, no. 5.
12 In the Philippines, the *barangay* is considered the smallest local government unit.

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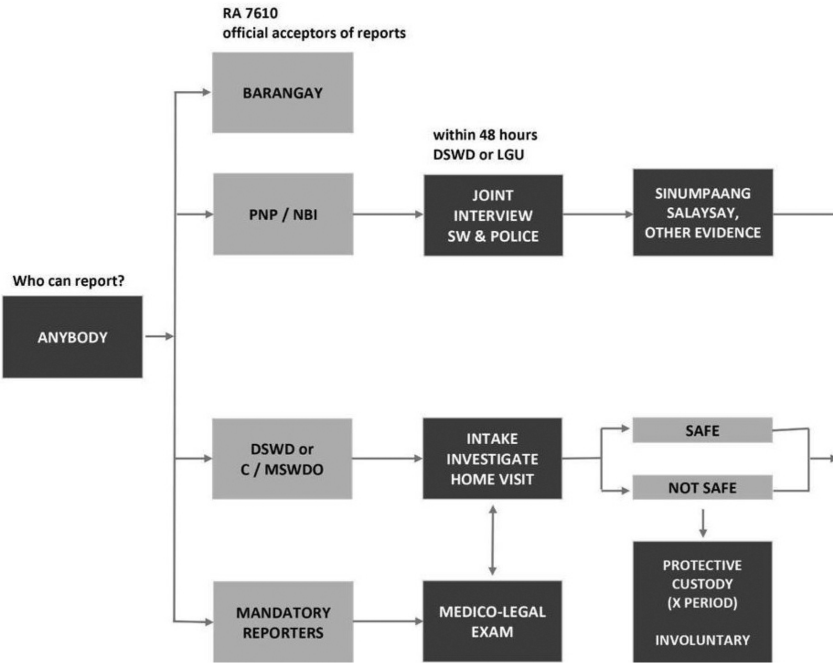
the government officers and doctors enjoy the presumption of regularity, which is important to the prosecution when prosecuting the case later.[13]

The importance of this procedure cannot be overemphasised since it is the proper observance of the established Protocol of the Special Committee for the Protection of Children which ensures the effective and successful prosecution of a child abuse case.

On the next pages is a flow chart summarising the management of cases of child abuse as found in the *Protocol for Case Management of Child Victims of Abuse, Neglect and Exploitation*.

Tue Flo,vchart on the Management of Cases of Child Abuse, Neglect and Exploitation



13 "By actual practice, *only government physicians,* by virtue of their oaths as civil service officials, *are competent to examine persons and issue medical certificates which will be used by the government.* As such, the medical certificate carries the presumption of regularity in the performance of his functions and duties.", Tarapen y Chongoy v. People, G.R. No. 173824, [August 28, 2008], 585 PHIL 568–598.

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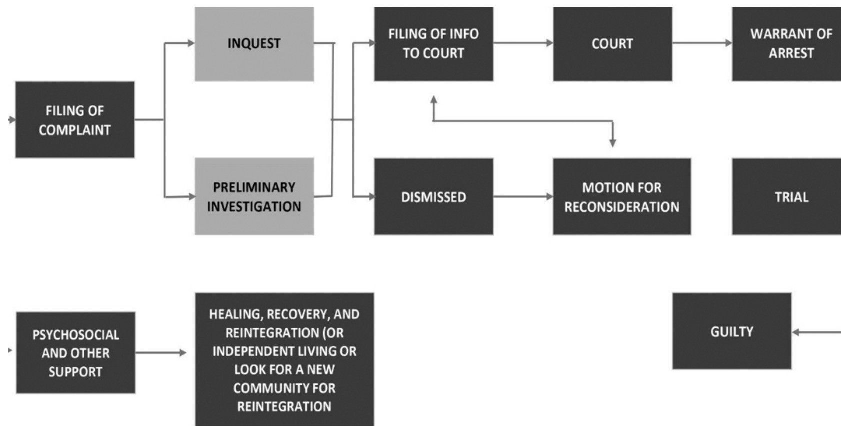

D. Who Can File a Case of Child Abuse?

The violation of Republic Act No. 7610 is a crime against persons, a public crime. As such, the right to file a complaint does not rest solely and exclusively with the offended party. Under the law, a complaint against a person who abused a child may be filed by any of the following:

1) Offended party;
2) Parent or legal guardian;
3) Ascendant or collateral relative of the child within the degree of consanguinity;
4) Duly authorised officer or social worker of the DSWD;
5) Officer, social worker or representative of a licensed child-caring institution;
6) Punong barangay;
7) At least three (3) responsible citizens from the community where the abuse took place who have personal knowledge of the offences committed.

The inter-agency Protocol referenced above[14] provides that when a child abuse case is reported to the local social welfare officer or to the police, the former must determine if there is a need for the child to be taken under protective custody. Subsequently, the child victim should be brought

14 Committee for the Special Protection of Children, Protocol for Case Management (cf. nt. 12).

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immediately to a government hospital or clinic for physical and medical examination.

The medical certificate issued by the government doctor on the results or findings of the medical examination of the child is documentary evidence which could later be used in the determination of probable cause for the filing of the corresponding formal charge for child abuse in court. Thus, in these cases of child abuse, it is imperative to act with haste in order to prevent the child from being subjected to undue influence, threat and harassment. Otherwise, the child or any person who has his or her custody and care may in the end choose not to pursue the case, thereby preventing the child from being subjected to timely medical attention.

E. What Happens when the Alleged Child Victim Files the Case upon Reaching the Age of Majority?

A child victim who has reached legal age can still file a case for abuse committed against him/her in his/her minority provided that the crime has not yet been prescribed. In this case, the offended party would then have to undergo the penal process the regular way.

Depending on the crime committed against the victim, prescription periods can range from a few years to even a couple of decades.

As a general rule, prescription usually begins to run from the moment the crime was committed. However, there are instances when the law admits exceptions. The 'blameless ignorance' doctrine, as stated in the *Department of Finance-Revenue Integrity Protection Service vs. Office of the Ombudsman* (2021), is an instance wherein "the courts would decline to apply the statute of limitations where the plaintiff does not know or has no reasonable means of knowing the existence of a cause of action".

In cases like this, an offended party enjoys a longer period within which he or she can pursue a case. If such a party was a naive minor at the time the crime was committed, the blameless ignorance doctrine can very well apply, which means that if he or she discovers the 'existence of a cause of action' much later, he or she still has the right to file a case by virtue of said doctrine.

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In the Philippines, the running of the prescription is understood to be interrupted when the complaint or information is filed.[15] However, the prescription period is also understood to not run when the offender is not present in the Philippines.[16]

This is important in cases where the offender flees the country in order to escape liability or to prevent the victim from pursuing him or her. In that instance, the prescription period is deemed to be interrupted, and the victim could buy time to file the case in court.

F. Should the Child be Separated from his/her Parents?

One important question to ask after the *prima facie* determination that a child may have been subjected to child abuse is this: is it necessary to remove the child from the custody of his/her parents?

When a child/victim remains in the custody of his or her parents, he or she is left vulnerable to being influenced or coerced by them. Considering the authority and control they hold over the child, it is possible that the child can be forced to succumb to their pressure and be prevented from pursuing any legal action. In cases like these, two legal principles come into play: the law on Obstruction of Justice under P.D. No. 1829 and the doctrine of *Parens Patriae.*

Under sec. 1(a) of P.D. 1829 (1981: no. 25), the crime of obstruction of justice is committed when any person:

> knowingly or wilfully obstructs, impedes, frustrates or delays the apprehension of suspects and the investigation and prosecution of criminal cases by [...] preventing witnesses from testifying in any criminal proceeding or from reporting the commission of any offense or the identity of any offender/s by means of bribery, misrepresentation, deceit, intimidation, force or threats.

Thus, if parents, guardians, or *any person* for that matter, attempt to prevent a child from testifying or reporting the commission of the crime to the authorities, as prescribed by the State, they can be held liable for obstruction of justice and be made to face a penalty of up to six years.

15 Cf. Article 91, Revised Penal Code, Act No. 3815, [December 8, 1930].
16 Cf. ibid.

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However, the State has already anticipated the possibility that parents, or guardians may, for the sake of preserving honour, prevent their child from reporting abuse. This is where *Parens Patriae* comes in. Under the doctrine of *Parens Patriae,* the State has the inherent power to intervene and remove the child from the custody of his or her parents in order to protect the child's best interests. By virtue of this doctrine, the child can be committed to protective custody or involuntary commitment through a petition filed in court.[17] At this point, the parents cannot intervene in the judicial process anymore, as a general rule.

> When the investigation discloses sexual abuse, serious physical injury, or life-threatening neglect, the social worker of the local social welfare and development office concerned, with the assistance of the law enforcement agency and/or barangay, shall immediately remove the child from the home or the establishment where the child was found and must place the child under protective custody to ensure the child's safety.[18]

When the social worker's assessment report calls for continuing protection of the child victim in view of the abusive or exploitative environment in their home, or the inability of parents/guardians to protect the child, and the high risk of the child being harmed in said situation, the local social welfare shall immediately, with the assistance of the DSWD social worker, file the Petition for Involuntary Commitment in court.

G. Can the Alleged Victim Appeal the Court's Decision?

In the case of *People vs. Hon. Asis* (2010: 462, 469), the Philippine Supreme Court stated that "In [Philippine] jurisdiction, [the Court] adhere[s] to the *finality-of-acquittal doctrine*, that is, a judgment of acquittal is *final and unappealable*". The rationale of this rule was further explained in *Chiok vs. People* (2015), where it is stated that:

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as

17 Cf. Implementing Rules and Regulations of Republic Act No. 7610, no. 10.
18 Protocol for Case Management, 23.

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enhancing the possibility that even though innocent, he may be found guilty.

As such, an appeal on a judgement of acquittal is considered to be double jeopardy, which is prohibited under the 1987 Philippine Constitution.[19]

However, Philippine jurisprudence still admits certain departures from the general rule. In the case of *People vs. Alejandro y Pimentel (2018)*, it is stated that "the rule on double jeopardy [...] is not without exceptions, which are: (1) Where there has been deprivation of due process and where there is a finding of a mistrial, or (2) Where there has been a grave abuse of discretion under exceptional circumstances".

Taking these case laws into consideration, it is submitted that despite a judgement of acquittal of the accused, an alleged victim still has a remedy for himself or herself, as long as the requirements as stated in the above-mentioned *Alejandro* case are met.

H. How Can the Victim Recover Damages in a Criminal Case?

In Philippine jurisdiction, a victim can recover civil damages from a criminal case simply by filing the criminal case and obtaining a judgement of conviction. Under Section 1, Rule 111 of the Philippine Rules of Court,[20] it is stated that the civil action for the recovery of civil liability arising from the offence (civil liability *ex delicto*) charged shall be deemed instituted with the criminal action. This means that the right for the victim to claim civil damages is already incorporated into the criminal case. An exception to this rule, however, would be if the offended party decides to waive the civil action, reserve the right to institute it separately or institute the civil action prior to the criminal action. In that case, the prosecution of the criminal offence would not involve the awarding of civil damages.

Taking these points into consideration, one may ask: what are the implications of civil liability *ex delicto*? What does it include?

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19 No person shall be twice put in jeopardy of punishment for the same offence. 1987 Phil. Constitution, (cf. no. 5).

20 When a criminal action is instituted, the civil action for the recovery of civil liability arising from the offence charged shall be deemed instituted with the criminal action unless the offended party waives the civil action, reserves the right to institute it separately or institutes the civil action prior to the criminal action. (Revised Rules of Criminal Procedure, A.M. No. 00–5–03-SC, [October 3, 2000]).

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In Philippine law, civil liability includes the restitution, reparation or indemnification of the victim for the damage or injury she/he sustained by reason of the felonious act of the accused.[21] Thus, in cases of child abuse, civil liability can mean the accused being made to pay for hospital bills and/or psychological treatment in case the child victim ends up needing professional intervention. However, civil liability need not be based on the injuries suffered personally or directly by the victim. Under the law, it is submitted that civil damages can be awarded as well on the basis of injuries suffered by the victim's family, or even by a third person by reason of the crime. This is indemnification for consequential damages.[22]

Civil liability *ex delicto* can also include the awarding of moral and exemplary damages to the victim of a crime**.** Moral damages, under the law, are compensation for "manifold injuries such as physical suffering, mental anguish, serious anxiety, besmirched reputation, wounded feelings and social humiliation".[23] This type of damages can be significant in cases of child abuse, where a child victim would undoubtedly have suffered mental anguish and serious anxiety by reason of his or her abuser's conduct.

On the other hand, exemplary damages are those which are imposed by way of example or correction for the public good.[24] In other words, these are damages that a defendant could be made to pay for as a way of deterring people from committing a similar crime. In cases of child abuse, this type of damages can also be consequential. Considering the gravity of a child abuse case, courts would not hesitate to set an example to the general public by making the accused pay a hefty sum of money, if only to deter people from committing the same act he or she was convicted of.

I. What Happens if Both the Victim and Perpetrator are in Different Jurisdictions?

It is a given fact that in some cases of child abuse, both the victim and perpetrator may be citizens and/or residents of different states, thus making them subject to different laws. This may pose a hitch in the prosecution of

21 Cf. Revised Penal Code, Act No. 3815, [December 8, 1930].

22 Indemnification for consequential damages shall include not only those caused to the injured party, but also those suffered by his family or by a third person by reason of the crime. (Revised Penal Code, Act No. 3815, [December 8, 1930]).

23 Del Mundo v. Court of Appeals 1995, 367–378.

24 Cf. Civil Code of the Philippines, Republic Act No. 386, [June 18, 1949].

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the criminal case, for one because the respective laws that govern both the victim and perpetrator might clash with each other (thus giving rise to the application of Conflict of Laws principles), and for another because of the plausibility that justice – which is best served by a tribunal that understands the child victim's context and circumstances – may be dispensed in a way that fully accommodates the totality of the victim's interests.

In situations like these, treaties and international agreements for the protection of victims now come into play. Extradition treaties and agreements for mutual legal assistance help ensure that a child victim properly receives thorough and more total justice.

a. Mutual Legal Assistance in Criminal Matters

The Philippines, for its part, has set in place mechanisms and legal frameworks to make this work. The *Mutual Legal Assistance in Criminal Matters* (2021) is a set of guidelines by which states can request mutual legal assistance for the prosecution of crimes committed across jurisdictions. The types of assistance it offers include:

- taking the testimony or statement of persons;
- providing documents, records and items of evidence;
- locating or identifying witnesses or suspects;
- effecting serving documents;
- making arrangements for persons to give evidence or assist in an investigation;
- identifying, tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities, including the restraining of dealings in property or the freezing of assets alleged to be related to a criminal matter;
- executing requests for searches and seizures.

The following countries have an agreement on mutual legal assistance in criminal matters with the Philippines: Australia, China, Hong Kong Special Administrative Region, Korea, Russia, Spain, Switzerland, United Kingdom, United States.

For countries without a mutual legal assistance agreement, recourse may still be had via an undertaking of reciprocity. Here, the Philippines can request legal assistance from a country with which it has no agreement; in return, that country would, in the future, expect the same assistance from

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the Philippines when it is their turn to seek aid. Undertaking reciprocity can be accomplished with greater ease when the foreign country from which the Philippines requests assistance is a party in a relevant multilateral treaty of which the Philippines is also a member.[25] In this way, the interests of the child victim can be properly protected even in cases that span different jurisdictions.

b. Extradition Treaties

Another way through which a child victim's rights may be more properly protected across jurisdictions is through the process of extradition. According to P.D. 1069, which is the Philippine Extradition Law, extradition is the:

> removal of an accused from the Philippines with the object of placing him at the disposal of foreign authorities to enable the requesting state or government to hold him in connection with any criminal investigation directed against him or the execution of a penalty imposed on him under the penal or criminal law of the requesting state or government.

In the Philippines, extradition matters are referred to a central authority, which is none other than its own Department of Justice. It is the Office of the Chief State Counsel of the Department of Justice that handles and processes all requests for extradition in accordance with the provisions of the Philippine Extradition Law and the applicable extradition treaty.

Under the law, the Philippines may only grant extradition pursuant to a treaty or convention. Countries which have an extradition treaty with the Philippines are: Australia, Canada, China, Hong Kong Special Administrative Region, India, Indonesia, Korea, Micronesia, Russia, Spain, Switzerland, Thailand, United Kingdom, United States.

By virtue of these extradition treaties, a perpetrator who flees to any of the above-mentioned countries can still be further pursued and prosecuted.

J. What if the Child Refuses to Undergo a Legal Process?

Indeed, not all abused children are willing to go through the burden of a legal process. Sometimes, forcing a child to submit to the system may not be in her/his own best interest. Taking these assumptions into consideration,

25 Cf. Department of Justice, *International Legal Cooperation*.

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we have now evolved a more victim-centred approach, one that gives a great deal of emphasis to the state of mind and psychological well-being of the child. It recognises the mental and emotional needs of the child victim more than simply dispensing retributive justice. The *video* and *audio taped interview* is just one strategy with which prosecutors can develop strong cases to convict the perpetrators despite the victim's unwillingness to testify in court. This strategy, along with other child-friendly strategies laid down above, all lead to a bigger picture of holistic, more integral justice, where the child's legal and psychosocial needs are met.

Of course, the victim-centred approach does not in any way diminish the necessity of criminal prosecution. Successful prosecution remains a top priority in addressing the child victim's best interests. In my years of handling child abuse cases, I believe that nothing can send a powerful signal to perpetrators more than a successful prosecution. It remains a strong deterrent to the commission of the crime. As such, the Church's seriousness in deterring clerical child abuse can be best manifested in its willingness to collaborate with the State, not only in the psychosocial care of the child victim but also in the successful prosecution of the offender. This will not only help the Church purge its clergy of abuse, but it would also greatly benefit its image in the public eye to a far greater extent than simply sweeping alleged offences under the rug.

K. Can a State Investigation into a Child Abuse Case be Replaced by a Church Investigation?

If a case of alleged sexual abuse committed on a child by a priest is referred to an investigative body and subjected to an internal process within the Church institution *instead of* or *prior to* being immediately reported to the state authorities, there is a danger of the child victim experiencing potential re-traumatisation as her or his issues would not be legally addressed with dispatch. Ecclesial investigations are not recognised by the State as a valid replacement for its own proceedings, so this would lead to a situation where a child victim initially subjected to the rigours of Church investigation would have to be subjected again to another investigation by the State, thereby exposing the child to a greater risk of psychological distress. Moreover, the Church is not legally competent under State law to investigate the existence of probable cause or to appreciate evidence acceptable in court

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for the purpose of dispensing criminal justice. Such is the domain of the State.

Nonetheless, this does not legally preclude the Church from conducting its own internal investigation on the veracity of the alleged sexual offence. State and Ecclesial investigations may proceed *simultaneously* with each other, as long as the latter *does not replace* the former.

5. *How the Child is Protected Throughout the Penal Process*

Throughout the different stages of the legal procedure, or even before or after then, the mental and emotional well-being of the child is of paramount importance. This is why the Protocol has laid down specific measures to be undertaken by every social worker, doctor or government agent involved in each stage of the case. These measures are designed to ensure that the child's mental and emotional states are not compromised, and that psychological trauma is minimised as far as possible. A summary of these measures follows:

A. Before Trial

Before the trial of the case, the protection of the child rests mainly in the hands of the social worker. It is the social worker's duty to ensure the child's mental and emotional state is properly maintained. In light of this, the *Protocol for Case Management of Child Victims of Abuse, Neglect and Exploitation* lists the following responsibilities and duties for the social workers to comply with:

1) Enrol the child in a 'Kids' Court Program', if one is available in the area. In the absence of such a programme, take the child to court before his/her appearance to ensure the child is familiar with the physical set-up, the characters (i.e., judge, prosecutor, defence counsel, court interpreter and other court staff), and the procedure. Enrol the child's parents or guardian in a similar programme so they, too, will understand the court process and appreciate how they can help the child prepare for court testimony.
2) Several days before the scheduled hearing, arrange a meeting between the child and the Public Prosecutor for rapport building and orientation for court testimony.

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3) Act as a guardian ad litem (GAL) or support person who will accompany the child to court.
4) If the child is not a resident of the area where the court sits, arrange temporary accommodation for the child before the child testifies.
5) Coordinate with the court social worker, if there is one, and/or the public prosecutor and provide information requiring immediate court intervention (e.g., issuance of protection or provisional orders).
6) If the social case study has not been submitted yet, furnish the court, through the Public Prosecutor, Private Prosecutor, if there is one, or the court social worker, with a copy to help the latter determine and order other interventions that the child needs. If the social case study is not yet completed, submit the accomplished intake interview form and preliminary assessment report to the court.
7) If subpoenaed by the prosecution, testify and give the assessment and recommendation. Otherwise, share relevant and crucial information and issues that affect the child's willingness to participate in the court process with the public prosecutor and court, if necessary.
8) Periodically communicate with the public prosecutor to monitor the status of the case filed.
9) Help the child and family understand court processes and procedures.
10) However, it is not only the social worker who has the responsibility to protect the child's mental and emotional well-being. The public prosecutor is duty bound as well to assist the child in familiarising himself or herself with the court processes. It is understood that helping the child acquaint himself or herself with the legal process minimises the stress and anxiety that he or she may experience on top of the trauma of being victimised. The prosecutor's duties under the protocol before a child's case is brought to trial are as follows:
    a) Prepare the child and other witnesses before their court testimony.
    b) On a case-to-case basis, identify the sequence of witnesses that will best help and facilitate the child's testimony. If the child has post-traumatic stress disorder (PTSD), present other witnesses first or seek continuance of the proceedings until the child is able to testify.
    c) With the help and in the presence of the parent, legal guardian or social worker, interview the child and prepare the child for court.
    d) Arrange with the court a one-day trial or marathon hearing to reduce the time in court and minimise the child's absence from school and the disruption of the child's daily routine.

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a. Videotaped and Audio Taped in-depth Investigation or Disclosure Interviews

There may also be instances where a child might be incapable of rendering his or her testimony in open court. This may be due to the mental and emotional stress brought about by the child's traumatic experience. As such, Philippine Evidence Rules admit the possibility of recording a child's in-depth and investigative or disclosure interview or testimony through video and audiotape as a way of perpetuating it. In section 28 of the *Rule on Examination of Child Witness, A.M. No. 00–4–07-SC* (2000)*,* it is stated that: "A statement made by a child describing any act or attempted act of child abuse, not otherwise admissible under the hearsay rule, may be admitted in evidence in any criminal or non-criminal proceeding".

For cases like this, it must be ensured that the child's videotaped and audio-taped in-depth investigation or disclosure interviews have been conducted by a duly trained member/s of a multidisciplinary team or representatives of law enforcement or child protective services in a situation where child abuse is suspected in order to determine whether child abuse occurred.[26]

This videotaped and audio-taped interview can later be used during trial as evidence in lieu of the testimony of a child who is unavailable.

B. During the Trial

During the trial of the case, the responsibility of ensuring the emotional and mental well-being of the child is now shared by the prosecutor and the court. For the Prosecutor's part, the *Protocol for Case Management of Child Victims of Abuse, Neglect and Exploitation* recommends the following:

1) Move for exclusion of the public from the hearing or to have it conducted in chambers to protect the identity of the child and ensure the confidentiality of proceedings.
2) Ensure that there is no direct confrontation between the child and the alleged perpetrator. Screens, one-way mirrors and other devices such as live-link monitors to shield the child from the accused must be used.
3) If the child is hearing-impaired or differently abled, move for the appointment of a sign language expert or other professionals (e.g., special

26 Cf. Rule on Examination of Child Witness, no. 36.

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education teacher) who may help him/her effectively communicate with the Court.

4) If there is danger to the safety of the child, file a motion for reception of the child's testimony through alternative means, e.g., Skype or video conferencing, or motion for a change of venue for the case.
5) If the child has developmental delay, and such delay incapacitates the child from competently testifying in court, present the testimony of a developmental paediatrician to explain to the Court the reason why the child cannot testify. If the child is suffering from PTSD, present a psychiatrist to explain the condition of the child and the adverse effects of the abuse on him/her and to share recommendations to hasten or facilitate the child's healing and recovery.
6) After the child has testified, debrief the child with the help of a parent, legal guardian or social worker, explain what will happen next and give the child the opportunity to ask questions about the process and the case, and to articulate other related issues.
7) If the child is unavailable, prosecute the case by presenting other witnesses and evidence deemed sufficient to prove the alleged perpetrator's guilt. The child is unavailable in any of the following:
   a) Deceased, suffers from physical infirmity, lack of memory, mental illness or will be exposed to severe psychological injury; or
   b) Absent from the hearing and the child's attendance in court cannot be procured by process or other reasonable means.
   c) The child's hearsay evidence (e.g., audio-taped or videotaped interview) shall be admissible if corroborated by other admissible evidence, such as the testimony of the forensic interviewer and the person who recorded, preserved and observed the chain of custody of the audio or video interview.
8) Upon the recommendation of the social worker, request the court to issue provisional and/or protection orders for the child.
9) Tap the assistance of the PNP and NBI[27] to locate missing witnesses.
10) Upon receipt of verified and confirmed information about the alleged perpetrator's possible flight, request the Court to issue a hold departure order.
11) Communicate with the Court about the child's immediate and long-term concerns and issues.

27 The PNP (Philippine National Police) and NBI (National Bureau of Investigation) are Philippine law enforcement agencies.

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12) Keep the child informed about the development of the case.[28]
13) If requested by the case manager, attend a case conference to help thrash out the child's issues and concerns that also impact the case.

On the part of the Court and its staff, the protocol recommends that:

1) Except for election and habeas corpus cases, trials on child abuse cases must take precedence over all other cases.
2) Dismissal of a child abuse case is prohibited solely on the basis of an affidavit of desistance or recantation submitted by the child and/or the child's family.
3) Any record regarding the child shall be confidential and kept under seal. The name of the child must not be indicated in the calendar of cases and in the Court's decision. During the arraignment, the name of the child must not be publicly read in open court. The child's alias, as indicated in the sworn statement, resolution and criminal information, shall be used to protect the child's identity.
4) Set the schedule of the child's testimony at the time most appropriate and sensitive to the child's age and condition. The child should testify only when well rested. Long delays and waiting times must be avoided.
5) The child shall not be exposed to the public. The court shall prepare a waiting room for child victims separate from the waiting room used by children in conflict with the law, other witnesses and litigants.
6) The child may testify in open court only after the public has been excluded. Alternatively, a hearing in the chamber can be conducted to prevent exposing the child to the public.
7) Before the child testifies, the Court must, in simple language, introduce the main characters (judge, prosecutor, defence counsel) and their roles, explain the basic rules in a court proceeding and give the child an opportunity to ask questions.
8) Without violating the alleged perpetrator's right to confront the witness face to face, the Court shall use screens, one-way mirrors, other devices or live-link monitors to receive the testimony of the child and to prevent direct confrontation with the alleged perpetrator.
9) The use of *testimonial aids* (e.g., dolls, anatomically correct dolls, puppets, anatomical drawings and other appropriate demonstrative devices) shall be permitted to facilitate the child's testimony.

28 This includes making the full text of the decision available to the child victim.

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10) The Court shall ensure that the examination of the child is conducted with the use of simple, developmentally appropriate, non-threatening and non-victim blaming words.
11) Proper court decorum must be maintained. Badgering and other oppressive behaviour towards the child is prohibited.
12) Whenever necessary and to facilitate the child's testimony, the Court shall appoint any of the following:
    a) Support person – preferably, a person chosen by the child who can accompany the child during court testimony to lend the child moral support.
    b) Facilitator – a person who can pose questions to the child if unable to understand or respond to questions asked. A facilitator may be a child psychologist, psychiatrist, social worker, guidance counsellor, teacher, religious or tribal leader, parent or relative.
    c) Interpreter – a person whom the child understands and who understands a child that does not understand English or the Filipino language or is unable to communicate due to their developmental level, fear, shyness, disability, condition or other similar reason. The interpreter shall take an oath or affirmation to make a true and accurate interpretation.
    d) Guardian ad litem (GAL) – a person who shall explain legal proceedings to the child; advise the Court regarding the child's ability to understand the proceedings and questions propounded; advise the Public Prosecutor concerning the ability of the child to cooperate as a witness for the prosecution; attend the trial and monitor and coordinate the child's concerns and needs with the Court.
13) In controversial child abuse cases, a gag order shall be issued to protect the identity of the child and the confidentiality of the proceedings.
14) On its own or upon a motion by any party, the Court may issue protection orders to protect the privacy and safety of the child and/or to order other appropriate intervention (e.g., immediate medical attention, referral to a mental health professional, placement in a temporary shelter, and such like).
15) After the child has testified, the Court must order the DSWD, the LSWDO or the NGO social worker to continue monitoring the child's safety and requirements for other interventions.

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C. After Trial

Even after trial of the case, the protection of the child continues as the protocol recommends that programmes and services be undertaken to ensure the child's full mental and emotional recovery. It puts emphasis on the social worker in determining the proper psychosocial interventions "geared towards healing, recovery and reintegration".

a. Multidisciplinary Approach

Perhaps the strongest legal protection so far in practice and experience is the multidisciplinary approach to a child abuse case.

In the *Protocol for Case Management of Child Victims of Abuse, Neglect and Exploitation,* it is stated that:

> [t]he social worker acting as case manager on the case may convene a multi-disciplinary case conference participated in by doctors, police, representatives of temporary shelter directly involved in the child, lawyers or mental health professionals to analyse issues pertinent to the child-victim and come up with an inter-agency plan and recommendation for the child and family.

This holistic approach involving collaboration between different agencies and disciplines promotes the child's best interests.

6. Conclusion and Recommendation

The laws, cases and protocols discussed above are a manifestation of the state's undeniable desire to afford its protection to children. Children, after all, are the future of the State, and a state that cares for its children cares for its destiny. Undoubtedly, the Church also sees its children in the same way. Just as children are the hope of the state, children too are the hope of the Church. Seeing, then, the common treasure that children are to both State and Church, it is imperative that the two institutions work hand in hand to ensure that their rights are well-respected.

One way both institutions can collaborate with one another in addressing the problem of child abuse is for the Church to benchmark the best practices that the State has in place. For instance, the State's particular emphasis on protecting the child victim's psychosocial well-being, as well

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as its victim-centred approach expressed in the guidelines and protocols above, is an important objective the Church must consider in formulating its canonical procedures.

Another way the Church can collaborate with the State is for it to take a proactive stance within the community in advocating child protection. Children, after all, are not only members of the Church alone or of the State alone, but of a whole community where the Church and State both play an active role. The Church must not hesitate, then, to become a loud voice in the public sphere, ardently preaching the necessity to protect children's rights and the obligation to report violations thereof. It should also not shy away from actually engaging in partnership with the State's efforts to dispense justice for child victims, providing concrete assistance to the State as needed. In this way, the community, moved by the advocacy of its two most influential actors, can be mobilised to stand up and be vigilant in maintaining a more secure environment for children.

However, it is unavoidable that the interests of both Church and State can sometimes run into one another, thereby blurring an opportunity for a more ideal response to clerical child abuse cases. For this reason, I humbly recommend the creation of an independent lay body within the Church, subject directly to the Pope or through the Pontifical Commission, whose paramount duty is to collaborate with the State in addressing child abuse cases involving the Church's clergy and religious figures. Since it serves as an intermediary between Church and State interests, it is imperative that this body be composed primarily of lay people, preferably experts in legal, psychological and other similar disciplines. The lay character of this body is necessary considering that victims of clerical child abuse, whom this body represents, happen to be primarily lay. It is only logical, then, that those who are to advocate for them should be lay people as well.

In order to maintain a universal presence, this lay body shall have regional offices in every bishop's conference and satellite offices in every diocese. Its responsibilities include actively cooperating with the State in the investigation and prosecution of perpetrators, keeping track of every case reported to them, and monitoring the compliance of the local Diocese and Ordinary with the Church's mandates on the just treatment of alleged child victims. Lastly, in instances where a clerical child abuse case has already been prescribed under the laws of the State, this independent lay body shall be the first to assist in the psychological, social and spiritual healing of victims and their families, as well as to take charge in the indemnification of any damages they suffered as a result of the abuse.

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On a final note, caring for the clergy's child abuse victims is not merely a legal obligation the Church owes to the State. It is a duty it owes to its Eternal Head, who once said "Let the little children come to me; do not stop them; for it is to such as these that the kingdom of God belongs".[29] An act of abuse against "the least of these" is a wound struck against Christ's Mystical Body, and every time their cries and plights are ignored, the Church risks losing more souls from the care of the Shepherd. It is imperative, then, that the Church takes drastic steps to purge itself of abusers and reach out to poor, abandoned victims, for the sake of Him who purchased their souls with the price of His Blood. If the Church is to present itself to the world as its Redeemer's Spotless Bride, it must be serious in ending this shameful and painful scourge.

Biography

Atty. Ma. Liza Miscala Jorda is a Filipino lawyer and advocate for children's and women's rights. She has undergone training from various governmental and non-governmental agencies, including the US Department of State, and has received numerous recognitions for her advocacy such as the Ninoy Aquino Award for Professional Development and Public Service. She currently serves as the City Prosecutor of the City of Tacloban, Philippines.

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29 Mark 10:14, NRSV.

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Rights of Survivors of Child Sexual Abuse in Criminal Proceedings in Australia

Jane Goodman-Delahunty, Nicholas Cowdery

Abstract

To examine the rights of survivors of child sexual abuse in the Australian adversarial system, this chapter starts with a general description of the Australian criminal justice process. Next, we present an overview of children's rights and of reforms implemented following a five-year Royal Commission into Institutional Reponses to Child Sexual Abuse, including mandatory reporting obligations and the offence of persistent child sexual abuse. The core of the chapter is a review of survivors' rights in three key stages in the course of a criminal case: the police investigation; the trial; and post-trial proceedings. The chapter outlines comprehensive innovations to minimise the distress and re-traumatisation of survivors, such as witness assistance service professionals, communication intermediaries, pre-recorded pre-trial evidence in chief and cross-examination and expert witness opinion evidence. The chapter concludes with a description of a national redress scheme for restoration of damage to survivors. The implications of these rights and entitlements of survivors of child sexual abuse for penal proceedings in canon law are considerable.

Keywords: *expert evidence; institutional child sexual abuse; Royal Commission; witness intermediary; specialist jurisdiction; mandatory reporting, criminal justice process, rights of victims, seal of confession*

1. The Australian Criminal Justice Process

Australian criminal law and procedure is divided into federal criminal law plus eight state or territory criminal law systems.[1] The latter encompass three different types: common law systems,[2] codified systems[3] and hybrid

1 Mark Nolan / Jane Goodman-Delahunty, Legal Psychology in Australia, Thomson Reuters 2015.

2 The Australian Capital Territory (ACT), New South Wales, South Australia and Victoria apply a mixture of judge-made common law and criminal law statutes.

3 The Northern Territory, Queensland, Tasmania and Western Australia apply systems shaped by codes similar to European (Napoleonic) restatements of the law.

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systems.[4] It is primarily state and territory criminal laws that affect the day-to-day lives of Australians and deal with the majority of criminal matters, including child sexual abuse (CSA).

The criminal justice process in Australian states and territories is adversarial and accusatorial. The trial is a contest between the prosecution, acting as the state's representative, and the accused, who is typically represented by a defence counsel. Persons who allege that they have suffered the harm (the complainant or abuse survivor) are not parties to the proceedings; they are usually witnesses.[5] Thus, it is not permitted for the complainant to have their own legal counsel appear in the trial.

As in most adversarial legal systems, procedures to protect the rights of the accused are accorded priority, with the right of the accused to a fair trial being paramount. Persons alleged to have committed child sexual offences are entitled to impartial and independent prosecution, legal representation when the accused is charged with a serious offence and cannot afford legal representation, a presumption of innocence, a right to silence, a trial without unreasonable delay and to examine witnesses to test their evidence.[6]

In Australia, when significant concerns arise about the effectiveness of the criminal justice process, these concerns are commonly referred by the Commonwealth or state Attorney-General to federal or state law reform commissions, respectively. Law reform commissions prepare issue papers and consult widely with the community and relevant stakeholders before proposing resolutions. A further mechanism to address legal change is a royal commission. Royal commissions function in a more inquisitorial style and have broad powers to hold public hearings, call witnesses under oath and compel evidence. Both, royal commissions and law reform commissions, recommend changes to government agencies.

Awareness of the dearth of rights for victims in the criminal justice process was expanded by findings of special commissions of inquiry. In New South Wales (NSW), the most populous Australian state, the Paedophile Inquiry[7] examined activities of an organised paedophile network, the

4 The ACT and the Northern Territory partially adopted principles of criminal responsibility from the Criminal Code (Cth) into common law and Griffith Code systems, respectively.
5 Nicholas Cowdery, Discretion in Criminal Justice, LexisNexis 2022.
6 Royal Commission into Institutional Reponses to Child Sexual Abuse (2017a).
7 James R. T. Wood, Report of the Royal Commission in the New South Wales Police Service, vols IV, V (1997).

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adequacy of procedures for protecting at-risk minors, and for responding to alleged offences against minors. Corruption in churches and schools was exposed, multidisciplinary team responses were initiated and police were compelled to take on a more proactive role in prosecuting CSA.[8] A subsequent inquiry into Child Protective Service NSW[9] culminated in recommendations to overhaul the state's child protection services, adding a voice for children and young people in decisions which affect them. Multidisciplinary, multi-agency responses implemented for CSA survivors remain current, such as the Joint Investigation Response Teams, with collaboration between police, health, departments of community services, family and community services and nongovernmental agencies.

Nationwide exposure to issues affecting the rights of CSA survivors was provided in a five-year national public inquiry by the Royal Commission into Institutional Responses to Child Sexual Abuse (hereafter "RC"). The term 'survivor' is preferred over 'victim' due to the negative connotations of the latter, such as 'loser', 'powerlessness' and 'helplessness', whereas 'survivor' is associated with self-empowerment.[10]

The RC inquiry, described as a 'landmark' in Australian history, focused on features associated with transitional justice, such as survivors' experiences, truth recovery and non-repetition[11] to ensure justice from the time of the referral through the investigative, prosecutorial and adjudicative trajectory of the criminal proceedings. The RC conducted: (a) 8,013 confidential private hearings; (b) 444 days of livestreamed public hearings with evidence from 1,200 witnesses about abuse in 116 different institutions, including faith-based institutions; (c) a research and policy programme supporting over 100 empirical studies; and (d) public round tables with local and international experts. Catholic institutions were identified as the source of most abuse, accounting for 26 % of the public hearings.

8 Jane Goodman-Delahunty, The Honourable James R. Wood AO QC: New South Wales Supreme Court Judge, in David Lowe / Dilip K. Das (eds), Trends in the Judiciary: Interviews with Judges Across the Globe, Volume Two, CRC Press 2015, 57–76.

9 James R. T. Wood, Report of the Special Commission of Inquiry into Child Protection Services in New South Wales, State of New South Wales 2008.

10 Stephanie Fohring, What's in a word? Victims on 'victim', *International Review of Victimology* 24, n 2 (2018) 151–164.

11 Kate Gleeson / Sinéad Ring, Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia, *Griffith Law Review* 29 (2020) n 1, 109–133.

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Two weeks of hearings centred on the rights of CSA survivors in criminal justice processes (summarised in Case Study 38, RC 2017a) and exposed what seasoned legal practitioners acknowledged as 'the poor fit' between traditional criminal processes and a satisfactory environment for CSA survivors.[12] Particular challenges for complainants were identified as: initial police interviews; communication with police and prosecutors; how and when evidence is given; and the nature of cross-examination. Providing meaningful assistance to juries to evaluate the evidence and complainant credibility was a further difficulty noted (RC 2017a).[13]

The findings of the RC were reported in 20 volumes (RC 2017b), of which three addressed criminal justice responses to survivors of institutional CSA (RC 2017a). A total of 85 integrated criminal justice reforms with a timetable for their implementation has impacted police investigations and the prosecution of CSA trials (RC 2017a). This chapter incorporates discussion of these reforms as they bear on the contemporary rights of Australian CSA survivors.

2. *The Rights of Child Sexual Abuse Survivors in Australia*

This section provides an overview of the context in which CSA offences and CSA survivors' rights are addressed, taking into account the development of a trauma-informed justice response and the role of Commissioners of Victims' Rights in criminal proceedings. Recent reforms following from the recommendations of the RC are described, in particular the treatment of historical CSA cases and mandatory reporting obligations.

A. Achieving a Trauma-informed Criminal Justice Process

Across the Australian justice sector, legal professionals are advised to demonstrate "sensitivity to how court processes may re-traumatise those suffering from trauma, awareness of the effect of trauma on memory and

12 Kara Shead, Responding to historical child sexual abuse: A prosecution perspective on current challenges and future directions, *Current Issues in Criminal Justice* 26 (2014) n 1, 55.

13 Ibid.

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the delivery of oral evidence".[14] A significant goal of the trauma-informed response is to avoid "secondary victimisation" or further victimisation of a CSA survivor through negative experiences, such as repeated exposure to the perpetrator, repeated questioning about the same events and inappropriate cross-examination. This approach was exemplified by the RC.[15] Guidance for judges on trauma-informed courts emphasises six principles: safety, transparency, peer support, collaboration, empowerment and consideration of cultural, historical and gender issues[16] (NSW Judicial Commission 2022). Educational initiatives for members of the legal profession and the judiciary about the needs and interests of victims and the causes and effects of victimisation are widespread and have included training about memory processes and what a CSA complainant can reasonably be expected to recall. Protection of police, prosecutors, witness assistance support officers and judges from vicarious trauma has been prioritised.

National debate ensued over the merits of specialist CSA courts versus strengthening specialised responses to sexual assault offences within existing court structures.[17] A pilot specialist jurisdiction being trialled in the NSW District Court is described in Section IV below. Major policies and practices implemented within existing criminal proceedings to extend a trauma-informed response to CSA survivors are explicated in Sections III and IV below, most notably, pre-trial recording of the complainant's evidence in chief and cross-examination.

B. The Role of Commissioners of Victims' Rights in Criminal Proceedings

The Office of Commissioners of Victims' Rights was created to assist in improving "victims' experiences in the criminal justice system without jeopardising the structure of the existing adversarial system between the accused and the state".[18] In Australian states and territories, while the Com-

14 Michael King, The importance of trauma-informed court practice, *Judicial Officers Bulletin* 34 (2022) n 6, 61.

15 Gleeson / Ring (n 11).

16 Peggy Hora, The trauma-informed courtroom, *Judicial Officers Bulletin* 32 (2020) no 12, 11–13.

17 Anne Cossins, Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial, Palgrave 2020.

18 Tyrone Kirchengast / Mary Iliadis / Michael O'Connell, Development of the Office of Commissioner of Victims' Rights as an appropriate response to improving the

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missioners of Victims' Rights lack any specific power to represent victims, they can monitor, facilitate and assist CSA survivors. Charters of victims' rights give emphasis to the four tenets of procedural justice: respect, trustworthiness, neutrality and voice.[19] However, rights enumerated in many Australian Charters of Victims' Rights have been unenforceable, except in NSW and South Australia. In NSW, 18 discrete rights of CSA survivors and other crime victims are set out in the charter within the *Victims' Rights and Support Act 2013,* which defines a crime victim as someone who suffers harm as a result of an act committed by another person in the course of a crime. The Act applies to all NSW government agencies that work with crime victims. The NSW Commissioner of Victims' Rights is empowered to make enquiries, conduct investigations and compel evidence.

C. Initiating Criminal Proceedings in Cases of Child Sexual Abuse

Complainants often delay reporting CSA, and many never report CSA to the authorities.[20] Information gathered across Australia in the period 2013–2017 in over 8,000 private hearings with institutional CSA survivors and more than 1,000 written accounts received from other survivors, revealed that the average delay period before reporting their abuse was 31.9 years.[21] A report to the police about alleged CSA that occurred years before it was reported is referred to as a historical case. Although most complainants have continuous memories of their abuse, erroneous beliefs have persisted that cases of historical CSA involve 'recovered' rather than previously unreported memories.

Limitation periods and immunities that were in place preventing the prosecution of alleged historical CSA crimes reported by adults were removed. Children and adults who delay in reporting CSA are treated alike. In 2021, the NSW Bureau of Crime Statistics and Research reported that approximately one-third of CSA allegations (n = 1,611) were from child victims under the age of 16 years, the majority from female children (81 %) and

experiences of victims in the criminal justice system: Integrity, access and justice for victims of crime, *Monash University Law Review* 45 (2019) no 1, 3.

19 Jane Goodman-Delahunty, Four ingredients: New recipes for procedural justice in Australian policing, *Policing: A Journal of Policing and Practice* 4 (2010) 403–410.

20 Kairika Karsna / Liz Kelly, The Scale and Nature of Child Sexual Abuse: Review of Evidence, Centre on Expertise on Child Sexual Abuse 2021.

21 Ben Mathews, A taxonomy of duties to report child sexual abuse: Legal developments offer new ways to facilitate disclosure, *Child Abuse & Neglect* 88 (2019) 337–347.

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children aged 11–15 years (64 %). Delay in reporting CSA was more typical: two-thirds of CSA reports (*n* = 3,081) were by individuals aged 16 years or older about events that occurred when under 16 years of age.

A report to the authorities of a CSA allegation, once accepted, initiates a criminal justice case. Provisions exist for a complaint to be initiated voluntarily by a minor personally, or through a parent, guardian or advocate or someone concerned about the child's welfare, such as a counsellor, psychologist, teacher or mandatory reporter.

D. Mandatory Reporting of Child Sexual Abuse

In Australia, the obligation of mandatory reporting of CSA arises when a person of a designated kind (e.g., doctor, teacher) has a reasonable suspicion (knows, suspects or should have known or suspected) that abuse occurred, although there is some variability between states in reporting thresholds.[22] In most Australian states, the seal of confession in the Catholic Church is not a reasonable excuse not to report abuse, which was prompted by findings (RC 2017a Case 50) that confessors did not take steps to report abuse whether raised by survivors or priests.[23] Criminal penalties apply to persons who fail to comply with their obligations: on average, a maximum penalty of two years in prison.

If a victim remains exposed to potential abuse, for instance when the perpetrator resides or works in a context in the presence of available victims, there may be a risk of present danger. A strict standard applies to professionals who work with children in terms of reckless disregard of this risk. Due to this higher standard than "reasonable suspicion", commentators have advocated for education and training to be legislatively mandated and supported for designated professionals and managers of organisations,[24] e.g., child protection workers, teachers, foster-carers, priests and others who work with and have access to children and alleged abusers. Training can provide a working knowledge of their duties and increased awareness of CSA indicators.

22 Natasha J. Ayling / Kerrieann Walsh/ Kate E. Williams, Factors influencing early childhood education and care educators reporting of child abuse and neglect, *Australasian Journal of Early Childhood* 45 (2020) no 1, 95–108.

23 Brian Lucas, The seal of the confessional and a conflict of duty, *Church, Communication and Culture* 6 (2021) Issue 1, 99–118.

24 Mathews (n 21).

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An increase in secondary and mandatory reporting of CSA has contributed to a trend of annual increases in CSA reports.[25] Prior research demonstrated that significant proportions of teachers were insufficiently familiar with their legislative reporting duty;[26] 53 % could answer questions about it. Few teachers were aware of immunity from liability and identity protection, yet fear of reprisal was an influential reason for failure to report suspected CSA.

3. *Rights of Complainants during Investigation and Referral for Prosecution*

In this section, the types of child sexual offences that are prohibited in Australia are specified. Legislative reforms to match legal elements of egregious, persistent CSA to what a CSA survivor of such experiences can reasonably recall are discussed. Innovative special measures available during the police investigation of the alleged abuse to provide emotional support and communication support to vulnerable CSA survivors are described, including witness assistance service officers and witness intermediaries. Finally, circumstances that resolve a CSA matter prior to trial are outlined.

A. Types of Prohibited Child Sexual Abuse Offences

Under Australian law, sexual abuse of a child under 18 years of age is a criminal offence. CSA offences include penetrative and non-penetrative contact offences (sexual assault, acts of indecency), as well as non-contact offences (self-manipulation, facilitation to engage in sexual acts) and producing or possessing child pornography/child abuse material.[27] The offence of grooming for sexual conduct with a child targets predatory conduct to facilitate later sexual activity with a child. RC hearings disclosed that, at

25 New South Wales Bureau of Crime Statistics and Research, *New South Wales Recorded Crime Statistics Quarterly Update June 2020* (2020).

26 Ben Mathews and others, Teachers reporting suspected child sexual abuse: results of a three-state study, *UNSW Law Journal* 32 (2009) no. 3, 772–813.

27 Hayley Boxall / Georgina Fuller, Brief Review of Contemporary Sexual Offence and Child Sexual Abuse Legislation in Australia Update, Australian Institute of Criminology 2015.

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times, the confessional was an opportunity for grooming a victim and/or where offending took place.[28]

B. Persistent Child Sexual Abuse

In the course of its activities, the RC observed that 85 % of the CSA survivors experienced multiple incidents of persistent sexual abuse (RC 2017b). Despite (or perhaps because of) repeated exposure to recurring events, these survivors struggled to provide particulars of the alleged abuse to enable charges to be formulated. A decision by the South Australian Court of Criminal Appeal captured the "perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence".[29] To explore what a CSA victim might reasonably be expected to recall and recount about historical and contemporaneous autobiographical events, the RC commissioned a review of research on features of memory for CSA.[30] Studies of the phenomenon of schematic memory processing to encode and recall recurring events show that after approximately three instances of repetition of a similar event, a schematic memory "script" develops for the recurring features, while memory of details of invariant features on specific dates or occasions is rarely retained.[31] The "script" consists of core repeated features or the gist of the offences.

To avoid the unrealistic memory burden of requiring complainants to recount unavailable particulars of multiple similar individual occasions of abuse by the same perpetrator, the states and territories amended this type of offence to focus on the existence of 'an unlawful sexual relationship', nomenclature that has attracted widespread criticism because of the use of the word 'relationship'. Controversial legislative requirements include confusion between the number of acts versus the number of occasions of abuse that a complainant must particularise, variable requirements for jury unanimity, and whether the approval of the Director of Public Prosecutions

28 Lucas (n 23).
29 R v Johnson [2015] SASCFC 170, 2.
30 Jane Goodman-Delahunty and others, Methods to evaluate justice practices in eliciting evidence from complainants of child sexual abuse, Newcastle Law Review 12 (2017) 42–60.
31 Alan Baddeley / Michael W. Eysenck / Michael C. Anderson, Memory, Routledge ^{3}2020.

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(DPP) or Attorney General remains a prerequisite to charges of persistent CSA.[32]

C. Investigation of Sexual Abuse Allegations

After the report of the alleged offence is received by the police, adult CSA complainants prepare a written narrative of the relevant events, child complainants present their evidence in a video-recorded police interview. In most circumstances, a single investigative interview is conducted by highly trained specialists in a child-friendly setting; in some instances, follow-up interviews may be required.[33]

D. Witness Assistance Service Officers

A witness assistance service officer in the DPP is appointed to provide emotional support, continuity and consultation with the complainant, and as a conduit of information from police and prosecutors about the criminal justice process and trial.[34] These officers maintain regular contact with CSA complainants and accompany them and their caregivers to all proceedings, from the commencement to the conclusion of the case.[35] These officers become familiar with individual complainants' needs, well-being, infirmities and vulnerabilities. Their presence can be integral in establishing a positive rapport with detectives and prosecutors and in securing the cooperation and willingness of the CSA survivor,[36] thus contributing to the success of the investigation. They may also refer complainants to specialist support services. Few cases proceed against the wishes of the complainant, although instances have been documented of very protective parents or guardians

32 Elizabeth Dallaston / Ben Mathews, Reforming Australian criminal laws against persistent child sexual abuse, *The Sydney Law Review* 44 (2022) no. 11, 77–109.
33 Shead (n 12), 55–73.
34 Cowdery (n 5).
35 Jane Goodman-Delahunty and others, Prosecutorial discretion about special measure use in Australian cases of child sexual abuse, in Victoria Colvin / Philip Stenning (eds), The Evolving Role of the Public Prosecutor: Challenges and Innovations, Routledge 2019, 169–187.
36 Cassia Spohn / Katharine Tellis, Sexual assault case outcomes: Disentangling the overlapping decisions of police and prosecutors, *Justice Quarterly* 36 (2019) no. 3, 383–411.

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who discouraged willing children from giving evidence or dominated a child to the extent that the child was unable to express their own view.[37]

E. Special Measures for Child Sexual Abuse Complainants

Starting in the 1990s, to mitigate the severe anxiety, distress and psychological difficulties experienced by young CSA complainants during the legal processes, a range of special measures was implemented in Australian jurisdictions to assist children in presenting their evidence. Most common are: (a) pre-recorded interviews conducted by a police investigator and submitted as part or all of the child's evidence in chief; (b) witness intermediaries; and (c) closed circuit television (CCTV), so a child can be cross-examined from a remote room without having to attend the same room as the accused. Lesser used special measures are (d) screens to block the accused from the child's view; (e) clearing of the public gallery during the child's evidence; (f) requiring members of the judiciary and counsel to remove wigs and gowns; (g) alternative seating arrangements; and (h) a witness support person of the child's choice to accompany them to legal proceedings.

Despite widespread acceptance in the justice sector of special measures during the investigative process in CSA cases, some areas for improvement were identified: (a) overcoming technological obstacles with pre-recorded interviews and CCTV evidence;[38] (b) better alignment of police interviews with evidence-based guidance; (c) the quality of in-court questioning;[39] and (d) extending special measures to vulnerable adults.[40]

37 Goodman-Delahunty and others (n 35).

38 Eunro Lee and others, Special measures in child sexual abuse trials: Criminal justice practitioners' experiences and views, *QUT Law Review* 18 (2019) no. 2, 1–27.

39 Martine B. Powell and others, An evaluation of the question types used by criminal justice professionals with complainants in child sexual assault trials, *Journal of Criminology* 55 (2022) no. 1, 106–124; Natalie Martschu and others, Judicial and lawyer interventions in trials of child sexual assault, *Journal of Judicial Administration* 31 (2021) no. 3, 1–16.

40 Sarah Deck and others, Are all complainants of sexual assault vulnerable? Views of Australian criminal justice professionals on the evidence-sharing process, *International Journal of Evidence and Proof* 26 (2022) no. 1, 20–33.

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F. Witness Intermediaries

Witness intermediaries were introduced as officers of the court in NSW, Victoria, the Australian Capital Territory, Queensland and Tasmania. Their duty is to impartially facilitate the communication of, and with, the witness, so the witness can provide their best evidence (e.g., Section 88 of the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*). They adhere to a *Procedural Guidance Manual*, which includes a detailed Code of Conduct.[41] Increasing acceptance of witness intermediaries led to initiatives to extend this scheme to vulnerable adults and defendants.[42]

Prior to the initial police interview, witness intermediaries interview the complainant to conduct a formal communication assessment of the capacity of the child to understand oral questions. They prepare a detailed communication report specifying linguistic structures and terminology to avoid, and questions within the capacity of the child. The report is available to police working in a child abuse and sex crimes squad, legal counsel and the trial judge, who may consult with the intermediary as is helpful. To facilitate communication, the intermediary often attends the police interview and/or special hearings to pre-record the complainant's cross-examination, as described in Section IV.

G. Charge Resolution

Once the investigation is complete, if the officer-in-charge is satisfied that sufficient evidence has been collected, police will arrest (if necessary) and charge the accused, and transfer the brief of evidence to the ODPP.[43] Decisions about the charges that proceed depend on whether there is a reasonable prospect of conviction and whether the public interest requires

41 Penny Cooper, A double first in child sexual assault cases in NSW: Notes from the first witness intermediary and pre-recorded cross-examination cases, *Alternative Law Journal* 41 (2016) no. 3, 191–194.

42 Jaqueline Giuffrida / Anita Mackay, Extending witness intermediary schemes to vulnerable adult defendants, *Current Issues in Criminal Justice* 33 (2021) no. 4, 498–516.

43 Cowdery (n 5).

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prosecution (Hodgson et al. 2020).[44] In general, prosecuting CSA matters is viewed as furthering the public interest (Goodman-Delahunty et al. 2023).[45]

In conjunction with charge certification, within six weeks, consideration is afforded to the Early Appropriate Guilty Plea process (which applies to prosecutions generally), in which senior prosecutors negotiate with the defence over pleas. Survivors must be consulted and their views considered when the prosecution entertains a plea from the accused and regarding any statement of agreed facts prepared for sentencing.[46] A key benefit for survivors of a negotiated plea is a reduced delay in resolving CSA matters and the certainty of the finalisation.

If all charges against the accused are not finalised by guilty pleas, prosecutors commit to the charges at trial. Rights of CSA survivors during the trial process are reviewed in Section IV.

4. Rights of Child Sexual Abuse Survivors at Trial

In this section, considerations about trial by jury or judge in CSA matters are reviewed. A series of unique practices arising in CSA trials includes the option of a trial by judge, joint trials with multiple complainants, procedures to adduce the evidence of a child complainant in examination in chief and cross-examination, proceedings in courts of specialist jurisdiction, provisions for expert witness opinion evidence in CSA trials and jury directions specific to CSA cases. The section concludes with reflections on the use of these procedures in the Australian historical CSA trial against Cardinal Pell.

A. Trial by Jury or Judge Alone

Conviction rates in CSA cases are lower than in other criminal cases. In 2019, of 994 persons charged with 4,705 individual CSA offences in NSW,

44 Natalie Hodgson and others, The decision to prosecute: A comparative analysis of Australian prosecutorial guidelines, *Criminal Law Journal* 44 (2020) no. 3, 155–172.

45 NSW Bureau of Crime Statistics and Research (n 25).

46 Cowdery (n 5).

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68 % were found guilty of at least one offence and 51 % of the offences charged were proven.[47]

CSA trials are usually decided by a jury of twelve. Some research suggests that juries are more likely to acquit in CSA matters than in other criminal trials due to the 'word-against-word' evidence, lack of corroborating or physical evidence, and jury susceptibility to CSA misconceptions. A study of jury questions to the court following evidence from 135 CSA survivors in a US jurisdiction revealed common misconceptions that children would resist their abuser, avoid future contact with the abuser, display emotional reactions and disclose abuse immediately, especially older children and survivors of persistent CSA.[48] These findings aligned with the endorsement of CSA misconceptions by Australian jury-eligible community members.[49] Jury simulation research confirmed that the credibility of the complainant and conviction rates are predicted by the accuracy of jurors' CSA knowledge[50] and that women tend to convict more readily and to favour harsher punishment in CSA cases than men.[51] Other relevant juror attitudes in CSA trials may include views on children (whether a child is capable of being coerced or lying), comfort with sexual terminology, attitudes towards pornography, perceptions of sex offenders (deserving of harsher punishment) and high 'homonegativity' in cases of same-sex offending.[52]

47 NSW Bureau of Crime Statistics and Research (n 25).

48 Suzanne St. George Coble and others, "Did You Ever Fight Back?" Jurors' Questions to Children Testifying in Criminal Trials About Alleged Sexual Abuse, *Criminal Justice and Behaviour* 47 (2020) 1032–1054.

49 Jane Goodman-Delahunty / Mark Nolan / Evianne L. van Gijn-Grosvenor, Empirical Guidance on the Effects of Childhood Sexual Abuse on Memory and Complainants Evidence, Royal Commission into Institutional Responses to Child Sexual Abuse 2017.

50 Jane Goodman-Delahunty / Natalie Martschuk / Anne Cossins, Programmatic pretest-posttest research to reduce jury bias in child sexual abuse cases, *Onati Socio-Legal Series* 6 (2016) no. 2, 283–214; Jane Goodman-Delahunty / Natalie Martschuk / Anne Cossins, What Australian jurors know and do not know about evidence in child sexual abuse cases, *Criminal Law Journal* 41 (2017) 86–103; Jane Goodman-Delahunty and others, Greater knowledge enhances complainant credibility and increases jury convictions for child sexual assault, *Frontiers in Psychology* 12 (2021) 624331.

51 Jennifer Pettalia / Joanna D. Pozzulo / Jennifer Reed, The influence of sex on mock jurors' verdicts across type of child abuse cases, *Child Abuse & Neglect* 69 (2017) 1–9.

52 Robert J. Cramer / D. D. Adams / Stanley Brodsky, Jury selection in child sex abuse trials: A case analysis, *Journal of Child Sexual Abuse* 18 (2009) no. 2, 190–205.

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Some research indicated that a CSA trial decided by a judge alone is less likely to result in a conviction,[53] although deliberation in a group yields higher acquittal rates due to a 'leniency asymmetry effect' favouring an acquittal faction.[54] Legislation (e.g., section 132 of the *Criminal Procedure Act* [NSW]) allows a criminal matter to be tried by a judge if the accused agrees and the judge considers that it would be in the interests of justice, for instance when the risk of jury prejudice is unavoidable, or a public health emergency such as the pandemic prevents jury trials. In the interests of justice, the accused may seek a trial by judge alone where this request is opposed by the prosecution.

B. Joint Trials of Multiple Complainants against a Single Defendant

Institutional CSA within religious organisations often involves serial offending by the same individual against multiple children. An early Australian archival study of conviction rates in 158 joint CSA trials with multiple victims versus 43 separate trials showed that the vast majority of the latter resulted in acquittals.[55] Yet prosecutors had little option to include charges by multiple survivors of a single defendant in a joint trial because higher conviction rates in joint trials were presumed to result from impermissible reasoning by juries in response to tendency and coincidence evidence of a similar pattern of conduct, amounting to unfair prejudice to the defendant.[56] An example is the inference that the accused has a criminal disposition or depraved character, such that 'if he did it once, he will do it again'.

To test whether juries would engage in logical and permissible uses of cross-admissible inculpatory evidence in a joint trial, the RC sponsored

53 J. Don Read / Deborah A. Connolly / Andrew Welsh, An archival analysis of actual cases of historic child sexual abuse: A comparison of jury and bench trials, *Law & Human Behavior* 30 (2006) 259–285.

54 Goodman-Delahunty and others (n 50); Norbert L. Kerr / Robert J. MacCoun, Is the leniency asymmetry really dead? Misinterpreting asymmetry effects in criminal jury deliberation, *Group Processes & Intergroup Relations* 15 (2012) no. 5, 585–602.

55 Patricia Gallagher / Jennifer Hickey / David Ash, Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*,* Judicial Commission of NSW 1997.

56 Jane Goodman-Delahunty / Anne Cossins / Natalie Martschuk, Jury Reasoning in Separate and Joint Trials of Institutional Child Sexual Abuse: An Empirical Study, Royal Commission into Institutional Responses to Child Sexual Abuse 2016.

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a large-scale jury simulation experiment with 1,029 jury-eligible Australians whose age, gender and employment status closely matched those of real juries. They attended realistic video trials in which a District Court judge and real barristers role-played legal professionals and actors played the witnesses, including three male complainants who alleged historical CSA against the same defendant. Jury deliberations were scrutinised for evidence of improper reasoning and unfair prejudice. Results showed that no jury conviction was based on impermissible reasoning, and no verdict was the result of emotional arousal or negative inferences about the defendant's character. The juries did not apply a lesser standard of proof when assessing more charges, or evidence from more prosecution witnesses when tendency evidence was led. Rather, verdicts turned on the extent to which the complainant was rated as credible and events as plausible. Reasons provided for verdicts were logically related to the probative value of the evidence. Credibility assessments of the accused were similar in all trial variations.[57] These outcomes suggested that the capacity of juries to return sound verdicts in trials where tendency and coincidence evidence is led has been underestimated.[58]

The High Court of Australia held that a strikingly close similarity in events reported by different complainants was not required for the admission of tendency evidence.[59] Thereafter, results of the foregoing joinder study were used by prosecutors to support more joint trials where some feature of the offending linked the cases. A focus on the relationship between complainants and the defendant emerged in reports by prosecutors of their decision-making about joint trials.[60] An important attribute of a joint CSA trial is that it provides a more complete picture of the motivation of the accused and the offending, whereas juries attending separate

57 Jane Goodman-Delahunty / Natalie Martschuk / Mark Nolan, Memory science and the Pell appeals: Impossibility, timing, and inconsistencies, *Criminal Law Journal* 44 (2020) no. 4, 232–246; Goodman-Delahunty and others (n 50).

58 Jane Goodman-Delahunty / Natalie Martschuk / Anne Cossins, National jury research published, *Judicial Officers' Bulletin* 28 (2016) no. 5, 45–48.

59 Hughes v The Queen [2017] HCA 20 – 263 CLR 338.

60 Jane Goodman-Delahunty / Judith Cashmore / Natali Dilevski, Prosecutorial decision making in cases of child sexual abuse, in Monica K. Miller / Logan A.Yelderman / Matthew T. Huss / Jason A. Cantone (eds) Cambridge Handbook of the Psychology of Legal Decision-making, Cambridge University Press 2023.

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trials wrongfully assume that if there were evidence of any other offending by the accused, they would be appraised of it.[61]

C. Specialist Jurisdiction for Trials of Child Sexual Abuse

In most Australian jurisdictions, adult CSA complainants give evidence in accordance with standard criminal proceedings; in Western Australia, adults give their evidence via CCTV. Aside from NSW, pre-recording of vulnerable complainants' evidence in chief and cross-examination in the absence of the jury is routine.[62] An intermediary can be appointed when a complainant is over the age of 16 years if the witness has communication difficulties that require assistance outside the court.

However, most courts do not permit the use of pre-recorded evidence for adults, with the exception of the Northern Territory and Tasmania.[63] Resistance to the extension of these and other special measures to adult CSA survivors accords with the view that rigorous cross-examination is necessary to protect the rights of the accused, especially in historical cases.[64]

To address difficulties in prosecuting CSA matters and to improve the experience of children, in 2003 a specialist jurisdiction for CSA matters was established in two NSW courts, incorporating practices similar to those in effect in CSA trials in Western Australia since 1992.[65] Available special measures were those described above to avoid secondary victimisation of the complainant.

In 2016, following consultation with the RC, the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* launched an expanded three-year pilot period, implementing (a) witness intermediaries; (b) procedures to pre-record cross-examination of child CSA complainants about allegations against the accused; and (c) two specially trained District Court judges appointed to manage pre-recorded evidence hearings in child

61 Goodman-Delahunty and others (n 56).
62 Scott Corish, Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses, *Criminal Law Journal* 39 (2015) no. 4, 187–xxx.
63 Deck (n 40).
64 Ibid.
65 Judy Cashmore / Lily Trimboli, An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot, NSW Bureau of Crime Statistics and Research 2005.

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sexual offence matters.[66] Practices in specialist jurisdictions are described below.

D. Pre-recording Special Hearings to Cross-Examine CSA Complainants

In CSA trials, in specialist jurisdictions, a special hearing to review the police interview and pre-record the cross-examination of the complainant, so that the child does not appear in person at trial, is typically scheduled as the first day of the trial, in the absence of the jury. This special hearing may take multiple days to address multiple alleged occasions of offending.

In advance of the special hearing, a witness intermediary provides the court and legal counsel with the report prepared for the police interview or interviews the child to assess their communication capacity and prepare a report. Uniquely, this creates an opportunity for the defence counsel to confidentially consult the intermediary about the manner of cross-examination and to gain insight into questioning approaches effective for that child.

In cases where communication is especially complex, a witness intermediary may recommend a series of ground rules for communication with that specific witness. The court may schedule a separate ground rule hearing to review and resolve the appropriate communication protocol. Ground rules are typically set out at the start of the special hearing to assist lawyers and judges in asking questions and understanding children's responses.[67]

Before the special hearing, the child reviews the videotaped police interview, so it is fresh in their memory. The hearing may be attended by the witness intermediary. Together, after editing the videotapes of the police interview and the pre-recorded cross-examination, these are played to the jury at trial in lieu of live, in-person or CCTV evidence from the complainant.

Rigorous cross-examination of a complainant is appropriate for robust advancement of the defence case. In sexual assault matters, the questions must not be posed to confuse or annoy the complainant, and the law does not permit cross-examination or questions about the complainant's prior sexual history. Other standard constraints on cross-examination in the *Evidence Act 1995* (Cth), s 41 apply regardless of the age or other vulner-

66 Cooper (n 41).
67 Ibid.

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ability of a witness, requiring a court to disallow an improper question. The *Uniform Evidence Act* imposes a duty on the court to intervene when questions cause harassment or are intimidating, offensive or oppressive.

Ironically, many questions asked on cross-examination reinforce acknowledged misconceptions about CSA survivors that courts have striven to preclude, such as ongoing contact with the offender or failure to resist or cry out.[68] Under the *Uniform Evidence Act,* in criminal trials, the child must be given the opportunity to say whether something they have said, and which the accused disputes, is true (*Brown v Dunne,* 1893; *Ward v R,* 2017).[69] To meet this legal obligation, some intermediaries recommend that the witness be instructed to agree or disagree in response to propositions from the defence, while others instruct the child to respond by stating that a proposition is true or false. Avoidance is recommended of confusing negative or "tag" questions which seek a yes/no response with a bias towards agreement.[70]

An evaluation of the use of witness intermediaries and ground rules for lawyers questioning child witnesses in pre-recorded court hearings demonstrated "strong widespread support for the special measures. The reasons for this support are that the measures partially level the 'playing field' in communicative capacities for child witnesses, helping to reduce the stress of the investigatory and prosecution process for them and helping child witnesses to give better quality evidence".[71]

As a group, defence counsels have tended to resist witness intermediaries and other special measures, adhering to the view that the most reliable evidence from survivors is provided via traditional in-person cross-examination.[72] Although the evaluation showed intermediary use was perceived to elicit more reliable CSA evidence and to reduce complainant distress, some defence lawyers raised concerns about fairness to the accused. Overall, there was "very strong support for expanding the special measures in

68 Jaqueline Horan / Jane Goodman-Delahunty, Expert Evidence to Counteract Jury Misconceptions About Consent in Sexual Assault Cases: Failures and Lessons Learned, *University of New South Wales Law Journal* 43 (2020) no 2, 707.

69 Brown v Dunne (1893) 6 R 66; Ward v R [2017] VSCA 37, [3] (Maxwell P and Redlich JA).

70 Corish (n 62).

71 Judy Cashmore / Rita Shackel, Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report, Victims Services, NSW Department of Justice 2018, 3.

72 Lee and others (n 38).

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the Pilot to other geographical areas and extending it to other groups, including vulnerable adults and child defendants”.[73]

E. Forensic Expert Evaluations of Children’s Evidence in Child Sexual Abuse Cases

An expert is a witness with specialised knowledge based on their training, study or experience, whose opinion is relevant to a fact in controversy in a CSA case. Their opinion must be wholly or substantially based on their specialised knowledge to be admissible.

Misconceptions about CSA, such as misconstruction of reasons for delayed reporting, can damage the credibility of a child complainant. Accordingly, Sections 79(2) and 108C of the *Uniform Evidence Act* 1995 permit expert opinion evidence about children’s behaviour and reactions to CSA to bolster a child’s credibility at trial. The function of this evidence, sometimes referred to as “counter-intuitive expert evidence”, is to educate the jury about common behavioural patterns of CSA survivors and relevant aspects of child development and autobiographical memory which may account for their reactions.

Expert evidence can be proffered in historical CSA cases regarding adult witnesses, as well as cases in which the complainant is a child. In some states, prosecutorial policy mandates expert evidence when the complainant is under five years of age at the time of the offending and when a complainant has special needs such as developmental disabilities. An example of a question from a jury in a recent trial of historical institutional CSA that prompted a request for an expert report was how an adult with learning disabilities might recall distinct childhood events of abuse.

Potential topics of expertise on CSA survivor behaviour can include self-blame, embarrassment and shame, denials, retractions, or non-reporting of CSA, continued contact with the alleged offender after the abuse, susceptibility to suggestion, avoidant coping styles, typical reporting practices by children in different age-ranges, the impact of post-traumatic stress disorder on social and cognitive functioning. Factors that make memory more or less durable and that might trigger recollection are important in historical cases, as are forgetting rates, accounting for gaps and inconsisten-

73 Cashmore, Shackel (n 71), 7.

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cies between accounts, and the impact of learning difficulties or intellectual disabilities on memory. Studies of what jurors do not know about CSA or about memory processes can assist in establishing a foundation for this evidence.[74]

Two broad types of expert evidence can be identified. 'Social framework evidence' by an expert provides a summary of general research findings on the relevant topics at issue, but the expert refrains from expressing an opinion applying those findings to a particular complainant, leaving that task to the jury.[75] By comparison, 'diagnostic expert evidence' includes an opinion on how the research applies to a particular complainant. Generally, a prerequisite to diagnostic evidence is an interview by the expert of the complainant, and administration of some standard assessment procedure or testing.[76]

A challenge by defence counsel to evidence from a proposed prosecution expert witness can be made in a pre-trial *voir dire* hearing, in the absence of the jury. The defence counsel may cross-examine the expert on their qualifications as an expert on a particular topic, the scope of their opinion and the basis of any opinion. The court may rule that all or some of the experts' report is inadmissible.

The scientific consensus since 1999 has been that most memories of child sexual abuse recovered in therapy are genuine, and that full false memories of sexual assault are rare. Australian Psychological Society guidelines for psychologists include advice to avoid methodologies known to be suggestive when working with people who present mental health issues that require counselling, such as anxiety, acute stress, intrusive thoughts and nightmares. The purpose of counselling is to alleviate the distress, not recover new memories.

Australian courts have been unreceptive to Statement Validity Analysis (SVA), despite extensive support for this approach by experts to analyse CSA accounts in European and South American courts, and its mandatory status since 1999 in CSA cases in Germany.[77] SVA is often misperceived as discriminating between real and false memories. Appropriately applied, SVA entails hypothesis development through examination of possible

74 Goodman-Delahunty and others (n 49); Goodman-Delahunty and others (n 50).
75 Aziz (a pseudonym) v R [2022] NSWCCA 76.
76 Ma v R [2013] VSCA 20; 40 VR 564; 226 A Crim R 575.
77 Gunter Kohnken and others, Statement validity assessment: Myths and limitations, *Anuario de Psicología Jurídica* 25 (2015) 13–19.

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sources of a CSA account to test the risks of unintentional errors (e.g., schematic and inferential memory processing, exposure to specific sources of misinformation).

One Western Australian District Court conceded the relevance of SVA by a psychologist with expertise on human memory, based on a review of transcripts of interviews and pre-recorded evidence of the complainant. Nonetheless, its admission was denied on the grounds that educative expert evidence to counteract CSA misconceptions was not intended to facilitate the introduction of evidence about the behaviour of a particular child. The expert evidence was rejected as too subjective to offer useful psychological insights either with respect to this specific complainant or children of the complainant's age group.[78]

A survey to assess perceptions of expert witness evidence in CSA trials showed that two-thirds (63 %) of criminal justice professionals (e.g., police, lawyers, judges) with experience in Australian CSA trials endorsed expert evidence on children's behaviour cases as helpful to juries.[79] Interviews with prosecutors reconfirmed this;[80] defence counsels were more ambivalent.

F. Jury Directions in Child Sexual Abuse Trials

In some Australian courts, in lieu of expert evidence, a court may instruct the jury about common misconceptions in CSA cases, such as delays in reporting the matter to the police. In addition, after hearing submissions from the prosecution and the accused person, if the judge considers that there is evidence that suggests a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability, a jury direction on inconsistencies and gaps in the memory of a complainant may be given (*Criminal Procedure Act 1986, s* 293a). Illustrative examples from the jury trial of Cardinal Pell are provided below (ss 52 and 54D(2)(c), *Jury Directions Act 2015* (Vic)).

A further jury direction that may be given in historical CSA cases describes the nature of the disadvantage experienced by the accused and

78 WA v KAP [No 2] [2011] WADC 51.

79 Lee and others (n 38); Martine B. Powell and others, An evaluation of how evidence is elicited from complainants of child sexual abuse, Royal Commission into Institutional Responses to Child Sexual Abuse 2016.

80 Goodman-Delahunty and others (n 60).

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instructs jurors on the need to take the disadvantage into account when considering the evidence (s 39 of the *Jury Directions Act*). This direction favours the accused and is not available to prosecution witnesses. The judge must not say, or suggest in any way, to the jury that it would be dangerous or unsafe to convict the accused or that the victim's evidence should be scrutinised with great care. (*s* 39(3)(a) and (b)).

G. Case Study: The Trial of Cardinal Pell

The trial of Cardinal Pell in Melbourne, Australia attracted global attention, even though a suppression order banned all media reporting on the matter until months after the delivery of a verdict. This case illustrates practices in Australian courts to balance special measures for the complainant and the forensic disadvantage to the accused in cases of historical CSA.

In 2017, Cardinal Pell pleaded not guilty to allegations that in 1996, while he was Archbishop of Melbourne, at St. Patrick's Cathedral, he committed one act of sexual penetration and four acts of indecency against two choirboys aged 12–13 years. One survivor passed away in 2014 before providing a police statement. The evidence in chief of the remaining complainant, an adult in his 30s, was presented by means of an audio-visual recording (per s379(b)(i) of the *Criminal Procedures Act 2009 (Vic)*). Cross-examination took place in court during the five-week jury trial.

The focal controversy was between the complainant's direct evidence of what transpired after Cardinal Pell entered the sacristy and evidence of the improbability that the accused had an opportunity to be alone in the sacristy with the boys. That evidence came from 23 defence witnesses, who described weekly practices and protocols at Mass. The prosecutor did not question all opportunity witnesses about whether their memory of key events could be mistaken, in violation of the rule in *Browne v Dunn* because the trial judge permitted that submission to the jury without raising the matter in cross-examination, for example due to the advanced age and apparent infirmity of witnesses such as sacristan Max Potter, aged 84.

With respect to the 20-year delay by the complainant in reporting the alleged offending to police, the defence's contention was that this silence 'was proof it didn't happen'.[81] The trial judge instructed the jury as follows:

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81 Pell v The Queen [2019] VSCA 186 (Ferguson, CJ, Maxwell, P) 26.

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> I want to give you some legal directions which relate to the issue of failure to complain and delay. The first one is this. Experience shows that people react differently to sexual offences and there is no typical, proper or normal response to a sexual offence. Some people may complain immediately to the first person they see, while others may not complain for some time, and other[s] may never make a complaint. It is a common occurrence for there to be [a] delay in making a complaint about a sexual offence.[82]

With respect to gaps and inconsistencies in the memory of a vulnerable complainant, the court provided the following direction to the jury:

> When you are assessing the evidence, also bear in mind that experience shows the following. One, people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time. Two, trauma may affect different people differently, including by affecting how they recall events. Three, it is common for there to be differences in accounts of a sexual offence. For example, people may describe a sexual offence differently at different times to different people or in different contexts. And finally, both truthful and untruthful accounts of a sexual offence may contain differences.[83]

In light of the lapse of 22 years between the time of the alleged offences and the trial, the defence sought a direction to the jury to take the forensic disadvantage of the accused into account when considering the evidence. The judge noted the lost opportunity that Pell had to make enquiries at, or close to, the time of the alleged offending, including exploration of the alleged circumstances of the offending in detail. Due to the delay, most witnesses could only give evidence of general practice and routine, rather than specific recollection, and the memory of some of the witnesses had diminished in the time that elapsed before the trial. In relation to the evidence of the complainant, his Honour advised the jury that:

> the effluxion of time has [...] also diminished the capacity for the defence to fully test [the complainant's] evidence [...] if this investigation and trial had been run [...] at a time proximate to 1996 then one might have

82 Ibid., 29.
83 Ibid., 24–25.

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> expected [the complainant] to be in a better position to answer questions about some of the details [of the offending].[84]

Other disadvantages enumerated by the judge included that Cardinal Pell had lost the opportunity to ask church witnesses about any specific recollection of the dates in question and whether they recalled accompanying him on the particular occasions; to call evidence from the then administrator of the Cathedral, who had been present at Sunday Masses in the relevant period but was now mentally infirm; and to call evidence from the deceased choirboy. His Honour directed the jury that if they found that the lucidity of a witness had been affected by the 22 years that had passed between the alleged offending and the trial, they must take this into account as a disadvantage to the defence.

A mistrial ensued after a week of deliberations when the jury was unable to agree on a verdict. In a retrial in 2018 before the same judge, the complainant was spared from repeating his evidence as his videotaped direct evidence and videotaped cross-examination from the first trial were presented to the second jury.

The second jury deliberated for four days and returned a unanimous verdict of guilty on all charges. At sentencing, written victim impact statements were submitted by the complainant and the father of the deceased choirboy (whose self-medication culminated in a heroin overdose at age 31). Neither asked to read their statements in open court. The court took their statements of the harm experienced into account along with authorities "that sexual activity with children is presumed to cause long term and serious harm, both physical and psychological to the child".[85] The defence sought mitigation on the grounds that the offending was spontaneous, not pre-planned. The court found that at the time of the two alleged occasions of brazen, opportunistic abuse, the accused had the capacity to reason and reflect on his actions; that no medical or psychological evidence was presented to support any inference that the mental functioning of the accused was impaired or diminished, and that the offending breached a relationship of trust with the victims.

The jury verdict was appealed. The Victorian Court of Appeal reviewed 2,000 pages of transcripts and videotapes of the complainant's evidence and those of eleven opportunity witnesses nominated by the accused,

84 Ibid., 282.
85 Ibid., 8.

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including master of ceremonies Charles Portelli (age 60). The Court of Appeal was critical of the lack of detailed recollection of events on the crucial date in December 1996 when the complainant said Pell entered the sacristy alone. Mr Portelli, who had attended 140–150 Masses with Cardinal Pell, claimed to recall standing outside the Cathedral with Cardinal Pell on that day and returning to the sacristy with him. The Victorian Court of Appeal affirmed the jury verdict.[86]

Cardinal Pell appealed to the High Court of Australia. The High Court criticised the Court of Appeal for watching the complainant's videotaped evidence and commenting on the complainant's demeanour, instead of relying exclusively on the trial transcript. The High Court accepted that the jury had assessed the complainant's evidence as credible and reliable. However, the evidence of Mr Portelli was found to create a real possibility that the offending did not occur, which should have been enough to produce a reasonable doubt in the minds of the jury of Pell's guilt. The High Court declared that any doubt about memories of witnesses who may have been able to provide an alibi for Cardinal Pell had to operate in his favour, because the delay and its effect on witnesses' memories disadvantaged Cardinal Pell. Accordingly, the High Court unanimously quashed the convictions and entered judgements of acquittal in their place.[87]

Legal commentators noted that the analysis by the High Court did not declare the jury verdict unsafe or egregiously misguided[88] and appeared to separate assessment of the complainant's credibility from that of other evidence in the case, contrary to how trial judges direct juries to assess the totality of the evidence.[89] A review of memory science and likely errors in the schematic memories of opportunity witnesses and older witnesses supported the majority decision by the Victorian Court of Appeal.[90]

In all, five years elapsed from the time the complainant reported allegations against Cardinal Pell to police until the final resolution of the case. Reducing the delay in the prosecution of CSA cases remains an abiding concern for both survivors and the accused.[91]

86 Ibid.
87 Pell v The Queen [2020] HCA 12.
88 Malcolm Knox, There are 12 unmentioned victims in the Pell verdict: The jurors, Morning Herald 2020.
89 Greg Byrne, The High Court in Pell v The Queen: An 'unreasonable' review of the jury's decision, *Alternative Law Journal* 45 (2020) no. 4, 284–290.
90 Goodman-Delahunty et. al. (n 57).
91 Goodman-Delahunty (n 35).

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H. Standards of Proof in Criminal Trials

The Pell case underscores the centrality of the legal standard "beyond reasonable doubt" for conviction in a criminal trial. The standard of proof in Canon law of "moral certainty" is very close to "beyond reasonable doubt".

In some Australian courts, jurors are required to be instructed that these words mean exactly what they say without any further definition; in other courts, judges may provide some explanation of this standard (*Jury Directions and Other Acts Amendment Act 2017 (Vic))* as the highest standard of proof and/or compare it with the civil standard, the 'balance of probabilities'.[92] In the absence of guidance on the meaning of 'beyond reasonable doubt', many jurors err on the side of caution by applying a threshold that is too stringent, interpreting it to mean incontrovertible proof, 100 % certainty.[93]

5. *Post-trial Rights of Child Sexual Abuse Survivors*

A. Access to Decisions by Prosecutors and Courts and Rights of Review

Since CSA survivors are witnesses within criminal proceedings at the discretion of the ODPP, the RC recommended that the ODPP implement a "robust and effective formalised complaints mechanism to allow survivors to seek internal merits review of key decisions" in their cases[94] (RC 2017b). To increase transparency and public access, the ODPP publishes its complaints mechanism online, along with data on its use and outcomes. In NSW the ODPP's treatment of victims and witnesses is set out in Chapter 5 of the publicly available Prosecution Guidelines and complaints are included at 5.11 (ODPP 2021). Results of internal audit processes monitoring ODPP consultation with CSA survivors are published in the ODPP annual report.

As witnesses within the criminal proceedings, CSA complainants have no rights to appeal decisions during or at the conclusion of those proceed-

92 Jonathan Clough and others, The Jury Project 10 Years On: Practices of Australian and New Zealand Judges, Australasian Institute of Judicial Administration 2019.

93 Ryan Essex / Jane Goodman-Delahunty, Judicial directions and the criminal standard of proof: Improving juror comprehension, *Journal of Judicial Administration* 24 (2014) no. 22, 5–94.

94 Kirchengast (n 18), 12.

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ings. Typically, rulings by a court during the pretrial and trial phases of a case are unpublished but publicly available in open court. When a case is decided by a judge alone, written reasons for the verdict are issued, to which the complainant has access. Jury deliberations are confidential, and juries are not required to provide reasons for their verdicts. Thus, grounds to overturn a jury conviction are limited; appeals are commonly premised on errors in jury directions by the trial judge or legal error in the course of the trial (e.g., wrongful admission or exclusion of evidence or procedural irregularity).

B. Participation of Child Sexual Abuse Survivors in Sentencing Procedures

If the accused is convicted of one or more of the alleged offences, legislation such as the NSW *Crimes (Sentencing Procedure) Act 1999* and the common law require a sentencing court to consider the effect of the crime on a victim and others in the community. Survivors can describe the experience and impact of an offence (or offences) committed against them by preparing a victim impact statement. Usually, the impact statement is submitted to the court in writing, and at the sentencing hearing, the survivor may read it aloud in open court. The survivor is not obligated to attend the sentencing hearing or to submit a victim impact statement. A survivor may make a claim for victim compensation (see below).

Indirect secondary victims, such as siblings or parents of the complainant who did not witness the alleged offences but who are deeply affected by the crime, are entitled to submit a victim impact statement and a claim for victim compensation.

6. Rights of Child Sexual Abuse Survivors to Restoration of Damage

Like other crime victims, CSA survivors can apply to state victims of crime compensation schemes, without awaiting resolution of a criminal charge. Compensation awards in these systems are very low, but somewhat high-

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er for male than female victims, with a maximum recoverable of AUD 10,000.[95]

The RC determined that higher payments to many CSA survivors were warranted and estimated that 60,000 survivors were potentially eligible to make a redress claim under a national Commonwealth-led Redress Scheme that commenced in 2018, with a ten-year tenure. It allows payments up to AUD 150,000 for institutional CSA survivors. Available relief comprises (a) a monetary payment; (b) access to counselling and psychological services; and if requested, (c) a direct personal response from the participating institution responsible including an apology, an opportunity to meet with a senior institutional representative to receive acknowledgement of the abuse and its impact, and assurance that steps were taken to protect against further CSA at that institution. In 2021, recommendations were made to extend the redress scheme to survivors who were initially excluded, i.e., non-citizens, non-permanent residents, prisoners, survivors with serious criminal convictions and certain care leavers abused between the ages of 18 and 21 years.[96] Based on feedback from stakeholders, operational procedures were refined to enhance survivor-focused, trauma-informed features, e.g., by streamlining the application to a single filing and providing support for applicants with a disability.

In the first 30 months of operation, over 9,000 applications were lodged for redress, of which 58 % alleged abuse by three or more institutions. In that period, a total of AUD 376.9 million was dispensed in redress payments, with an average payment of AUD 83,201. These sums do not include the costs of counselling, which was sought by approximately half of the survivors. Compensation is determined by a "reasonable likelihood" of exposure abuse, contact abuse and/or penetrative abuse. Consideration of vulnerability and extreme circumstances, such as multiple, repeated occasions of abuse, can increase the award. Approximately 2,000 applicants self-identified as disabled. By 2022, approximately 200 claims were lodged per week, adjudicated by a nationwide team of approximately sixty independent decision makers. Applicants may request an internal review of their redress

95 Kathleen Daly / Robyn Holder, State payments to victims of violent crime: discretion and bias in awards for sexual offences, *British Journal of Criminology* 59 (2019) no. 5, 1099–1118.

96 Robyn Kruk, Final Report, Second Year Review of The National Redress Scheme, Department of Social Services 2021.

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determination if found ineligible or dissatisfied with the outcome; institutions have no right of review.[97]

A survivor may consult a legal representative to recover monetary compensation via a private civil lawsuit, alleging a breach of institutional duty of care (Foster 2018).[98] Generally, these claims are based on significant injuries that result in settlement payments. In 2015, the RC determined that 80 % of settlements in private civil actions were in the range of AUD 100K, and 10 % exceeded AUD 200K (RC 2015).

7. Conclusions

The foregoing review of rights of CSA survivors in criminal proceedings in Australia demonstrates the use of innovative measures to standardise consultation with and support for survivors in all phases of the criminal justice process, guided by trauma-informed principles. Some special measures are well-established, others are still undergoing testing before extension to other courts and jurisdictions. Further evaluations are likely to lead to additional refinements over time.

Failure to enforce the rights of victims is a failure of the criminal justice system with adverse consequences that extend beyond those of the victim to many others in the community.[99] High rates of consensus exist that special measures accorded to CSA survivors in the Australian criminal justice process in conformity with the recommendations of the Royal Commission have enhanced the fairness of trials, the experiences of CSA survivors and jury understanding of those experiences.

This array of procedures to accommodate child and vulnerable adult CSA survivors provides a rich set of considerations for implementation to increase their access to justice under canon law.

97 Ibid.

98 Neal J. Foster, Tort liability of churches for clergy child abuse after the Royal Commission: Implications of developments in the law of vicarious liability and non-delegable duty, 2018, available on www.works.bepress.com/neil_foster/127/download/, access 30.07.2022.

99 Cowdery (n 5), 5.44.

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Biography

Prof. Dr Jane Goodman-Delahunty is a Professor at Newcastle Law School at the University of Newcastle in Australia, and a member of the New South Wales Civil and Administrative Tribunal. Trained in law and experimental psychology, she conducts empirical legal studies and has published over 200 scholarly articles and books. Her most recent book is "*Understanding Sexual Harassment: Evidence-Based Forensic Assessment*".

Adj Prof Nicholas Cowdery, AO QC FAAL is a former NSW Director of Public Prosecutions. He is a former President of the International Association of Prosecutors and was founding Co-Chair of the Human Rights Institute of the International Bar Association. He holds a number of awards and honorary academic positions. He convenes a postgraduate course at the University of Sydney Law School. His most recent book is "*Discretion in Criminal Justice*" (LexisNexis, 2022).

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A Crime Victim Rights Framework in the USA

Mary Graw Leary

Abstract

Today, the Catholic Church hierarchy arguably finds itself in a similar situation as the United States did in the 1960s regarding crime victim rights. In short—it does not have them. This chapter argues that the Church hierarchy would benefit from affording victims of clergy abuse substantive and procedural rights in the canonical system. Such steps would ensure the legitimacy of that system in the eyes of the world. Failure to do so will only confirm the longstanding perception that the system is by design neither transparent nor just. Although this would be a major change for the Church, such major changes have previously been made in the American criminal justice system which have served to only benefit the system as a whole.

Throughout the majority of American criminal justice history, the crime victim had no explicit rights, while the accused had numerous Constitutional and statutory rights. Indeed, by the 1980s, the President's Task Force on Victims of Crime described the system as "appallingly out of balance" with a "neglect of crime victims [that was] a national disgrace". However, by then the country found itself plagued by crime, with national crime rates at their highest levels. The general public came face to face with the horrors of violent crime and few American households were spared being touched by crime

The United States was able to reform some aspects of its system to be more protective of victim-survivors, enshrining them with certain rights on both the state and federal levels. This chapter outlines the basic parameters of federal crime victims' rights in America in order to offer an introductory understanding of these rights, their history and the importance of fulfilling their promise. It then argues the canonical system should adopt such a framework. This is particularly critical given the extensive trauma inflicted upon victims of child sexual abuse by offenders, a Church that failed to protect them and a system that re-traumatises them.

The crime itself, the failure of the system to protect the victims, the behaviour of the institutions in ignoring the problem and the re-traumatisation by the systems in place to adjudicate these cases share a common truth. They all flow from an absolute failure to recognise the inherent dignity of the victims as human beings. Adopting such a system of rights will do much to rectify that hypocrisy.

Keywords: *victims' rights, child sexual abuse, Catholic Church, canon law, protection of victims*

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1. Introduction[1]

Today, the Catholic Church hierarchy arguably finds itself in a similar situation as the United States did in the 1960s regarding crime victim rights. The American criminal justice system is a defendant-based system. That is to say, the system is designed to err on the side of the accused rather than that of the crime victim.[2] Possessing over 20 constitutional rights and numerous statutory ones, the American criminal defendant has many mechanisms in place both pre and post-trial which function to attempt to protect his/her rights. Throughout the majority of American criminal justice history, the crime victim had no such rights. Indeed, by the 1980s, the President's Task Force on Victims of Crime described the system as "appallingly out of balance" with a "neglect of crime victims [that was] a national disgrace".[3]

As with the canon law system, the American criminal justice system focused on the defendants for many years, and victim-survivors functioned as merely witnesses for the prosecution. However, in the late 1980s the country found itself plagued by crime, with national crime rates in America at their highest levels. The general public came face-to-face with the horrors of violent crime and few American households were spared being touched by crime. At the same time, a growing number of Americans became outraged at a system which seemed to "treat [] the victim with institutionalized disinterest".[4]

Similarly, the Church hierarchy has been forced to face the breadth of abusive crime within its ranks and a public outraged by its continued lack of regard for the victim-survivors left in its wake. Recently, the Church hierarchy professed a desire to convert from a system of secrecy and clericalism to one more protective of victim-survivors and marked by transparency and accountability.[5] Yet, as with the American criminal justice system half

1 This paper builds upon a previous book chapter entitled, Crime Victim Rights, The State of Criminal Justice 2015, American Bar Association (2015).
2 "It is better that ten guilty persons escape than that one innocent suffer." William Blackstone, Bl Comm (3rd ed., Callaghan & Company 1884).
3 Lois H. Herrington, Final Report of the President's Task Force on Victims of Crime, U.S. Department of Justice 1982, v-vi.
4 Ibid. [vi].
5 Francis, Letter of His Holiness Pope Francis to the People of God, 20 August 2018, available on https://www.vatican.va/content/francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html, access 06.08.2022.

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a century ago, it finds its procedural system not designed for the task of providing a victim-centred approach.[6] This reality is compounded by the historical reality that the Church hierarchy is not merely unpractised in serving the needs of victims, but in many ways is itself guilty of fostering the abuse inflicted. Thus, it encounters a public not only sceptical of its ability to avoid re-traumatising victims, but doubtful of its real desire to do so.

Indeed, that is why the Church hierarchy must transform the victim-survivor experience from one of indifference to victim-centred. This will demonstrate to the greater world that it can reform its system to be one of justice and accountability, where victim-survivors can regain some of the dignity taken from them by their abusers and the clerical system that allowed the abuse to flourish.

The United States was able to reform some aspects of its system to be more protective of victim-survivors, enshrining them with certain rights on both the state and federal levels. This was done within the context of the aforementioned defendant-based system that possesses mechanisms favouring the release of ten guilty men so that one innocent man is not convicted.[7] While much work remains to be done, the American experience can provide some examples of how to transform from a defendant-based system to one that expands its concept of justice to include all stakeholders including victim-survivors.

This chapter outlines the basic parameters of federal crime victims' rights in America in order to offer an introductory understanding of these rights, their history and the importance of fulfilling their promise. First, it outlines the brief history of the victims' rights movement in the United States, which is critical to understanding today's state of victim-survivor rights. Second, the paper focuses on federal rights as a framework for discussion, while also outlining the federal rights currently afforded to victims. However, that is not to say that crime victims always enjoy these federal rights. In the analysis of the Crime Victims' Rights Act (CVRA), the chapter discusses some of the practical challenges to obtaining them. As with so many other aspects of criminal rights and procedures, it is

6 Human Trafficking Task Force e-Guide (OVCTTAC), available on https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/, access 02.08.2022 (A victim centric approach is defined as "the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner.").

7 William Blackstone, Bl Comm, Callaghan & Company 1884, 46.

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important to underscore from the outset that the manifestation of these rights, the mechanisms used to affect them and the level to which they are adhered varies greatly among jurisdictions.

The prevalence of child victimisation is abhorrent. The number of crimes against children and vulnerable people in the United States is staggering, with an average of over 5 million victims of violent crime per day in the last three years.[8] Equally as shocking, if not more so, are the tens of thousands of victims of clergy abuse throughout the world.[9] These statistics reflect more than simply a tragic reality of modern life; they represent a significant cost to the victim-survivors and society at large—both in the crimes themselves as well as the re-traumatisation of these victim-survivors. The crime itself, the failure of the system to protect the victims, the behaviour of the institutions in ignoring the problem, and the re-traumatisation of the victims by the systems in place to adjudicate these cases share a common truth. They all flow from an absolute failure to recognise the inherent dignity of the victims as human beings.

2. *A Brief History of Victims' Rights in America*

The public prosecution model in the American adversarial system has not always been the model in the United States. It replaced the early colonial system in which mainly individual citizens handled issues of justice by utilising the services of public officials for a fee. The responsibility—and cost—to investigate, charge and prosecute offenders fell to the victims themselves.[10] These prosecutions could have resulted in the victim receiving damages from the offender. However, as American life became increasingly more urban and diverse, this "private prosecution" method was both inadequate and risked corruption. Consequently, the law migrated to a "public

8 Rachel E. Morgan / Alexandra Thompson, Criminal Victimization, 2020 and Criminal Victimization, 2021, 2.

9 E.g., Sylvie Corbet, French Report: 330,000 Children Victims of Church Sex Abuse, AP News, 5 October 2021, available on https://apnews.com/article/europe-france-child-abuse-sexual-abuse-by-clergy-religion-ab5da1ff10f905b1c338a6f3427a1c66, access 06.10.2021; Laurie Goodstein / Sharon Otterman, Catholic Priests Abused 1000 Children in Pennsylvania, Report Says, NY Times, 14 August 2018, available on https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html, access 06.10.2021.

10 Peggy M. Tobolowsky et al., Crime Victim Rights And Remedies, Carolina Academic Press 2010, 4.

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prosecution" model in which professional government law enforcement agencies conducted investigations while government prosecutors replaced the victims as justice initiators and the societal interests of deterrence, incapacitation, rehabilitation and retribution replaced victim redress.[11] This new system relegated the victims' role to that of a government witness possessing, in stark contrast to the accused, no unique rights or protection.

In the mid-20th century, many separate influences converged to plant the seeds of reform. In the 1950s, a new discipline emerged: victimology, which studied victimisation; the relationship between victims and perpetrators; the relationship among victims, law enforcement and the criminal justice system; theories of victimisation; and risks regarding victimisation.[12] This field developed and expanded to advocate for alterations to the criminal justice system, to become more responsive to the needs of crime victim-survivors, to increase their role in the process of adjudication and to offer them more restorative remedies addressing their actual needs.[13]

In the 1960s, these reforms gained some traction as increasing crime rates garnered the attention of society and empowering social change movements proceeded, such as the women's rights movement, the anti-domestic violence movement and the civil rights movement.[14] With the commencement of the Crime Victimization Survey and its disclosure that actual crime levels exceeded those found in the FBI's Uniform Crime Reports, due in large part to victims' distrust of the criminal justice system, the victims' rights movement continued to gain momentum.[15] This manifested in some of the early statutes regarding victim compensation, the first of which was California's compensation programme in 1965. Many states later followed this model.[16] Such programmes were seen as a component of society's duty

11 Lynne N Henderson, The Wrongs of Victim's Rights, Stanford L. Review 37 (1985) 937.

12 Tobolowsky et al. (n 10), 6–7; Marlene Young / John Stein, History of the Crime Victims' Movement in the United States, National Criminal Justice Reference Service 2004.

13 Tobolowsky et al. (n 10), 7.

14 Ibid. 7–8; Young / Stein (n 12): Noting that the women's movement "was central to the development of a victim's movement. Their leaders saw sexual assault and the poor response of the system as potent illustrations of a woman's lack of status, power, and influence."

15 The federal government first published the National Criminal Victimization Survey in 1973.

16 Department of Justice, Landmarks in Victims' Rights and Services, Resource Guide, 2020, 2.

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to victim-survivors and also a form of encouragement to victim-survivors to report crimes.[17] Legal reform on behalf of victim-survivors emerged in varying forms including restitution laws, rape reform, the increased severity of some penalties and the allowance of victim impact statements.[18] The movement also grew to include the establishment of victim assistance programmes, victim impact procedures and victim services.[19] Various societal programmes also emerged in different local jurisdictions throughout the country, such as mandatory arrest for domestic violence, state victim compensation boards and battered women's shelters.

In the 1970s, the movement took on a more national tone with the creation of national crime victim organisations often founded by victims, such as the National Coalition Against Sexual Assault, National Coalition Against Domestic Violence and Mothers Against Drunk Driving. Numerous examples of victim-oriented legal reform began to take shape, including the reform of rape laws, the emergence of drunk-driving laws, the use of comfort items, support people or victim attorneys for child victims, and the creation of victim impact statement procedures for sentencing.[20]

Critically, these reforms took place against the backdrop of increasing crime rates and national concern. The President's Task Force on Victims of Crime (the "Task Force") was established in 1982. The Task Force held hearings throughout the country to receive commentary from victim-survivors and those who serve them, as well as examined the existing victimology literature. It issued its Final Report (the "Task Force Report") in December 1982 and found *inter alia* that "victims of crime have been transformed into a group oppressed and burdened by a system designed to protect them".[21] To alleviate this injustice, the Task Force recommended over sixty action items for all levels of government (federal, state and local law enforcement agencies) and professions involved in victim services.

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17 Department of Justice, Section 5. Landmarks in Crime Victims' Rights and Services, National Crime Victims' Week Resource Guide, 2014, 2, available on https://www.ncjrs.gov/ovc_archives/ncvrw/2014/index.html, access 06.10.2021; Young / Stein (n 12).

18 Charles Doyle, Crime Victims Right Act: A Summary and Legal Analysis of 18 U.S.C. § 3771, Congressional Research Service, RL 3367921, 2021, 20.

19 Ibid. 2–4.

20 See, e.g., Charles Doyle, Crime Victims Right Act, Nova Science Pub Inc 2008, 3; Landmarks in Victims' Rights and Services (n 16), 4–5; Tobolowsky et al. (n 10), 8–9; EH v Slayton 468 P.3d 1209 (Ariz 2020) (Allowing victim's attorneys to sit before the bar).

21 Herrington (n 3), 114.

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At the time of the Report's issuance, over thirty-seven states had some form of victim compensation. However, other provisions such as victim notice, direct victim services and victim impact statement procedures were inconsistent throughout the country.[22]

Some of the Task Force Report's recommendations were effectuated on the national level, including the establishment of the Department of Justice's Office for Victims of Crime to coordinate the federal government's response to the Task Force Report. In the same year of the Task Force Report, Congress enacted several pieces of legislation, such as the Victim and Witness Protection Act, which required victim impact statements in pre-sentencing reports, restitution and outlined victim rights; and the Victims of Crime Act of 1984, which was part of the Comprehensive Crime Control Act of 1984. These acts established a crime victim fund and some reformed defendant-based criminal practices. The Victims of Crime Act outlined many rights, but never achieved full success, however, because it was placed in the Public Health and Welfare Title of the US Code, rather than the Criminal Code. Additionally, the Mandatory Restitution Act of 1996 required restitution for certain federal offences, and the Victim Rights Clarification Act of 1997 precluded judges from excluding victim-survivors from trial because they may participate in the sentencing hearing.[23]

Although efforts at a federal Constitutional amendment failed, several states passed constitutional amendments and even more passed state legislation outlining the exact nature of crime victim protection. Congress passed a well-supported alternative to a Constitutional amendment as part of the Justice for All Act of 2004, which was later amended through the Justice for Victims of Trafficking Act.[24] The Crime Victims' Rights Act of 2004 ("CVRA") created or modified specific substantive and participatory rights for crime victim-survivors and enforcement mechanisms for the statute's implementation.[25] Today's rights include (1) the right to be reasonably protected from the accused; (2) the right to reasonable notice of certain

22 Tobolowsky et al. (n 10), 11.

23 Ibid. 8–9; Paul Cassell, The Victims' Rights Amendment: A Sympathetic Clause by Clause Analysis, Phoenix L Review 5 (2012) 301, 304–307; e.g., 18 USC §§ 3510, 3525, 3663–3664; One Task Force Report recommendation that did not come to fruition on the federal level: an amendment to the United States Constitution articulating a crime victim's Bill of Rights.

24 Justice For All Act of 2004, Public L No 108–405, 118 Stat 2260.

25 18 USC § 3771; These rights are also reflected in the Federal Rules of Criminal Procedure 60; Jordan v Department of Justice, 173 F. Supp 3d 44, 49 (S.D.N.Y. 2016).

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court proceedings; (3) the right to not be excluded from most court proceedings; (4) the right to be reasonably heard at certain public proceedings; (5) the right to confer with the government attorney; (6) the right to full restitution; (7) the right to proceedings free from delay; (8) the right to be treated with fairness and respect for the victim's dignity and privacy; (9) the right to notice of a plea and deferred prosecution agreements; and (10) the right to notice of the aforementioned rights and statutory rights and services.[26] They responded to a system that had become "out of balance—while criminal defendants [have] an array of rights under the law, crime victims have few meaningful rights".[27] Moreover, these were accompanied by reforms to the Rules of Criminal Procedure and the Federal Rules of Evidence to decrease trauma for witnesses in criminal trials.[28] While the CVRA outlines some of the rights of crime victims, the Crime Victims' Rights and Restitution Act (VRRA) outlines mandatory services for victims.[29]

The very crux of the CVRA's purpose is essential to modern concepts of justice. The Act's goal is to "encourage crime victim participation in the criminal justice process".[30] The significance of the CVRA lies not only in its explicit articulation of specific victims' rights, but also in the other provisions. The CVRA defines "victim" broadly. It also discusses the courts' obligation to "ensure that the crime victim is afforded" the rights found within the statute, providing various provisions and limitations. Furthermore, it demands the federal government effectuate several actions to ensure compliance with these rights. Finally, it is located in the Criminal Code and contains specific enforcement provisions when prosecutors fail to pursue victim-survivors' rights.[31]

Every state has some form of victims' rights legislation, and more than thirty-two states enacted a Crime Victim Bill of Rights or similar amendment to their state constitution.[32] Some of these and all the remaining states

26 18 USC § 3771.
27 150 Congressional Record S4260–0, comments Senator Feinstein, 22 April 2004.
28 E.g., Federal Rules of Criminal Procedure 12(1), 4(13); Federal Rules of Evidence 412.
29 42 USC § 10607.
30 US v Minard, 856 F.3d 555 (8th Cir. 2017); US v Stevens, 239 F Supp 3d 417, 422 (D.Conn. 2017).
31 Cassell (n 23), 309.
32 National Victims' Constitutional Amendment Passage (NVCAP), State Victim Rights Amendments, available on http://www.nvcap.org/states/stvras.html, access 03.08.2022.

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have legislative protection for victims, many of which include rights provisions, compensation and restitution provisions, and service provisions.[33]

In the United States, criminal litigation occurs on two levels: the federal level or individual state level. In this public law system, crime victim rights may vary among jurisdictions. What will not vary is that victim-survivors are now at least recognised by the government as people possessing rights, and the risk of re-victimisation within the legal institutions that are supposed to protect them is significant. A crime victim possesses "the right to be treated with fairness and with respect for the victim's dignity and privacy".[34] This statement is more than aspirational. It is also more than a well-intended platitude to appease a politically important, if not powerful, community group. This paper outlines central obligations of the criminal justice system—and all the actors within it—to crime victims, recognising their inherent dignity and delivering them respect.

3. Basic Crime Victims' Rights Framework

The following discussion is an introductory description of victims' rights found in federal law. Although the states have arguably been more successful in their pursuit of victim-survivors' rights, these ten rights within the CVRA serve as one of the several accepted basic frameworks for crime victims' rights. However, the CVRA only provides a framework. Because each state and the federal government have distinct victim rights provisions in their codes, constitutions or rules of criminal procedure, determination of a particular victim's rights often turns on the facts of the victimisation and procedural status of the case.[35]

Threshold Issues

A. Definition of "Victim"

The issue of *who* qualifies as a victim is central and indicates how well a given jurisdiction understands the gravity of victimisation. Jurisdictions should reject the temptation to conceptualise the victim as only the person

33 *See generally* Tobolowsky et al. (n 10), 11–12.
34 18 USC § 3771(8) (2014).
35 Landmarks in Crime Victims' Rights and Services (n 17).

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directly harmed by the wrongful act. This is particularly true with child abuse as this is a crime that tears at the family framework, having a ripple effect on the immediate family of a victim as well as anyone in relation with him/her. While defining "victim" that broadly is impossible, extending the definition beyond just the individual directly harmed by the offender to include those proximately harmed is possible. In the United States,

[T]he term "crime victim" means a person directly and proximately harmed as a result of the commission of a[n] …offense. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.[36]

Thus, the federal CVRA recognises only those directly or proximately harmed by a federal crime.[37] As such, the statute arguably suggests that, with children, the incompetent, incapacitated or deceased others can assume the rights of victims who cannot do so themselves. Because these people are proximately harmed, they possess their own rights as well.[38]

Courts have attempted to interpret the term "victim". "[T]he government must show not only that a particular loss would not have occurred but for the conduct…but also that the causal connection between the conduct and the loss is not too attenuated (either factually or temporally)".[39] "Not too attenuated" injects a risk of subjectivity which raised questions of inconsistency. Given the value of uniformity, the better course is to follow the wisdom of courts that recognise the gravity of victimisation. Some states, such as California, have broad definitions encompassing any victim of any crime and including relatives or representatives of a deceased, incompetent, incapacitated or minor victim.[40] It should be noted that the status of victim may be based on allegations, not proof to assert rights because victims'

36 18 USC § 3771(e) (2014); Federal Rules of Criminal Procedure 1(b) (12).

37 US v Maldonado – Passage, 4 F 4th 1097, 1103 (10th Cir 2021) (Noting that defendant caused victim emotional harm with threats and no physical harm necessary); In re Stuar*t*, 552 F.3d 1285, 1288 (11th Cir 2008).

38 Tobolowsky et al. (n 10), 16.

39 US v Robertson, 493 F.3d 1322, 1334 (11th Cir. 2007).

40 California Constitution article I, § 28(e).

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rights begin well before conviction.[41] That approach recognises the dignity of all those harmed by an offender and the metastasising nature that criminal victimisation has on all human persons.

B. Responsibilities

The CVRA is more comprehensive than a list of rights. It also encompasses duties and responsibilities for the government and other actors. For example, certain officials are charged with engaging in "best efforts" to inform victims of their rights.[42] Rights mean nothing if not explicitly shared with those who have them. This collection of rights is notably not a list of exclusive rights. Many other statutes exist which may allow for specific remedies such as access to a crime victim fund, the right to sue civilly, or the right to obtain restitution after a criminal conviction. But with regard to these rights, the prosecutor and courts must fulfil their responsibilities of informing victims and engaging in certain actions to ensure the execution and realisation of the rights.

C. Limitations

The rights are not absolute. As will be discussed, at times they will come into tension with other rights. Although the rights are not absolute, however, they are not abandoned if difficult to execute. For example, the Act provides that if, due to the number of crime victims, compliance with these rights would be impractical, then the CVRA authorises courts to fashion "a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings".[43] Just as it is never acceptable to discard the rights of the accused, once these duties are labelled *rights* for the victim-survivors, it is also unacceptable to discard them. Courts and adversaries must reasonably accommodate them as rights, not simply preferences.

41 US v Sultsmon, No. 07 – CR-641 (NGG), 2007 WL 423985, alx, (EDNY Nov. 27, 2007).
42 See Section III D.
43 18 USC § 3771(d) (2) (2014); See e.g. US v Babich, 301 F.Supp. 3d 213 (D Mass 2017).

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I. Victims' Rights

Federal statues provide for the following minimum rights. Victim-survivors receive their rights on their own and should not need to request or fight for the following.

1) The Right to Be Reasonably Protected From the Accused

This right has been subject to minimal litigation on the federal level. While no system can guarantee the safety of any victim, this right still has significant value. The legislative history behind this provision indicates its purpose, including not only a general right of reasonable protection efforts but that it is also designed to obligate the government to provide victims with protection from the accused during proceedings. Such rights may include the right to separate and secure waiting areas during trials and hearings as well as the right to reasonable conditions of pretrial and post-trial release.[44] It could even include some protection for witnesses from uninvited inquiries from the defendant's lawyers. While it may seem as though this is an unnecessary right in canonical cases, such a view ignores the Church hierarchy's repeated failure to protect children from clergy abuse and, in some cases, facilitates it by knowingly affording known sexual offenders access to children. Therefore, this canonical process should be concerned with protecting the victims from further harm by addressing the offender's previous abuse and removing them from a role of ministry as a means of that protection. Similarly, offenders often try to influence victims through others in authority or the community. Given the difficulty of abuse allegations within a faith community, Church leaders should help to realise this right using transparent public statements and direction to the community to protect the victim from undue influence, harassment or worse. Additionally, it should also think of this as a right for the victim-survivors during the process by protecting victim-survivors from contact with the offender during the actual process of the hearing, while still affording them a significant role. In the United States, even proceedings closed to the public allow crime victims to be notified of a defendant's arrest, adjudication and disposition such that they can protect themselves from actualisation of

44 150 Congressional Record S10910, statement of Senator Kyl, 9 October 2004.

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a threat.[45] For example, in the United States, juvenile proceedings cannot be open to the public. However, in C.S., the court allowed a church (the victim) to be notified of a juvenile's threat to it, as well as the status of proceedings.[46]

Many states provide broad rights by articulating specific forms of protection, such as freedom from harassment, stalking or further abuse. Moreover, many states execute this right by providing victims with necessary information regarding the release of the accused in question. Thus, protection is included within the concept of notice to the victim of any release hearing and other such events which may impact victim safety.[47]

2) Right to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime or any release or escape of the accused.[48]

An important word in this section is "public". All these rights presume a public process which is transparent. A public proceeding is necessary for accountability, and such a proceeding must be one in which victims are welcome. Any process that does not have some public aspects is doomed to failure in achieving accountability.

Putting the qualifier of "public" aside, this right is intertwined with the right to protection as notice affords victims the ability to take self-protective measures. However, this right also accomplishes another significant goal of the criminal justice system—to facilitate the participation of victims in the system and ensure that they are involved and informed stakeholders. "The obvious purpose for the right to notice was to provide a gateway to the…other rights".[49]

This is confirmed when read in conjunction with § 3771(c), which charges "officers, employees of the United States engaged in the detection, investigation, or prosecution of crime" to make their "best efforts" to notify

45 US v CS, 968 F.3d 237, 242 (3d Cir 2020).
46 Ibid.
47 National Crime Victim Law Institute (ed.), Fundamentals of Victims' Rights: A Summary of 12 Common Rights, *Victim Law Bulletin* November 2011, available on https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12, access 04.09.2022.
48 18 USC § 3771(a) (2) (2014).
49 Doyle (n18), 19.

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crime victims of all ten of the rights outlined in the CVRA.[50] Additionally, a prosecutor *"shall"* advise a victim that he or she can seek the advice of counsel regarding those rights.[51] Although this section was originally conceived as a victim-survivor counterpart to the Miranda rights of suspects, noticeably absent from this section is the requirement that the victim be informed of his or her rights.[52] Not only does the right rest in the list of crime victims' rights, but Rule 60 of the Rules of Criminal Procedure specifically directs that "[t]he government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime".

This section is also subject to other limitations. In addition to the aforementioned limitation in cases with a large number of victims, notice need not be given if doing so would endanger the safety of another person.[53] The phrase "involving the crime" is a rather general phrase which can be interpreted broadly. In cases with large numbers of victims, procedures using technologies such as websites to update victims have been approved.[54] While the word "public" might suggest a narrowing of hearings that victims can attend, such is not the case. This choice of wording seems to exclude already closed proceedings, such as grand jury proceedings and national security matters.[55] Another flaw with this phraseology is that within the criminal justice system, significant legal events can occur through pleading filings and not in court events. Written decisions, for example, are not considered public proceedings.

Two aspects of notification are essential. First, it must be clear that the right to notification is automatic, i.e., victims need not request notice in order to receive it. Victim-survivors must be informed of all events.[56] Second, notice provisions must be clear, precise and funded. "[T]he absence of clearly articulated notification procedures and sometimes limited resources" negatively impacts the effectiveness of such provisions.[57] Finally,

50 18 USC § 3771(c) (1) (2014).
51 18 USC § 3771(c) (2) (2014).
52 Doyle (n 20), 10.
53 18 USC § 3771(c) (3) (2014).
54 E.g., US v Skilling, No. 11–04–025-SS, 2009 WL 8066757, at 1–2 (SD Tex. Mar 6, 2009); *US v Olivares,* No. 3:13-cr-00335, 2014 WL 2531559 (W.D.N.C. 2014).
55 Doyle (n 18), 19.
56 E.g., State ex rel Hance v Arizona Bd. Of Pardons and Parole, 178 Az 591 (Az Ct App 1993).
57 Tobolowsky et al. (n 10).

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sanctions must exist for the failure to notify. "The incentive to perform notification requirements must also be reduced by the absence of victim remedies or sanctions for violation of notification rights...."[58]

3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

A natural tension exists between a victim's dual status as both victim and witness. Victims had traditionally been allowed to attend trials and court proceedings, but in the United States' federal court, this practice changed in 1975 with the adoption of the Federal Rule of Evidence 615.[59] This provision effectively made sequestration routine.[60] In many jurisdictions, witnesses are excluded from the courtroom during trials, sentencing or other proceedings so as not to improperly influence their testimony.[61] Conversely, the Constitution affords defendants the right to be present at all stages of their public trials. It may risk a defendant's constitutional rights to a public trial and due process to fail to sequester witnesses. However, defendants do not have the constitutional right to exclude witnesses from the courtroom.[62] Moreover, the right to a public trial is not only a right for a defendant, but has also been interpreted as being of benefit to the general public.[63] Of all the members of the public, the victim of the crime charged possesses the most vested interest in observing the court proceedings. Yet, victim-survivors were often barred from proceedings. Consequently, victim-survivors were not only afforded fewer rights than the accused,

58 Ibid.
59 Federal Rules of Evidence 615 ("At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or (d) a person authorized by statute to be present.").
60 Victim Law Bulletin (n 47).
61 See Federal Rules of Evidence 615 (requiring the court to sequester witnesses upon a request of either party but excepting "persons authorized by statute.").
62 US v Jim, No. CR 10–2653, 2012 WL 119599 (D New Mexico 2012) *2.
63 See, e.g., Globe Newspaper Co v Superior Court, 457 U.S. 596 (1982); see also Maldonado (n 38), 1103.

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but they possessed even fewer rights than average members of the public unaffected by the crime.

The CVRA addressed this tension by providing victim-survivors with a right to not be excluded from a proceeding unless a court determines through clear and convincing evidence "that the testimony by the victim would be materially altered if the victim heard other testimony at that proceeding".[64] The Ninth Circuit described this burden as "clear and convincing evidence that it is highly likely, not merely possible, that the victim-witness will alter his or her testimony".[65] F.R.E. 615 has an exception to this Rule of Sequestration. It does not authorise excluding "a person authorized by statute to be present".[66] The CRVA provides such an exception.[67] This right is underscored by § 3510, which precludes a trial court from excluding a victim from a trial because he or she may testify at the sentencing or death phase of the trial.[68] The CVRA further provides that, prior to the court making the determination of the risk of altered testimony, "the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim".[69] In other words, sequestration is an act of last resort. Should the court deny a victim-survivor his or her right of attendance, it must state its reasons on the record.[70]

While canonical proceedings are not public, this right underscores the importance of transparency. By allowing the public, or at least the victim, broadly defined to attend, the procedural system demonstrates the value of the victim-survivor and his or her inherent dignity.

4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.[71]

The aforementioned right to attendance is distinct from the right to be heard. Although this right evokes the ability to speak at sentencing, it

64 18 USC § 3771(a) (3) (2014).
65 In re Mikhel, 453 F.3d 1137, 1139 (9th Cir. 2006); Jim (n 63).
66 Federal Rules of Evidence 216.
67 Jim (n 63).
68 18 USC § 3510 (2014).
69 18 USC § 3771(b)(1) (2014).
70 18 USC § 3771(b)(1) (2014); Federal Rules of Criminal Procedure 60.
71 18 USC § 3771(a)(4) (2014).

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encompasses much more than that. The CVRA specifically outlines certain public proceedings where the victim has a "right to be reasonably heard". These include "proceedings involving release, plea, sentencing or any parole proceeding".[72] While the text of the statute is silent on the method through which a victim can be heard, legislative history is fairly clear that "[t]his provision is intended to allow crime victims to directly address the Court in person. It is not necessary for the victim to obtain permission from either party to do so".[73]

Although canonical proceedings do not typically consider issues of release, they do consider questions of agreements, punishment, remedy and whether the offender will be released back to society with the imprimatur of clergy with or without limitations or a different status. The nature of these rights is therefore translatable to that process. Therefore, canonical procedures should offer victim-survivors the right to be heard prior to any agreement or remedy being determined.

This right is qualified by the word "reasonably". However, it still possesses significant breadth. This qualification recognises that judges must balance the rights between victim-survivors and others while striving to reach a reasonable compromise and allow a victim a voice.

With over 90 % of federal cases being resolved with a guilty plea, victim input before a plea is critical. These pleas significantly impact victims regarding restitution and harm suffered. The right is clearly not one of veto power, but one that simply ensures victim-survivors are heard prior to parties entering into a plea agreement and a court accepting it. It is no coincidence that the first right afforded victims in the CVRA is protection; the importance of being able to address the court in public hearings, which could lead to a defendant's release, includes not only bail review, but also sentencing and parole.

In passing the Act Congress made the policy decision that victims have the right to inform the plea negotiation process by conferring with the prosecutors before a plea agreement is reached. This is not an infringement on the government's independent prosecutorial discretion; instead it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.[74]

72 18 USC § 3771(a)(4) (2014).

73 150 Congressional Record S4268, remarks of Senator Kyl, 9 October 2004.

74 *In re Dean,* 527 F.3d 391 (5th Cir 2008).

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The main thrust of litigation in this space relates to victim impact statements at sentencing. Victim impact statements serve several important purposes and must be a component of any justice system. They "provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness at sentencing".[75] The Supreme Court explicitly repudiated an earlier case that denied victims the right to speak at a death penalty sentencing, describing it as wrongly decided.[76]

The components of this Act that allow for victim impact statements at sentencing were upheld by the Ninth Circuit Court of Appeals in *Kenna v. U.S. District Court for the Central District of California,* which held, *inter alia*, that (1) the intent of Congress was to allow victims to speak at sentencing hearings, not simply provide written statements; and that (2) the remedy for not allowing a victim to speak is vacating the sentence and having a new hearing in which the victims speak.[77] Initial concerns that such a right would cause administrative inefficiencies and be overly burdensome have proved to be misplaced. Additionally, the value and importance of this opportunity for victim-survivors far outweigh any administrative costs.[78] "Among the purposes of the CVRA is to make victims 'full participants' in the sentencing process and to ensure that the district court doesn't discount the impact of the crime on victims".[79] These statements are beneficial to all stakeholders. Judges and prosecutors have commented supportively on victim impact statements as at times providing increased information, defendants having increased awareness and, most importantly, victims having increased empowerment.

The language of the statute does not give courts discretion as to whether they must accept the impact statement, other than requiring the qualifier of reasonableness. The Supreme Court has tried to balance victim impact statements during the penalty phase of a capital case.[80] However, even if such a statement is not required to be admitted because of, for example, the status of the witness, courts retain the discretion to admit them.[81]

75 Cassell (n 23), 324.
76 Payne v Tennessee, 501 U.S. 808 (1991).
77 Kenna v United States District Court, 435 F.3d 1011, 1016–17 (9th Cir 2006).
78 Tobolowsky et al. (n 10), 11.
79 US v. Yamashiro, 788 F 3d 1231, 1234 (9th Cir 2015).
80 See, e.g., Tennessee (n 77), 826–827.
81 Victim Law Bulletin (n 47).

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5) The reasonable right to confer with the attorney for the Government in the case.

The Task Force Report noted a common criticism of the public prosecution model was the failure of prosecuting attorneys to consult with victim-survivors.[82] Such a situation has several negative effects. Most obviously, such a failure could lead to the prosecutor acting upon inadequate information. As such, the resolution may be disproportional to the harm caused. Proportionality is a fundamental principle of modern criminal justice. Therefore, the failure of the prosecution to be fully informed of the harm caused by a crime and the wishes of the harmed party—the victim—undermines some of the goals of the criminal justice system. More intangible, but equally as important, the failure to confer decreases victim participation in the justice system and can further victimise him/her by again eliminating his/her sense of input over the outcome or the process to achieve the outcome.

This right makes clear that Congress made the policy decision that victims—and their families—have the right to confer with the prosecution.[83]

This right has actual substance to it. Itmeans more than that a prosecutor need only answer phone calls or emails if a traumatized victim has the venue to initiate a conversation with the prosecutor about the case. Instead the right to confer with the prosecutor should be read in light of one of the CVRA's primary purposes: to give victims a meaningful voice in the prosecution process.[84]

Indeed, the law requires the prosecution to "respect the rights and interest" of a victim and his/her family.[85]

Importantly, this right does not allow a victim-survivor to dictate the direction of the prosecution.[86] The state prosecutes an offender for crimes against the community. These rights do not authorise victims to veto pro-

82 Herrington (n 3), 8–9; Tobolowsky et al. (n 10), 74–76.

83 E.g. In re Dean, 527 F.3d 391, 395 (5th Cir 2008); Jordan v Dept of Justice, 173 F.Supp.3d 44, 51 (SPNY 2016).

84 US v Stevens, 239 F Supp 3d 417, 421–422 (D Conn 2017).

85 Ibid. 422.

86 150 Congressional Record S4268, statement of Senator Kyl, 9 October 2004; United States v Degenhardt, 405 F.Supp.2d 1341, 1345 (D Utah 2005): "Some courts reject the idea that written statements comply with this right. "Such a construction…would defy the intention of the CVRA's drafters, ignoring the fact that defendants and prosecutors make oral statements at sentencing and disregards the rationales underlying victim allocution."

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secutorial discretion or to control or approve decisions.[87] It simply affords them the right to confer. This tension then between the individual victim and the collective societal victim is inherent but workable.

Notably, this provision is not limited to conferring with any representative of the government, but specifically mentions the attorney. Similarly, it is not limited to conferring only about outcome, but may include other issues such as testimony, safety concerns, privacy issues or other matters of importance to the victim. The Department of Justice Guidelines for Victim and Witness Assistance specifically direct prosecutors to make reasonable efforts to proactively notify identified victims "and consider victims' views about prospective negotiations".[88] The stated goal is to provide a meaningful opportunity "to offer views before a plea agreement is reached".[89] The right is not unlimited, however. Recognising the reality of busy criminal dockets and the inability of a prosecutor to meet with a victim at every request, some legislative history suggests the right is intended to cover critical stages in criminal cases after charging.[90]

Although this right may be unfamiliar in the canonical system, its prosecutors must change their perspectives as American prosecutors have had to do. "Prosecutors should consider it part of their profession to be available and consult with crime victims about the concerns victims may have which are pertinent to the case proceedings or dispositions".[91] This rethinking of the role of advocates has been beneficial to the legitimacy of the criminal justice system and could do the same for the canonical system.

6) The right to full and timely restitution, as provided in law.

As the Holy See considers how to accompany victim-survivors of clergy abuse, the concept of restitution may seem misplaced. However, the reality is that many of the cases in this system have not been addressed in the criminal or civil law systems due to statutes of limitations. The Holy See could consider that in such situations, hearings could provide access to a

87 United States v Thetford, 935 F.Supp.2d 1280, 1282 (ND Ala 2013).
88 Attorney General Guidelines for Victim and Witness Assistance, 2011 ed. (2012) 20 (hereinafter "Guidelines").
89 Ibid.; see also ABA Standards of Criminal Justice, Please of Guilty, Standard 14–3.1(s): "The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims before reaching a plea agreement."
90 150 Congressional Record S4268, statement of Senator Kyl, 9 October 2004.
91 150 Congressional Record 7301, statements of Senators Feinstein and Kyl, 2004.

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victim fund to provide restitution type remedies to victim-survivors. While this may not be able to be a provision of the canonical outcome, it is included in this paper so that readers can have some understanding of its importance in the American system as a right victim-survivors possess.

Restitution is money the offender pays to the victim to cover the losses the victim suffered as a result of the crime.[92] Courts order restitution as part of the resolution of a criminal matter. This is distinct from civil remedies, which a victim can obtain by successfully litigating a civil lawsuit against an offender in civil court for financial loss. Restitution can be mandatory or discretionary and its availability often depends upon the offence in question. "The primary goal of restitution is remedial or compensatory but it also serves punitive purposes".[93]

It is axiomatic that victimisation can have long-term financial, emotional and physical effects. The costs of crime can include mental and physical health, property loss, lost productivity and victim services. Restitution can be critical for victim recovery.

The CVRA provides victims the right to "full and timely restitution as provided by law".[94] This language reflects concerns about nominal restitution orders to comply with the law but does not adequately compensate victims. It also reflects the other end of the spectrum when restitution must be limited by either practical realities or legal limitations, such as a case with multiple victims and inadequate resources.

The CVRA must be read within the context of other mandatory restitution schemes in the federal criminal code. The Mandatory Victim Restitution Act of 1996 (MVRA) mandates restitution, regardless of a defendant's ability to pay, for out of pocket expenses of victims of certain types of crimes.[95] Furthermore, the Guidelines direct prosecutors to utilise asset forfeiture provision to recover assets to return to crime victims.[96] Additionally, Congress has also demanded mandatory restitution for certain types of crime, such as all crimes within Chapter 110 of the US Criminal Code, crimes of sexual exploitation and abuse of children.[97] However, in 2014 although the Supreme Court explicitly recognised the plaintiff as a victim,

92 18 USC § 3771(a)(6) (2014).
93 Paroline v United States, 134 S. Ct. 1710, 1726 (2014).
94 18 USC § 3771(6) (2014).
95 18 USC § 3663A (2014).
96 Guidelines (n 89), 45.
97 18 USC § 2259 (2014).

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it ruled that a victim of child pornography was not allowed restitution from a child pornography possessor, and called upon Congress to clarify the statute.[98] In response, Congress passed the Amy, Vicky and Andy Child Pornography Victim Assistance Act,[99] which created a Child Pornography Victim Reserve Fund and several mechanisms for victims to access that restitution.

Prior to the Task Force Report, only eight states mandated victim restitution.[100] Today, every state has some statutory provision for restitution, and many states have such a provision within their constitutional amendments.[101] They differ in both scope and applicability. While some states allow restitution in nearly every crime, others limit it to specific crimes. Not all restitution rights are mandatory and often granting the provision is at the discretion of the court.

Some states include not only direct victims but spouses, children and unemployable adults among those who can have access to crime victim funds.[102] Others still allow victims to access the fund even if the offender was acquitted.[103] As the law develops, this expansive notion of restitution reflects the realistically comprehensive conceptualisation of victims. Understanding that many people are victims of a given crime and the ways they are victimised is essential. To have legitimacy, the canonical system should reflect this common understanding.

7) Right to Proceedings Free From Unreasonable Delay

While defendants in the United States possess a 6th Amendment right to a speedy trial, which is further supported by speedy trial statutes on both the federal and state levels, there was no correlative right for victims. Notably, delays in cases often operate to the detriment of crime victims, jeopardising their interest in achieving justice for their harm suffered. “Delay often works to the defendant’s advantage. Witnesses may become unreliable, their memories fade, evidence may be lost, changes in the case may be

98 See, e.g., HR Report No 113–4981 (2013); Senate Report No 113–2344 (2014); Senate Report No 113–2301 (2013).
99 Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Public L. No 115–299, 132 Stat.4384.
100 Tobolowsky et al. (n 10), 152.
101 Victim Law Bulletin (n 47).
102 Debra J Wilson, The Complete Book of Victims’ Rights, Prose Associates 1995, 76.
103 Ibid. 81.

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beneficial or the case may simply receive a lower priority with the passage of time".[104] More substantively, such delays can also prevent the victim from achieving closure to his or her victimisation, prolong mental suffering and preclude timely receipt of restitution.

The CVRA sought to remedy the inequities between the defendants and victims with regard to the reasonable period of time in which to resolve a criminal case. In so doing, it adopted the above language, fashioning for victims the "right to proceedings free from unreasonable delay".[105] While this is an improvement for victims over their previous status as having no rights regarding prompt resolution, it is noticeably different than the defendant's right to a speedy trial. Victims should also possess the right to a speedy resolution.

As the legislative history of the CVRA notes, this provision targets the situation that arises all "too often" in which "delays in criminal proceedings occur for the mere convenience of the parties….It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties and the court".[106] While it is not an absolute right to a delay-free experience, the provision does at least require that "any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay".[107]

8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

This right rests at the core of what the victim–criminal justice interface has lacked for many years: a recognition of the inherent dignity of the crime victims and the need for that fairness, dignity and privacy to be respected. In many ways, all other victim rights, whether within the CVRA, state constitutions or state statutes, are encompassed within this language.

104 Doyle (n 18), 37 (quoting Paul Cassell, Balancing the Scales of Justice: the Case for and Understanding the Effects of Utah's Victims' Rights Amendments, Utah L. Review 1994, 1373, 1402).
105 18 USC § 3771(a)(7) (2014).
106 150 Congressional Record S4268–269, 9 October 2004.
107 150 Congressional Record S10910, 9 October 2004.

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"This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches to treat victims of crime with the respect they deserve and to afford them due process".[108] Unlike the other rights, this one suggests no limitation to it being applied throughout the process. Rather, this seems to encompass all stages of the process.[109]

While dignity, fairness, and privacy may seem ambiguous concepts, they are central to victim rights. The State of Utah even defined these rights within its crime victim rights laws. It defines "dignity" as "treating the crime victim with worthiness, honor, and esteem"; "fairness" as "treating the crime victim reasonably, even-handedly, and impartially"; and "respect" as "treating the crime victim with regard and value".[110]

Much of the litigation in this area focuses upon the right of the victim to his or her privacy and involves the media and the court—a situation not at issue in the canonical process.[111] Privacy, however, is a complex concept here in that some might try to use "privacy" to preclude access to proceedings. In the American system, the offender does not have a right to privacy in that sense. On the contrary, he/she has a right to a public trial. Victim-survivors are the stakeholders with more significant privacy interests. Those interests, however, do not preclude the public trial and they should not be used to shield the details of the harm caused from the public. Rather, they should be used as a basis for more surgical privacy, such as withholding the victim-survivor's true name from the media, the victim-survivor's identifiable information from the offender, or potential illegal images from the public. All Americans enjoy a Constitutional right to privacy, and globally many other nations provide a much more robust privacy right.[112] Furthermore, many jurisdictions protect privacy in a myriad of ways, including limited disclosure of identifying information, rape shield laws and redactions of personal information in discovery and court documents.

108 150 Congressional Record S10911, 9 October 2004.
109 US Department of Justice (ed.), The availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, Opinions of the Office of Legal Counsel 34 (2010) 239–262, 8.
110 Utah Code Annotated § 77–38–2 (West 1953).
111 Victim Law Bulletin (n 47).
112 Right to Erasure, Art 17 GDPR: "The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay...".

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Some district courts have ruled this right to fairness could even include the right to be heard at a hearing to dismiss an indictment or the right to be referred to as "the victim".[113] Through this provision, "Congress, in effect, has determined that failure to treat a victim with fairness and with respect to privacy works a clearly defined and serious injury to the victim".[114] While the language may seem aspirational, this is clearly an enforceable right. Department of Justice staff are directed to protect victims' privacy information from disclosure utilising protection orders, redaction or other tools.[115] Conversely, however, sealing a record which prevents the victim accessing the record violates this right. "A trial court sealing of the record…is inconsistent with victims' right to fair treatment and respect for his dignity" because he or she cannot determine if his or her rights have been violated.[116] Therefore, this concept of privacy cannot be manipulated for further protection of the defendant or the system that supports him/her. The canonical process must also appreciate the point made in Patkar. Not only is the failure to treat a victim-survivor with fairness wrong, but it is also *revictimisation* of him/her, which causes its own injury. The Holy See should avoid further harming child victims by not providing them with the most minimal of standards: the fairness, respect, dignity and privacy that individual victims require.

9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

In 2015 this right was added to the list of federal statutory crime victim rights.[117] Congress did so despite the Department of Justice's position that the aforementioned right to be heard at any proceeding applied only after an offender had been formally charged.[118] With the vast majority of cases resolved by plea agreement, for many of them the plea bargaining process has already been completed prior to charging in many cases. Therefore, the Department of Justice's position made little sense in actuality as it would

113 Cassell (n 23) 314–15; United States v Spensley, No 09-CV-20082, 2011 WL 165835 (CD Ill January 19, 2011) 1–2.
114 United States v Patkar, No 06–00250, 2008 WL 233062 (D Haw January 28, 2008) *5.
115 Guidelines (n 89), 3; Federal Rules of Criminal Procedure 49.1.
116 Doyle (n18), 40.
117 18 USC § 3771(a)(9) (2016).
118 The Availability of Crime Victims' Rights (n 109), 1.

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have foreclosed many victim-survivors' opportunity to consult. Congress designed this provision to correct that Department of Justice interpretation and ensure that victims have the right to this plea information even if charges have not yet been filed.

This issue came to a head in the case of the wealthy financier Jeffrey Epstein. Although a procedurally complicated case, it highlights the problem with enforcing rights. Epstein created a sex-trafficking ring of minor girls in several different states. After sufficient evidence to proceed was secured, no state charges emerged, and the FBI responded to a request to investigate. This work occurred and the FBI prepared a 53 page draft indictment.[119] However, prior to criminal charges being filed, Epstein's attorneys reached a non-prosecution agreement with the then United States Attorney's Office allowing Epstein to plead guilty to minor state prostitution-related charges in exchange for him avoiding federal or state trafficking charges and for immunity for Epstein and all others involved in the offence. The United States Attorney's Office never told the over two dozen victims about this sealed agreement, actively misled them and actively hid it from the victim-survivors.[120] Upon learning that the prosecutors had not only failed to confer with them but had actively misled them, the victim-survivors were outraged, and one victim-survivor sued, alleging the violation of her rights under the CVRA. The 11th Circuit agreed with the plaintiff that the prosecutors' actions were unconscionable but found that the victim did not have a right to sue civilly under the Act until charges were filed, which they were not.[121] Subsequently, Congress enacted this right to prevent such a situation and ensure such victims are informed of such disclosures.

The Holy See should learn from this correction and avoid making similar missteps. Victim-survivors must have the right to be informed of agreements, thus affording them the ability to actualise their other rights. More importantly, such a practice confers to them the respect and dignity these rights convey.

119 In re Wild, 994 F.3d 1244, 1248 (11th Cir 2021).
120 Ibid. 1247.
121 Ibid.; Doyle (n18), 41.

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10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (*42 U.S.C. 10607(c)*) [1] and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

Although it seemed implicit in the original list of rights that victim-survivors should be provided notice of such rights, the history of neglect of these rights led to the addition of this right. Through the inclusion this provision, what was implicit in the language requiring Department of Justice employees to make their best efforts to notify victim-survivors of their rights becomes explicit. Section 3771(a) (10) now enhances that command making it an unambiguous right.

4. *Enforcement*

Effective enforcement requires at least two basic elements. First, a mechanism for victim-survivors to obtain relief when their rights are not recognised must exist. Second, there must be sanctions for officials whose duty it is to carry out these rights when they fail to do so. Without an enforcement mechanism, these rights are not rights at all but simply function in contravention to the stated rights as they offer a victim hope of fairness and justice where there is none.

The CVRA provides that the right may be enforced by the victim-survivor, the government or his/her lawful representative in the court where the defendant is being prosecuted or, if there is not yet a prosecution, the district where the crime occurred.[122] The CVRA then places a burden on the court that it "shall ensure that the crime victim is afforded the rights described…".[123] As discussed, government employees must also make their best efforts to see that victims are accorded their rights.[124] Congress ordered the government to train employees who interact with crime victims regarding the rights afforded under this Act. Similarly, it created a sanction system for those who fail to do so. The Department of Justice established the Office

122 18 USC § 3771(d)(1), (3) (2014); Federal Rules Criminal Procedure 60(a)(2); e.g., US v Does, 749 F.3d 999 (11th Cir 2014).
123 18 USC § 3771(b)(1) (2014).
124 18 USC § 3771(c)(1) (2014).

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of Victims' Rights Ombudsman as the office where victim-survivors can file complaints regarding a department employee failing to provide them their rights.[125] A victim-survivor can file an administrative complaint seeking the relief that a Department of Justice representative comply with the CVRA.[126] After the filing of such a complaint, the Department of Justice is required to investigate the allegation. "[I]f it is later determined that the Department of Justice willfully disregarded the rights of the victim, the Department is required to sanction that employee".[127]

Although these provisions do not provide a cause of action against the government, trial courts are required to address these rights when asserted, and if the victim disagrees with the outcome, she can petition for a writ of mandamus for relief, which must be decided upon within 72 hours. If the appellate court denies the relief, it must state the reasons in writing on the record.[128]

While these provisions have some minimum measure of the two elements of enforcement, more could be done. The procedural mechanism does exist. Whether the public nature of requiring a written response to allegations is sufficient to ensure compliance is debatable. However, it is certainly preferable to the retraumatisation of victims by a system without an avenue to assert one's rights.

5. Additional Models

The above represents a basic framework of minimal laws. Many courts, both state and federal, have built additional rights and protective measures upon this scaffolding for victim-survivors of sexual offences. This paper would be remiss if it did not address some of these mechanisms, which demonstrate the rights and the theories behind them in action.

These include measures taken outside the courtroom to assist victim-survivors in navigating the system. Such measures include the creation of the ombudsman position and the requirement that his contact information be readily available to victim-survivors. Some courts can appoint *Guardians Ad Litum* to represent child witnesses' best interests. Key figures in assist-

125 28 CFR § 45.10 (2005).

126 Virginia Kendall / Markus Funk, Child Exploitation and Trafficking, Rowman and Littlefield 2012, 244.

127 Ibid.

128 18 USC § 3771(d)(3), (6).

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ing victim-survivors are the victim witness advocates (VWA). Due to the incredible size of many prosecuting attorneys' workloads, the attorneys themselves cannot engage in the many tasks that entail complying with victims' rights. VWA's are designed to fulfil those duties by being the point of contact for victim-survivors and their cases. VWA's also accompany the victim-survivor to court, keep them notified of case status, and articulate their questions and concerns to the prosecuting attorneys.

Within the courtroom, other mechanisms are in place to put a victim-survivor at ease so that his/her testimony can be the most accurate. Measures such as these can include allowing the victim witness to have a comfort item while testifying, to have a VWA accompany them to the courtroom while testifying, protection from aggressive cross examination or the ability to prioritise cases consistent with speedy trial rights.

An example of a comprehensive reform effort worthy of considering comes from another institution which found itself plagued by revelations of widespread sexual assaults: the United States military. Like the Church hierarchy, this institutional crisis also represented an insular, hierarchical community with its own generally closed military justice system. Among the many reforms[129] implemented in response to this revelation of vast sexual assault, each branch of the military created a Special Victims Counsel (SVC).[130] SVCs are attorneys appointed to each victim of sexual assault whose duty is "to independently represent the victim of an alleged sexual assault... [and who is] separate and independent from the prosecutorial 'trial counsel'...".[131] The SVC is provided without charge to the victim, and is "tasked with both advising the victim of the legal process and protecting the victim's privacy interest".[132] While much more needs to be done to protect victims in the military from sexual assault and harassment, this access to a dedicated attorney in the justice process can shine a light on the process for an already traumatised victim-survivor and help protect him or her from further harm. Given the complex and similarly obscure canonical process, such a programme could prove highly beneficial to victim-survivors of clergy abuse.

129 10 USC § 806(b) (2016).

130 Ibid.

131 Erin Gardner Schenk / David L. Shakes, Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military?, *University of Denver Criminal L. Review* 6 (2016) 5.

132 Ibid.

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6. Conclusion

The Holy See stands in the same position as the United States Government did 50 years ago. Its members have been victimised in unimaginable ways by its officials. The Church hierarchy is just beginning to comprehend the gravity and life-altering consequences of abuse for the victim-survivors and their families. The institution has publicly stated it seeks reconciliation and to correct the wrongs of its past. A necessary component of that recognition and reconciliation is the awareness that there is a vital and essential role for victim-survivors in the canonical process that will benefit both the process as well as the victim-survivor himself/herself. The basic rights afforded in the American federal criminal justice system to all victims of crime provide a minimal framework for that important first step. The framework, however, is meaningless without executing it properly in all cases, and sanctions when those responsible for doing so fail in that duty. These concepts are not luxuries of a justice system. They represent essential components of justice, and any system of adjudication lacks legitimacy without an active role for victim-survivors.

Biography

Prof. Dr. Mary Graw Leary, Senior Associate Dean for Academic Affairs and a professor of law at The Catholic University of America. Former federal prosecutor, Professor Graw Leary's scholarship examines the intersection of criminal law, criminal procedure, technology and contemporary victimisation. She focuses on the exploitation and abuse of women, children and the marginalised. She is a recognised expert in the areas of criminal law and procedure, victimisation, exploitation, human trafficking, missing persons, technology and the Fourth Amendment.

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Rights of Alleged Victims in Penal Procedures in Spain

Jorge Cardona

Abstract

This paper analyses the most recent reforms produced in Spanish law in relation to the rights of children and persons in a situation of special vulnerability who are victims of crimes, especially sexual abuse. The reforms introduced by Organic Law 8/2021 on the comprehensive protection of children and adolescents against violence are analysed. In particular, the reforms carried out by said LO 8/2021 to the Criminal Procedure Law and the Statute of the Victim are analysed. The analysis is carried out by answering the questions that were formulated by the organisers of the Colloquium. The paper ends with some reflections on the possible application of the spirit of these reforms to canon law.

Keywords: *rights of child victims; Spanish law; protection of children against violence; child sexual abuse*

1. Introduction

The purpose of this paper is to contribute to the development of guidelines and standards for the protection of children who claim to have been victims of sexual abuse, in order to improve their rights in canonical penal proceedings.

For this purpose, based on the standards required by the Convention on the Rights of the Child and other international instruments in relation to the rights of children who claim to be victims, an analysis is conducted of the current regulation and practice of this matter in Spain in order to see to what extent it could help the Church in its proceedings.

Accordingly, the outline to be followed is, first, a brief reference to the standards required by the Convention on the Rights of the Child and other relevant international norms; second, how those standards have been implemented in Spanish law, especially through Organic Law 8/2021 on the *Comprehensive Protection of Children and Adolescents from Violence* and, within that framework, to respond to the specific questions that have been posed to me by the organisers of the seminar; thirdly, to point out some

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issues that could be particularly relevant to the purpose of this seminar, that is, to improve the criminal procedures of canon law.

2. The Convention on the Rights of the Child and Other International Treaties: Enforceable Standards

The international legal framework we are going to use, for the purpose of identifying the minimum standards required, is made up of:

- the *United Nations Convention on the Rights of the Child* (hereinafter *CRC*) and the *General Comments of the Committee on the Rights of the Child* (hereinafter GC) and an interpretation of its provisions (in particular GC 12, 13 and 14);[1]
- the *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (hereinafter the *Guidelines*), which were adopted by the United Nations Economic and Social Council in its resolution 2005/20;
- the *Model Law on Justice in Matters involving Child Victims and Witnesses of Crime* (hereinafter the *Model Law*), developed in 2009 by the United Nations Office on Drugs and Crime, in collaboration with UNICEF and the International Bureau for Children's Rights;
- the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms, as interpreted by the Human Rights Committee and the European Court of Human Rights respectively.

The Holy See is a party to the *CRC* and, therefore, the starting point should be article 39 of that Convention, which is specifically dedicated to child victims of crime, according to which:

> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed

1 General Comment No. 12 of the Committee on the Rights of the Child on The right of the child to be heard (CRC/C/GC/12 of 20 July 2009); General Comment No. 13 of the Committee on the Rights of the Child on The right of the child to be free from all forms of violence (CRC/C/GC/13 of 18 April 2011); General Comment No. 14 of the Committee on the Rights of the Child on The right of the child to have his or her best interests taken as a primary consideration (CRC/C/GC/14 of 29 May 2013).

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conflict. Such recovery and reintegration shall be carried out in an environment which fosters the health, self-respect and dignity of the child.

However, regardless of the obligation to take such measures with respect to child victims, the crucial question that arises is the respect of all the rights recognised in the CRC with respect to children who claim to be victims in the context of canonical penal proceedings, in particular in relation to crimes against sexual integrity and sexual indemnity.

In this regard, in accordance with the CRC and the other international instruments cited, the interpretation of this set of rights must be carried out in accordance with the four general principles of the CRC. These principles are also rights: the right to non-discrimination; the right to be heard and to participate in the proceedings; the right to have the best interests of the child as a primary consideration; and the right to the survival and holistic development of the alleged child victim.

These 4 principles translate into a set of concrete rights in the framework of penal proceedings when the child is a victim or witness:

a) Right to non-discrimination

According to the *Guidelines*, the alleged child victim should have access to a justice process that protects him or her from discrimination based on personal or social circumstances; the process and support services should take into account the personal or social circumstances of the alleged child victim; special services and protection should be instituted for children who are vulnerable to particular offences; the child should not be discriminated against in testifying and participating in the process on the basis of age alone, with maturity being a determining factor.

b) Right to be heard and to participate in the process

There has been a transformation in the traditional approach, which attributed to children the role of passive recipients of the care and attention of adults (who were responsible for adopting by substitution the most relevant decisions concerning them), to recognise children as active protagonists and, therefore, be called upon to participate in any decision-making process concerning them as subjects of rights and not simply as objects or passive recipients of adult protection. The approval of the CRC represented

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a paradigm shift whereby the child is now seen as an individual with his or her own opinions that must be taken into account in accordance with his or her maturity.

In this regard, the child's right to be informed, heard and listened to must be seen in relation to Article 12 of the CRC, which calls on State Parties to guarantee the child, who is capable of forming his or her own views, the right to express those views freely and, to this end, to give him or her the opportunity to be heard in any proceedings affecting him or her. General Comment No. 12 of the Committee on the Rights of the Child devotes paragraphs 62 to 64 to the right to be heard of child victims and child witnesses, establishing, firstly, a right to be consulted, secondly, a right of expression and, finally, a right to information.

“Every effort should be made”, says paragraph 63, to consult the child victim or witness about his or her participation in the criminal proceedings and this is in connection with the right to express – within that consultation framework – their “views and concerns” and, in particular, “their concerns about their safety in relation to the accused, the manner in which they prefer to give evidence and their feelings about the outcome of the proceedings”.[2]

The right to information should apply to a wide range of issues:[3] a) availability of medical, psychological and social services; b) role of the child in the proceedings; c) form of interrogation; d) support mechanisms of the child complainant or participant in the proceedings; e) date and place of hearings; (f) progress and conduct of the proceedings, including information on the apprehension and detention of the accused, his or her custodial or non-custodial status, as well as any imminent changes in that status and relevant developments after the trial and the disposition of the case; (g) protective measures; (h) possibilities for redress; and (i) possibilities for appeal or recourse.

For its part, the *Model Law* provides that, at the trial stage, the child may testify, regardless of his or her age, unless proof of capacity to the contrary is duly provided. The child may express his or her views on the various aspects of the case and must be heard, which is objectified by the formula “in cases where his or her views have not been taken into account, the child

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2 ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Res 2005/20 (Guidelines), 22 July 2005.

3 Ibid.; GC 12 (n 1) para. 64.

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must be given a clear explanation of the reasons why they have not been taken into account".[4]

c) The right to have as few appearances as possible

Linked to their right to be heard is the need for listening modalities to comply with the principle of prudence in terms of number in order to avoid revictimisation.

If the need to minimise what is known as secondary victimisation is an unavoidable task in any criminal proceeding, it becomes much more imperative when the victim is a child. In a child, the need to remember and recount the traumatic event to which he or she was subjected generally has more pernicious consequences than in an adult. "Healing" will not come and sometimes will not even begin until all need for procedural presence has dissipated. Procedural times are alien to the therapeutic needs of the minor: they follow a different rhythm. Being forced to repeat the episode several times in detail, being subjected to questions and cross-examination at different times, delays recovery. As a rule, the child is more fragile than the adult. Therefore, their appearances should be reduced to those strictly necessary: this reduces their victimisation. The repetition of statements, the uncertainty about the date of the oral trial and its outcome will in many cases trigger emotional stress, which interferes in the therapeutic process of the child's recovery.

Seeking the greatest temporal proximity to the facts is another desideratum. The reproduction of statements and, particularly, the passage of time since the event, are elements that favour the appearance of "contamination" phenomena such as the creation, re-elaboration and removal of memories, especially in pre-adolescents. *Experimental psychologists have taught us that the degree of objectivity of a child's statements is usually inversely proportional to the number of statements that have preceded them.*

4 UNODC 'Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary' (April 2009) article 20.4 (Model Law), available on https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf, access 20.08.2022.

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d) Right to be treated with dignity and understanding

This right includes a wide range of concrete measures, from the premise that professionals should treat child victims and witnesses of crime with tact and sensitivity, or the need to provide them with certainty about the process, specially designed interview and hearing rooms, breaks during testimony, hearings at times suitable for a child, special procedures for obtaining evidence (e.g., using video recordings) to limit the number of interviews, avoiding contact with the perpetrator (separate waiting rooms, no direct perpetrator/victim questioning), child-friendly questioning involving psychological experts, limiting the number of interviews and avoiding visual confrontation.[5]

In GC 13, the Committee also notes that children who have been victims of violence should be treated with tact and sensitivity throughout the judicial process, considering their personal situation, needs, age, gender, any physical impairments they may have and their level of maturity, and with full respect for their physical, mental and moral integrity.

The *Model Law* provides that, in the pre-trial phase, questioning shall be conducted by an investigator "specially trained in dealing with children to direct the questioning of the child, using methods adapted to the child".[6]

In addition, the *Model Law* proposes child-friendly waiting rooms, where waiting times should be kept to a minimum, with priority given to hearing the testimony of child victims and witnesses in the courtroom.[7] In the courtroom there should be special provisions, such as elevated seating or assistance for children with disabilities, and children should be seated near their parents or other persons close to them.[8] In no case shall the accused question the child.[9]

In addition, to the extent possible, *judicial intervention should be preventive in nature*, actively encouraging positive behaviour and prohibiting negative behaviour. Judicial intervention should be part of a coordinated and integrated approach across sectors, support other professionals in their work with children, caregivers, families and communities, and facilitate access to the full range of available childcare and protection services.

5 Guidelines (n 2).
6 Model Law (n 4), article 13.1.
7 Ibid. articles 24.1 and 24.5.
8 Ibid. articles 26.1 and 26.2.
9 Ibid. article 27.

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e) Right to effective assistance

The *Guidelines* stipulate that the alleged victim should be given multidisciplinary assistance by properly trained professionals. Of particular interest is the reference to promoting proper coordination "in order to avoid involving children in an excessive number of interventions" and the accompaniment by specialists and family members at the time of giving testimony.

Likewise, the *Model Law*, in addition to providing for the appointment of a free lawyer for the child, ex officio or at the request of the interested party,[10] assigns a particularly important role to the figure of the "support person", who is present from the police phase to the judicial phase, defined as "a qualified professional, [and] specialized in communication techniques with minors and assistance to children of different ages and cultural and family contexts, in order to avoid the risk of coercion, repeated victimization and secondary victimization".[11] The figure of the support person is key in the system proposed by the *Model Law*, as he or she is attributed a wide range of both legal and personal functions; in the legal order, he or she will be present at the interrogation,[12] will consult with the court on the different options for giving evidence, including videotaping,[13] and will request protective measures,[14] among others. On the personal level, this includes, for example, emotional support to reduce the level of anxiety or stress,[15] assistance in taking measures to help the child continue with his or her daily life,[16] or advising the child on the need for psychological treatment or support.[17]

f) Right to privacy

The *Guidelines* contain measures to ensure confidentiality by restricting the disclosure of information which identifies the child or the publicity of hearings.

10 Ibid. article 10.
11 Ibid. article 15.
12 Ibid. article 16.5.
13 Ibid. article 17(f)
14 Ibid. article 17(h)
15 Ibid. article 17(a) in connection with 25.1.
16 Ibid. article 17(b)
17 Ibid. article 17(c)

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Of particular interest is article 28 of the *Model Law*, which, under the heading “measures to protect the privacy and well-being of child victims and witnesses” lists different techniques aimed directly at avoiding “secondary victimization” such as deleting from the records any reference to the identification of the child (including by assigning a pseudonym or a number to the child), holding closed sessions and, above all, listing different appropriate ways of giving evidence: behind an opaque screen; using image or voice altering means; conducting the interrogation elsewhere, transmitting it to the courtroom simultaneously via closed circuit television; by video recording the child's interrogation prior to the hearing (preconstitution of evidence), or through a qualified intermediary.

g) The right to safety and to special preventive measures for child victims or witnesses who are particularly vulnerable to repeated victimisation or abuse

The right to security includes measures such as police protection, the adoption of measures to ensure that their whereabouts are not revealed, or precautionary measures with respect to the person investigated or accused.

In addition, professionals should develop and implement comprehensive strategies and interventions tailored specifically to cases where there is a potential for further victimisation of the child. These strategies and interventions should take into account the nature of the victimisation, including that arising from domestic abuse, sexual exploitation, institutional abuse and child trafficking.

h) Right to a speedy trial

The right to a trial without undue delay (art. 14.3.c/ of the International Covenant on Civil and Political Rights), or within a reasonable time (art. 6.1 of the European Convention on Human Rights) requires judicial bodies to carry out the formalities of the proceedings in the shortest possible time, considering all the circumstances of the case.

The right to a trial without undue delay is a right for everyone and, therefore, not only for the defendant or accused, but also for the victim.

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As GC 14 points out:

> "[C]hildren and adults do not have the same perception of the passage of time. Decision-making processes that are delayed or take a long time have particularly adverse effects on children's development. *Therefore, procedures or processes that are related to or affect children should be prioritized and completed in the shortest possible time.* The timing of the decision should correspond, as far as possible, with the child's perception of how it may benefit him or her, and decisions made should be reviewed at reasonable intervals, as the child develops and his or her capacity to express his or her opinion evolves".[18]

The *Guidelines* also include the principle of celerity and promptness both in the holding of trials and during the investigation of crimes involving children as victims and witnesses, which should also be carried out expeditiously and there should be procedures, laws or procedural regulations to expedite the cases in which these children are involved.

The importance for the victim to see the damages associated with the crime suffered promptly repaired, obliges the public authorities to make every effort to realise the generalised aspiration for greater speed and efficiency. As clinical psychology points out, the emotional recovery of the child does not begin until the resolution of the case. One of the most important stress factors for child witnesses is the time that elapses between the facts and the resolution of the case by Justice.[19]

i) Right to reparation

According to article 39 of the CRC, "State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of any child victim". This includes "full compensation, reintegration and recovery".

Although, in principle, compensation corresponds to the offender, in those cases in which the offender is a state official or acts on behalf of

18 General Comment No. 14 (n 1). Emphasis added.

19 Crimes against sexual indemnity are often the source of various psychological disorders and have repercussions on the personality of underage victims, still in a state of formation, affecting their sociability and future sexual life. In addition, the very existence of the process can have a negative impact on their development, causing situations of secondary victimisation associated with contact with the institutions responsible for criminal prosecution.

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the state, given the state's obligation of prevention, subsidiary liability must be established. Moreover, even in cases where the crime is committed by a private individual, the possibility of establishing state victim assistance programmes is also contemplated.

j) The right to have his best interests be a primary consideration in any action concerning him and its compatibility with the rights of the accused

According to GC 13, "due process must be respected at all times and in all places. In particular, all decisions taken must be taken with the primary *aim of protecting the child, safeguarding his or her subsequent development and ensuring his or her best interests* (and those of other children, if there is a risk of recidivism by the perpetrator)".[20]

The right of every child to have his or her best interests taken as a primary consideration was developed by the Committee on the Rights of the Child in GC 14, in which the Committee explains that the best interest of the child is nothing other than respect for all of his or her rights and his or her holistic development. In this sense, the best interests of the child in criminal proceedings imply respect for all the rights described above.

However, the need to take into consideration the best interests of the child when he or she is the victim of certain particularly serious criminal acts should not entail a reduction in the rights of the accused. The particular situation and special vulnerability of child victims or witnesses requires special weighing of the protection needs that they require without any detriment to the right of the accused to a fair trial surrounded by all its guarantees. Obtaining the truth while respecting the presumption of innocence and the rules of a fair trial is not at odds with respect for the best interests of the child.

Thus, for example, one of the essential rules of the development of the process is the *principle of contradiction*.[21] However, in this context there is

20 General Comment No. 13 (n 1) para. 54. Emphasis added.

21 Article 6.3 of the European Convention on Fundamental Rights and Freedoms of November 4, 1950, lists the rights that, as a minimum, every accused person has, and among them, in letter d), the right "to examine or have examined the witnesses who testify against him and to obtain the summoning and examination of witnesses who testify in his favour under the same conditions as witnesses who testify against him". This implies the right to a contradictory trial in which the accused may defend

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also the need to take into consideration the rights and needs of children who are victims of crimes or act as witnesses in criminal proceedings, for whom the same process of repeatedly giving testimony and even more so in the presence of their alleged abuser, can lead to revictimisation. The rights of the victim, through the best interests of the child, and the rights of the accused, through the presumption of innocence, converge in equal importance and must be compatible.

Thus, although the evidence must normally be presented in a public hearing in the presence of the accused in order to be able to have, before the judge, a rational and orderly discussion based on the principle of contradiction, the case law of the ECtHR has also expressly admitted that this general rule admits exceptions, through which, in accordance with the law, it is to integrate the result of the summary investigation proceedings into the evidentiary assessment, if they are subject to certain requirements of contradiction.[22]

These modulations and exceptions take into account the presence of other relevant principles and interests that may coincide with those of the accused. In such exceptional cases, it is possible to modulate the manner of giving evidence and even to give probative value to the incriminating content of statements given outside the oral trial if the defendant's right of defence is sufficiently guaranteed.[23]

The ECtHR has recognised that victims often experience trials for crimes against sexual freedom as “a real ordeal”; it is not only that they are forced to recall and narrate to third parties the circumstances of the aggression, but also the undue repetition with which, to this end, their appearance is

himself against the accusation, presenting evidence in his defence and combating incriminating evidence, together with the possibility of participating in the proceedings and formalities of the trial, in order to exercise his right to be heard and to argue, in his interest, what is in his best interest.

22 In this sense, the ECtHR has declared that the incorporation of statements into the proceedings that have taken place in the investigation phase of the crime does not in itself harm the rights recognised in paragraphs 1 and 3 d). of Art. 6 of the European Convention, provided that there is a legitimate reason that prevents the statement at the oral trial and that the rights of defence of the accused have been respected; that is, provided that the accused is given an adequate and sufficient opportunity to answer the prosecution's testimony and question its author either when it is given or afterwards (ECHR of July 2, 2002, case of S.N. v. Sweden).

23 ECHR of 20 November 1989, Kostovski case, § 41; 15 June 1992, Lüdi case, § 47; 23 April 1997, Van Mechelen et al. case, § 51; 10 November 2005, Bocos-Cuesta case, § 68; and 20 April 2006, Carta case, § 49.

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required at the various stages of the proceedings. Such circumstances are accentuated when the victim is a minor.[24]

Since, in crimes of sexual abuse, the child's statement is usually the only direct evidence of the facts, since the rest are usually limited to relating what the child has narrated or to evaluating the conditions in which he or she narrated the facts or his or her credibility,[25] the focus of attention naturally falls on the guarantees that must surround the examination of the child and the way in which it can be introduced into the debate of the oral trial. In the precise delimitation of the minimum precautions that must be established in favour of the defence in order to simultaneously protect the victim and guarantee a trial with all the appropriate guarantees, the canon established in the ECHR of 28 September 2010, A.S. v. Finland, § 56, is enlightening and relevant. § 56 states that:

> "[W]hoever is suspected of having committed the crime must be informed that the child is going to be heard, and must have an opportunity to observe the examination, either at the time it takes place or afterwards, through its audiovisual recording; he must also have the opportunity to address questions to the child, directly or indirectly, either during the course of the first examination or on a later occasion".

These are the minimum guarantees that, according to the case law of the ECtHR, must be observed.

In short, the summary of the pronouncements of the ECtHR that have been cited indicates that "the protection of the interests of the minor who claims to have been the object of a crime justifies and legitimizes the adoption, in his favour, of protective measures that can limit or modulate the ordinary way of carrying out his interrogation". This may be carried out by an *expert* (whether or not outside the state bodies in charge of the investigation), who must conduct his examination according to the guidelines indicated to him; it may be carried out *avoiding visual confrontation* with the accused (by means of physical separation devices or the use of videoconferencing or any other technical means of remote communication); if the presence of the minor at the trial is to be avoided, the

24 ECHR of 20 December 2001, case P.S. v. Germany; 2 July 2002, case S.N. v. Sweden; 10 November 2005, case Bocos-Cuesta v. The Netherlands; 24 April 2007, case W. v. Finland; 10 May 2007, case A.H. v. Finland; 27 January 2009, case A.L. v. Finland; 7 July 2009, case D. v. Finland; or, finally, the most recent of 28 September 2010, case A.S. v. Finland.

25 ECHR case P.S. v. Germany, § 30; case W. v. Finland, § 47; case D. v. Finland, § 44.

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previous examination must be *recorded*, so that the trial court can observe its development, and in any case, the *defence must be given the possibility of witnessing the examination and directing directly or indirectly, through the expert, the questions or clarifications that it considers necessary for its defence, either at the time of the examination, or at a later time.* In this way, it is possible to avoid unnecessary reiterations and confrontations, and, at the same time, it is possible to submit the manifestations of the minor that incriminate the accused to a sufficient contradiction, which balances his position in the process.

In this regard, it is worth noting the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* of October 25, 2007 (Lanzarote Convention), which in Article 35.2 provides the need to adopt measures to ensure that interviews with minors who are victims of this type of crime are recorded and that these recordings can be accepted as evidence in the oral trial.[26]

26 Likewise, within the framework of European Union law, Directive 2012/29/EU, on the rights and protection of crime victims, establishes the obligation of Member States to ensure that “in criminal investigations, all statements taken from child victims may be recorded by audio-visual means and these recorded statements may be used as evidence in criminal proceedings” (art. 24.1.a), with national law having to determine the procedural rules for these national recordings and their use. Also, Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ 2 335/01 art 20.4 establishes the obligation of the Member States to ensure that the statements of child victims or witnesses are recorded by audio-visual means and that such recordings may be admitted as evidence in criminal proceedings
In the same sense, within the framework of the so-called soft law, *the Brasilia Rules on access to justice for persons in vulnerable conditions,* approved in the Plenary Assembly of the XIV Ibero-American Judicial Summit, contain the recommendation (Rule 37) of “the adaptation of the procedures to allow the anticipated practice of the evidence in which the person in vulnerable condition participates, to avoid the repetition of statements, and even the practice of the evidence before the aggravation of the disability or illness. For these purposes, it may be necessary to record on audio-visual support the procedural act in which the person in condition of vulnerability participates, in such a way that it can be reproduced in the successive judicial instances”.

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k) The necessary specialisation in childhood for the operators involved in the procedure

Among the recommendations contained in GC 13 is the need for investigations to be carried out "by *qualified professionals* who have received extensive and specific training for this purpose and must follow an approach based on the rights of the child and his or her needs", taking "extreme *care not to harm the child by causing him or her further harm in the investigation process*".[27] This specialisation is reiterated when it calls for "*specialized juvenile or family courts for children who have been victims of violence*", or "the creation of *specialized units in the police, the judiciary and the prosecutor's office*".[28]

3. Spanish Law: Organic Law 8/2021 On the Integral Protection of Children and Adolescents Against Violence

The criminal process in democratic states has normally been centred, on the one hand, around the guarantees of the passive subject, i.e., the person accused of committing the crime; and, on the other hand, on the idea of justice through the punishment and rehabilitation of the guilty party. Since the penal system replaced private vengeance with public and institutional intervention, which is even-handed and dispassionate, victims of crime have suffered a certain neglect.

From this perspective, it is easy to understand the phenomenon known as "secondary victimization" which includes all the material and moral damages suffered by the victim as a result of the criminal justice system itself, damages that are a consequence of the lack of adequate assistance and information from the criminal justice system and that are added to the negative experience of having suffered a crime.

In response to this, Spanish criminal law, like other forms of national criminal law, has tried to restore the victim's role in the criminal process in recent years, so that the latter also takes into account the victim's rights and aims, as far as possible, to repair the harm suffered by the victim. If this orientation has been given to all victims, it has been accentuated more when they were in a situation of special vulnerability, as is the case with children or people with disabilities, who need special protection.

27 General Comment No. 13 (n 1) para. 51. Emphasis added.
28 Ibid. para. 56. Emphasis added.

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In this way, there has been a shift from the old, almost sole interest in the causes of the crime and the punishment of the perpetrator, to social concern for the consequences of the crime, which focuses attention on the victim and, in the case of sexual abuse, on the serious consequences, particularly those which are psychological, that these crimes produce in the victim.

Until the beginning of 2021, the Spanish legal system included the guarantees of the child victim of a crime through various provisions contained in: Organic Law 1/1996 on the *Legal Protection of Minors*; Law 4/2015, on the *Statute of the Victim of Crime* (hereinafter the *Statute of the Victim*);[29] and various provisions of the *Criminal Procedure Law*[30] (hereinafter the *LECrim*). However, on the recommendation of the Committee on the Rights of the Child, it undertook a long process of legal reflection to help eradicate all types of violence against children. This process has crystallised into the recent *Organic Law 8/2021 on the comprehensive protection of children and adolescents against violence*[31] (hereinafter LO 8/2021), which introduced important modifications to all previous laws.

This law is holistic and comprehensive in two ways: a) in terms of the areas it covers (the family, the centres of the protection system, education, academia, health, sports, leisure, the digital environment, social services, the media, law enforcement agencies and the judiciary) and b) in terms of the actions it provides for (awareness and training, prevention, detection, punishment and redress).

Naturally, it places special emphasis on prevention, as its aim is to eradicate violence against children, but it also includes a profound legislative reform in relation to the rights of children who have been victims or claim to be victims.

For the purposes of this study, the reforms carried out in the *LECrim*, as well as in the *Statute of the victim*, are of special relevance.

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29 Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito. BOE-A-2015–4606 (Statute of the victim), available on https://www.boe.es/buscar/act.php?id=BOE-A-2015-4606, access 28.08.2022.

30 Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal. BOE-A-1882–6036 (LECrim), available on https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036, access 28.08.2022.

31 Ley Orgánica 8/2021, de 4 de junio, de protección integral a la infancia y la adolescencia frente a la violencia. BOE-A-2021–9347 (LO 8/2021), available on https://www.boe.es/eli/es/lo/2021/06/04/8, access 28.08.2022.

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The latter has configured a regulatory framework to provide the public authorities with "the broadest possible response, not only legal but also social, to the victims, not only to repair the damage in the framework of criminal proceedings, but also to minimize other traumatic effects in moral terms that their condition may generate, regardless of their procedural situation".[32] It fills a legal vacuum by establishing the *Statute* as a general catalogue of the procedural and extra-procedural rights of all victims (or those claiming to be victims) of crimes. And, within this framework, the *Statute* imposes as an obligation, "that, in the case of minors, the best interests of the child shall guide any measure and decision taken in relation to a minor victim of a crime during criminal proceedings".[33]

To explain those issues that are considered most relevant to the object of our study, we will explain the current regulation following the questions that the organisers of the seminar asked us:[34]

1) How does the judicial system differentiate between the alleged victim who is still a minor at the time of the complaint and the adult who files the complaint of having been abused as a minor?

There are several issues to distinguish between in this question:

a) In relation to the consideration of the victim, there is no difference because the complaint is filed as an adult: one is a victim at the time the crime is committed (when he/she was a minor) and it is the laws and circumstances at that time or period of time – when he/she is a victim – (e.g., current legislation on important matters such as: age of sexual consent, penalties by type of crime, statute of limitations, etc.) that are considered for the purposes of prosecution and trial. The laws in force at the time the complaint is filed (as an adult) are not used, but rather the laws in force at the time the acts were committed (when the victim was a minor).
b) However, if the complainant is a minor, specific protection measures are adopted: adapted language, the intermediation of experts, a friendly courtroom, an in-camera trial, avoiding visual confrontation with the accused, data protection / safeguarding the privacy of the minor, the

32 Preamble of Ley 4/2015 (n 29).
33 Ibid.
34 Some questions have been divided into several questions for clarity.

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complainant being accompanied during the hearing, taking the statement as pre-constituted evidence, the benefit of automatic legal aid regardless of their economic situation, etc. However, although in principle these guarantees apply when the alleged victim *is a* minor, some of these measures do not exclude the case where the complainant is of legal age.

c) In any case, the difference may be in the statute of limitations of the crime. Prior to LO 8/2021, crimes began to be counted for the computation of the statute of limitations when the victims (minors) reached 18 years of age; with the new law, the statute of limitations begins to count from the age of 35 years. According to the preamble of the law:

> "The statute of limitations for the most serious crimes committed against minors is extended, modifying the date on which the period begins to run: the statute of limitations will be counted from the time the victim reaches thirty-five years of age. This avoids the existence of spaces of impunity in crimes that statistically have proven to be slow to be assimilated by the victims at the psychological level and, many times, of late detection".

2) What provisions exist for minors to file a complaint a) personally, b) through a parent or c) through a guardian and/or advocate?

As regards the complaint, *all victims, regardless of their age, may file the complaint by themselves,* since the Statute of the Victim does not exclude this possibility and they may designate a person to accompany them, and the formal validity of the complaint is not subject to the formal requirement of representation.[35]

In this regard, LO 8/2021 explicitly provides that the police must allow "minors, who so request, to file a complaint by themselves and without the need to be accompanied by an adult".[36]

35 Article 4 of the Law on the Statute of the Victim. In the same sense, Article 17.1 of LO 8/2021 (n 31) provides that "children and adolescents who were victims of violence or witnessed any situation of violence against another minor, may report it, personally, or through their legal representatives, to the social services, the Security Forces and Corps, the Public Prosecutor's Office or the judicial authority and, where appropriate, to the Spanish Data Protection Agency".

36 LO 8/2021 (n 31) article 50.2.e).

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In addition to the child victim, a complaint may also be filed by the child's parents, guardians, or legal representatives, as well as by any person who has knowledge of the facts. As discussed in the next question, some persons even have a qualified duty to report suspected abuse.

In order to make complaint mechanisms accessible and friendly, "public administrations shall establish safe, confidential, effective, adapted and accessible communication mechanisms, in a language they can understand, for children and adolescents, who may be accompanied by a person of their trust that they themselves designate".[37] Likewise, "public administrations shall guarantee the existence and support of electronic means of communication, such as free telephone helplines for children and adolescents, as well as their knowledge by civil society, as an essential tool available to all persons for the prevention and early detection of situations of violence against children and adolescents".[38]

To facilitate children's knowledge of all reporting procedures, LO 8/2021, provides that all educational centres at the beginning of each school year, as well as all establishments where minors usually reside, at the time of their admission, shall provide children with all the information concerning the procedures for reporting situations of violence, as well as the persons responsible in this area. Likewise, these centres will provide, from the very beginning, information on electronic means of communication, such as telephone helplines for children. This information should be kept permanently updated in a visible and accessible place, adopting the necessary measures to ensure that children can consult it freely at any time, allowing and facilitating access to these communication procedures and existing helplines. All information shall be available in accessible formats.[39]

3) Are there any special rules on mandatory reporting?

There are special rules on mandatory reporting. Organic Law 8/2021 provides for two types of reporting obligations: a general one and a qualified one.

In accordance with Article 15 of the law, "Any person who notices signs of a situation of violence against a minor is obliged to report it immediately

37 Ibid. article 17.2.
38 Ibid. article 17.3.
39 Ibid. article 18.

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to the competent authority and, if the facts could constitute a crime, to the Security Forces and Corps, the Public Prosecutor's Office or the judicial authority, without prejudice to providing the immediate care that the victim may require".

In addition to this general duty of communication, there is a qualified duty provided for in Article 16, according to which: "The duty of communication provided for in the preceding article is especially applicable to those persons who, by reason of their position, profession, trade or activity, are entrusted with the assistance, care, teaching or protection of children or adolescents and, in the exercise thereof, have become aware of a situation of violence exercised over them".

It should be noted in this regard that there are no exceptions to this duty. Thus, the exemption from the obligation to report that ascendants, descendants and collateral relatives have in article 261 of the LECrim, is explicitly excluded after Law 8/2021 for crimes against life, homicide, injury, habitual abuse, against freedom or against sexual freedom and indemnity or trafficking in human beings, when the victim of the crime is a minor or a person with disabilities in need of special protection.

Therefore, there is an inexcusable duty of denunciation for all persons. In relation to what are the consequences of non-compliance with this duty:

a) The most serious ones may produce a criminal response, such as the case of Article 450 of the Penal Code,[40] or the more restricted case of Article 408.[41]

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40 Article 450 of the PC: "1. Whoever, being able to do so with his immediate intervention and without risk to himself or others, does not prevent the commission of a crime that affects people's life, integrity or health, freedom or sexual freedom, shall be punished with a prison sentence of six months to two years if the crime is against life, and a fine of six to twenty-four months in other cases, unless the crime not prevented corresponds to the same or lesser penalty, in which case the lower penalty shall be imposed in degree to that of the former.
2. The same penalties shall be incurred by anyone who, being able to do so, does not go to the authorities or their agents to prevent a crime as provided for in the preceding paragraph and whose next or current commission is known to him".

41 Article 408 PC: "The authority or official who, failing to fulfil the obligation of his office, intentionally fails to promote the prosecution of crimes of which he has knowledge or of those responsible, shall incur the penalty of special disqualification for public employment or office for a period of six months to two years".

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b) Apart from these cases, the consequence of non-compliance with the obligation to report operates within the scope of the LECrim. in Article 262, which provides for fines.[42]
c) Finally, the third of the possible channels through which this non-compliance with the obligation to report suspected abuse may be addressed is the disciplinary channel within the framework of the different ethical rules and sanctioning rules specific to each professional sector.

The non-existence of exceptions to the obligation to report also extends to the obligation to declare. LO 8/2021 has given a new wording to art. 416 of the LECrim, according to which the exemption from declaring that exists for ascendants, descendants, a spouse or a person united by a de facto relationship analogous to marriage, siblings and collateral relatives up to the second degree *is not applicable,* among others, in the case of crimes against sexual freedom.

Finally, and in general, the Criminal Code provides that in crimes committed against minors or persons with disabilities in need of special protection that affect eminently personal legal property, the *forgiveness of the offended person does not extinguish criminal liability.*[43] Therefore, just as there are no exceptions to the obligation to report a crime or testify to it, there are no exceptions to liability for failure to comply with this duty.

4) Can parents prevent their minor children from testifying in criminal proceedings concerning their own abuse?

In Spanish law, in accordance with the Convention on the Rights of the Child, the right to be heard is generally configured as a right of the child and not of his or her parents.

42 Article 262 of the Criminal Procedure Act: "Those who, by reason of their positions, professions or trades, learn of a public crime, shall be obliged to report it immediately to the Public Prosecutor's Office, to the competent Court, to the examining magistrate and, failing that, to the municipal or police officer nearest to the site, if it is a flagrant crime.
Those who fail to comply with this obligation shall incur the fine indicated in article 259, which shall be imposed by disciplinary action....
If the person who incurred the omission is a public employee, they shall also be brought to the attention of his immediate superior for administrative purposes.
The provisions of this article are understood when the omission does not give rise to liability under the Laws".

43 Article 130 of the Penal Code.

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Thus, if there are judicial proceedings in progress, parents cannot oppose or prevent their children from testifying, nor the way in which they do it in front of the judge (pre-constituted evidence, plenary, video conference...). They could refuse in previous instances: to the police or any other entity other than the judge.

In particular, in relation to the right to be heard and give testimony in proceedings for violence, Article 11.1 of LO 8/2021, provides that:

> "The public authorities shall ensure that children and adolescents are heard and listened to with all guarantees and without age limit, ensuring, in any case, that this process is universally accessible in all administrative, judicial or other proceedings related to the accreditation of violence and the reparation of victims. The right to be heard of children and adolescents may only be restricted, in a reasoned manner, when it is contrary to their best interests".

Therefore, the child will have the right to testify without his/her parents being able to prevent him/her from doing so. The only exception to the right to be heard provided for in both the LOPJM[44] and LO 8/2021 relates to when the right to be heard is contrary to the interests of the child.

The Spanish Constitutional Court has repeatedly stated that the right of minors to be "heard and listened to" in all judicial proceedings in which they are involved and which lead to a decision that affects their personal, family or social sphere, is part of the unavailable legal status of minors, as a rule of public order, of inexcusable observance for all public authorities.[45] Its constitutional relevance is reflected in various decisions of this Court, which have deemed the right to effective judicial protection of minors to have been violated in cases of judicial proceedings in which they had not been heard or explored by the judicial body in the adoption of measures affecting their personal sphere.[46] In accordance with this constitutional jurisprudence, the Supreme Court has ruled on several occasions that allowing the testimony of the minor concerned is mandatory for the judge, who

44 Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil BOE-A-1996–1069 (LOPJM), available on https://www.boe.es/buscar/act.php?id=BOE-A-1996-1069, access 29.08.2022.

45 STC 141/2000, of May 29, 2000, FJ 5.

46 SSTC 221/2022, of November 25, FJ 5; in the same sense, SSTC 71/2004, of April 19, FJ 7; 152/2005, of June 6, FFJJ 3 and 4; 17/2006, of January 30, FJ 5; and STC 64/2019, of May 9.

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may only fail to hear him/her by explicitly motivating it on the basis of the impossibility of doing so or in the best interests of the child.

Therefore, reasons must be given as to why, in the best interests of the child, he/she has not testified. In any case, Article 9 of the LOPJM provides that "Whenever in administrative or judicial proceedings the appearance or hearing of minors is denied [...], the decision will be motivated in the best interests of the minor and communicated to the Public Prosecutor, the minor and, where appropriate, his representative, explicitly indicating the existing resources against such decision".[47]

Therefore, it does not depend on the will of the parents whether the child testifies or not because, in any case, it is a right of the child that is covered by guarantees.

However, this is a right of the child and not an obligation and, therefore, the child may waive his or her right and not testify. However, in this case, it must be taken into account that in cases of sexual crimes against minors, the victim, the evidence and the testimony are usually the same and, consequently, if the children do not testify in front of the judge (in whatever form), the main prosecution evidence would not be substantiated.

5) What provisions exist for victims to participate in a trial through a lawyer or attorney?

First of all, it should be noted that any alleged child victim may appear, duly represented, in criminal proceedings and be a party to them regardless of his or her age.[48] Likewise, any child allegedly harmed by the crime may appear in order to exercise the civil actions for reparation that he or she considers.[49] Finally, any alleged child victim may appear as a private pro-

47 LOPJM (n 44) article 9.

48 New article 109bis of the LECrim after its reform by LO 8/2021: "*The victims of the crime* who have not waived their right may exercise the criminal action at any time before the qualification of the crime, although this will not allow [them] to go back or reiterate the actions already practiced before their appearance. If they appear once the term to file the indictment has elapsed, they may exercise the criminal action until the beginning of the oral trial by adhering to the indictment filed by the Public Prosecutor's Office or the rest of the defendants". Emphasis added.

49 New article 110 of the LeCrim after its reform by LO 8/2021: "The *persons harmed* by a crime who have not waived their right may become a party to the case if they do so before the qualification of the crime and exercise the appropriate civil actions, as appropriate, without thereby backtracking in the course of the proceedings. If they

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secutor at any time during the proceedings.[50] Therefore, the alleged child victim has the right to participate in all types of accountability proceedings, including disciplinary proceedings within the administrative framework.

In order to be able to participate in the process, in accordance with article 14 of LO 2021, every child victim of violence has the right to a free defence and representation by a lawyer and attorney.[51] A lawyer who, in order to be able to act as a public defender (free justice) for this type of crime, must previously have received "specific training in the rights of children and adolescents, with special attention to the Convention on the Rights of the Child and its general observations, and must receive, in any case, specialised training in violence against children and adolescents".[52]

LO 8/2021 also provides for the obligation of the Bar Associations to adopt all "the necessary measures for the urgent appointment of a public defender in proceedings for violence against minors and to ensure their immediate presence and assistance to the victims".[53] This obligation is extended in the same terms to the Bar Associations for "the urgent appointment of a public prosecutor in proceedings for violence against minors when the victim wishes to appear as a private prosecutor".[54]

To facilitate access to a lawyer, it is explicitly provided that the police, upon learning of an act of violence against a child, "shall inform the child without delay of his or her right to free legal assistance and, if he or she so desires, shall request the competent Bar Association to immediately

become a party after the term to file an accusation has elapsed, they will be able to exercise the criminal action until the beginning of the oral trial by adhering to the accusation filed by the Public Prosecutor's Office or the rest of the accusations.
Even when the injured parties do not appear as parties in the case, it is not understood that they waive the right to restitution, reparation or compensation that may be agreed in their favour in a final judgment, being necessary that the waiver of this right be made in a clear and definite manner". Emphasis added

50 LO 8/2021 (n 31) article 14.6 "Minors who are victims of violence may appear as private prosecutors at any time during the proceedings, although this will not allow the proceedings already carried out prior to their appearance to be taken back or reiterated, nor may it entail a reduction in the right of defence of the accused".

51 Ibid. article 14.1 "Minors who are victims of violence are entitled to free defence and representation by lawyer and attorney in accordance with the provisions of Law 1/1996, of January 10, on free legal aid."

52 Ibid. article 14.2.

53 Ibid. article 14.3.

54 Ibid. article 14.4.

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appoint a lawyer from a specific public defender's office to appear at the police station”.[55]

The benefit of legal aid is also extended to the successors in title in the case of the death of the victim, provided that they were not participants in the facts.[56]

In any case, it is important to point out that, even if the alleged child victim is represented by a lawyer and attorney, the information must be provided in an accessible and friendly manner, adapted to his or her personal circumstances and conditions, as explained in the following point.

6) To what extent are alleged victims entitled to have access to information at the various stages of the different criminal and/or disciplinary proceedings?

In Spain, *every victim (regardless of age) has the right*, from their first contact with the authorities and officials, including the moment prior to the filing of the complaint, to receive, without unnecessary delay, information adapted to his or her personal circumstances and conditions and to the nature of the crime committed and the damages suffered.[57]

Thus, in the moments prior to the filing of the complaint, LO 8/2021 explicitly provides in Article 10 (entitled “Right to information and advice”) that:

> “1. Public administrations shall provide children and adolescent victims of violence, in accordance with their personal situation and degree of maturity, and, where appropriate, their legal representatives, and the person of their trust designated by them, with information on the measures contemplated in this law that are directly applicable to them, as well as on the existing mechanisms or channels of information or denunciation.
>
> 2. Child and adolescent victims of violence will be referred to the corresponding Victim Assistance Office, where they will receive the information, advice and support that is necessary in each case, in accordance with the provisions of Law 4/2015, of April 27, on the Statute of the Victim of Crime.

55 Ibid. article 50.2.f).
56 Ibid. article 2 g) of Law 1/1996 on free legal aid, amended by LO 8/2021.
57 Statute of the Victim (n 29) article 5.

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3. The information and advice referred to in the previous paragraphs shall be provided in clear and understandable language, in a language they can understand and in formats accessible in sensory and cognitive terms and adapted to the personal circumstances of the addressees, guaranteeing universal access. In the case of territories with co-official languages, the child or adolescent may receive such information in the co-official language of his or her choice".

Once the proceedings have been initiated, it is provided[58] that any victim has the right to make a request to be notified without unnecessary delay of the date, time and place of the trial, as well as the content of the accusation against the offender, and to be notified of the following resolutions:

a) The resolution by which it is agreed not to initiate criminal proceedings.
b) The sentence that puts an end to the proceeding.
c) Resolutions agreeing to the imprisonment or subsequent release of the offender, as well as the possible escape of the offender.
d) Resolutions agreeing to the adoption of personal precautionary measures or modifying those already agreed upon, when their purpose was to guarantee the victim's safety.
e) The resolutions or decisions of any judicial or penitentiary authority that affect subjects convicted of crimes committed with violence or intimidation and that pose a risk to the safety of the victim. In these cases, and for these purposes, the Penitentiary Administration will immediately communicate to the judicial authority the resolution adopted for its notification to the victim affected.
f) Likewise, he/she shall be provided, upon request, with information regarding the status of the proceedings, unless this could prejudice the proper conduct of the case.

All such communications shall include, at least, the operative part of the resolution and a brief summary of the basis for the resolution.

However, in the same way that the right of the alleged victim to be informed is provided for, it is also provided that "victims may at any time express their wish not to be informed of these resolutions".[59]

58 Ibid. article 7.1.
59 Ibid. article 7.2 Emphasis added.

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Moreover, as explained in the answer to question 10, the child victim not only has the right to receive information about the proceedings, but also about the execution of the sentence.[60]

Finally, it is important to refer to *how this information is expected to be provided*.

Pursuant to Article 4 of the Victims' Statute, every victim has the *right to understand* and be understood in any action to be taken from the filing of a complaint and during criminal proceedings, including information prior to and for the filing of a complaint:

a) All communications with victims, whether oral or written, shall be made in clear, simple and accessible language, in a manner that takes into account their personal characteristics and, especially, the needs of persons with sensory, intellectual or mental disabilities or their minority. If the victim is a minor or has judicially modified capacity, communications shall be made to his or her representative or the person assisting him or her.
b) The victim shall be provided, from the first contact with the authorities or with the Victim Assistance Offices, with the necessary assistance or support so that he/she can make him/herself understood before them, which shall include interpretation in legally recognised sign languages and means of support for oral communication for deaf, hearing impaired and deaf-blind persons.
c) The victim may be accompanied by a person of his or her choice from their first contact with authorities and officials.

However, it should be noted that, although the child has the right to information, it is possible that on the recommendation of an expert and through the legal guardians of the minor, it is considered in the child's interest to provide him with the information in doses and/or modulate how it is conveyed and at what time; for example, how an acquittal can affect a minor victim, who is also undergoing a therapeutic process, etc.

On the other hand, the right to information also applies when not involved in a criminal proceeding, but in an administrative *disciplinary*

60 Vide infra.

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proceeding, in which it is provided that "any directly or indirectly injured party may appear and take cognisance of the proceedings".[61]

7) What provisions exist for listening to a minor?

Psychology has shown that a child generally experiences his/her intervention in a trial as a potentially stressful experience with long-term effects. Minors can suffer great anxiety before, during and even after the procedural act in which their testimony is concerned. Moreover, confrontation with adults accused of or implicated in the crime against them and aggressive questions from the parties are the situations that can leave the most traumatic aftereffects on children appearing in court. This particular vulnerability of child victims and witnesses calls for their special protection, as well as assistance and support appropriate to their age and level of maturity, in order to avoid trauma or to minimise the impact that their participation in a proceeding may cause.

In the case of the testimony of minors who have been victims of a crime against sexual freedom, the legitimate cause that justifies the claim to prevent, limit or modulate their presence at the oral trial to submit to the personal interrogation of the prosecution and the defence, has to do both with the *nature of the crime under investigation* (which may require a greater guarantee of their privacy) and with the *need to preserve their emotional stability and normal personal development.*

As we saw in the international standards for guaranteeing the rights of the alleged child victim, the ECtHR has established requirements to ensure compatibility between the best interests of the child to be protected against revictimisation and the rights of defence of the accused.

For the purposes of complying with these requirements, Spanish law distinguishes between children under 14 years of age and children over 14 years of age:

a) "When a *person under fourteen years of age* or a person with disabilities in need of special protection must intervene as a witness in a judicial proceeding that has as its object the investigation of a crime of hom-

61 Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas. BOE-A-2015–10565 article 4, available on https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565, access 29.08.2022.

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icide, injury, against freedom, against moral integrity, trafficking in human beings, against sexual freedom and indemnity, against privacy, against family relations, relating to the exercise of fundamental rights and public freedoms, criminal and terrorist organizations and groups and terrorism, against family relations, relating to the exercise of fundamental rights and public freedoms, criminal and terrorist organizations and groups and terrorism, the judicial authority will agree, in any case, to practice the hearing of the minor as pre-constituted evidence, with all the guarantees of the practice of evidence in the oral trial and in accordance with the provisions of the previous article. This process will be carried out with all the guarantees of accessibility and necessary support".[62]

b) When *the alleged victim is older than 14 years of age*, the judge may agree to pre-constituted evidence in light of the circumstances of the case and the situation of the victim or witness, although he/she is not obliged to do so.
   In any case, in the event that the person under investigation is present at the hearing of the minor, visual confrontation with the witness shall be avoided, using, if necessary, any technical means.

The pre-constituted evidence will consist of the hearing of the child practised

> "[T]hrough psychosocial teams that will support the Court in an interdisciplinary and inter-institutional manner, collecting the work of professionals who have previously intervened and studying the personal, family and social circumstances of the minor or disabled person, to improve the treatment of the same and the performance of the evidence. In this case, the parties will transfer to the judicial authority the questions they deem appropriate who, after checking their relevance and usefulness, will provide them to the experts. Once the hearing of the minor has taken place, the parties may request, in the same terms, clarifications from the witness. The statement will always be recorded and the Judge, after hearing the parties, may request from the expert a report giving an account of the development and result of the hearing of the minor".[63]

62 LECrim (n 29) Article 444 ter, introduced by LO 8/2021. Emphasis added.
63 Ibid.

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The formal requirements for the performance of the pre-constituted evidence are: The judicial authority shall guarantee the principle of contradiction in the practice of the statement. The absence of the person under investigation duly summoned will not prevent the practice of the pre-constituted evidence, although his defence counsel, in any case, must be present. In the case of the unjustified absence of the defence counsel of the person under investigation or when there are reasons of urgency to proceed immediately, the act will be substantiated with the public defender expressly designated for this purpose.[64]

On the other hand, in Spain, the so-called "casas del niño" or *Barnahus* are beginning to be implemented. In these centres, an interdisciplinary team made up of health personnel, psychologists, social workers and jurists attends the alleged child victim of sexual abuse and performs all the tests in one place in a child-friendly manner. It is in these places where, once the complaint has been filed, the pre-constituted evidence is also taken.

8) What role and authority do forensic experts have in evaluating their testimony?

With regard to the value of the expert opinions carried out by forensic experts on the evaluation of the testimony, it is a reiterated doctrine of the Supreme Court of Spain that the expert opinions are evidence of discretionary or free appreciation and are not legal or appraised, so that, from the normative point of view, the Law specifies that "the Court will value the expert opinions according to the rules of sound criticism",[65] which, ultimately, means that the evaluation of the expert opinions is free for the Court, as, in general, is established in art. 741 of LECrim for all evidential activity, without forgetting, however, the constitutional prohibition of arbitrariness of the public authorities (art. 9.3 C.E.).

The Court is, therefore, free to assess the expert opinions. It is only limited by the rules of sound criticism – which are not contained in any precept, but which, in short, are constituted by the requirements of logic, scientific knowledge, the maxims of experience and, ultimately, common sense – which, logically, impose on it the need to take into consideration, among other extremes, the difficulty of the matter on which the report

64 Ibid. article 449 bis.
65 Ibid. article 348.

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is based,[66] the technical preparation of the experts, their specialisation, the origin of the choice of the expert, their good faith, the technical characteristics of the report, the firmness of the scientific principles and laws applied, the background of the report (examinations, observation periods, technical tests carried out, number and quality of the reports in the case file, concordance or disagreement between them, the result of the evaluation of the other tests carried out, the Court's own observations, etc.). The latter, finally, must state in its sentence the reasons that have led it to accept the conclusions of the expert's report or not. It is not evidence that provides factual aspects, but criteria that assist the court in the interpretation and assessment of the facts, without modifying the powers that correspond to it in order to assess the evidence.

The rationale for this role given to forensic experts is to be found in the difficulties that exist in relation to the techniques used by forensic experts to evaluate testimonies.

According to the *Guide and Manual for the Comprehensive Forensic Assessment of Gender and Domestic Violence* (Ministry of Justice, 2005), the assessment of the credibility of the testimony of the victim/complainant by the psychologist is included in the action plan, the psychological technique of reference being the *Statement Validity Analysis* (SVA), which defines the steps to be taken in the implementation of the technique, the criteria of Statement Validity, and the criteria of the content of the statement, *Criteria Based Content Analysis* (CBCA), to estimate the credibility of the testimony based on the criteria of reality. However, attention has been drawn to the fact that, unfortunately, sometimes attempts have been made to reduce the SVA to a criterion-based application of CBCA, which is far from the procedure proposed since its origins. In recent years, various scientific publications have sought to draw the attention of all professionals in the field of forensic expertise to be more cautious about the conclusions drawn from the use of the test with the original 19 criteria.

Thus, the evaluation of testimonial evidence, on the one hand, would allow the forensic psychologist to collaborate with the judicial system so that the magistrates can best assess the credibility of this type of testimony, but, on the other hand, the results of the most recent scientific research indicate that the mere analysis of the presence of the so-called credibility criteria is not sufficient to discriminate between real statements and those

66 In this regard, it must be acknowledged that psychiatric expertise is the most far-reaching, complicated and difficult of all forensic expertises.

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that are not. These results sow serious doubts that with this partial analysis it is possible to carry out completely reliable credibility assessments in court which are capable of invalidating the presumption of innocence on their own.

It has also been noted that the SVA is not intended to be applied in all cases, nor to all persons or in all circumstances. In short, the SVA has strengths, weaknesses and limitations, which must be considered in order to be applied correctly, with adequate training and an adequate application being very important, taking into account the limitations and scope of the technique itself, in order to avoid erroneous procedures leading to invalid results.

This characteristic implies that the results of the methods are highly dependent on the evaluator and/or coder, depending on their degree of training, experience and judgement. The reliability of the entire procedure ultimately rests with the interviewer/evaluator, which is why thorough training is essential.

These procedures, therefore, cannot be used in all cases, nor are all professionals trained to do so, nor is every methodology valid for applying the techniques for obtaining and valuing the statements.

All of this supports the Supreme Court's criterion of the discretionary interpretation or free and not legal or assessed appreciation of the evaluations of the testimonies carried out by the forensic experts. Naturally, this does not imply that they do not have a role in the judge's reasoning. But it will be the judge who will assess that evaluation in the light of the circumstances of the case, although, as we have pointed out, he is obliged to state in the reasoning behind the sentence, the reasons why he accepts or does not accept the conclusions of the expert's report.

9) To what extent do alleged victims have the right to present evidence at the various stages of the different criminal and/or disciplinary proceedings?

In addition to what has already been pointed out in question 5 on the participation of the child alleged victim in the proceedings,[67] Article 11 of the Statute of the Victim on active participation in the criminal proceedings should now be highlighted, according to which:

67 Vide supra.

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"Every victim has the right:

a) To exercise criminal and civil action in accordance with the provisions of the Criminal Procedure Law, without prejudice to any exceptions that may exist.
b) To appear before the authorities in charge of the investigation to provide them with sources of evidence and information that he/she deems relevant to the clarification of the facts".

Thus, every alleged child victim has the right to present during the procedure the evidence he/she considers.

And in the disciplinary field, regardless of the sectorial regulations, the general principle derives from Law 39/2015, which, at the expense of processes with a reserved nature, provides that, once the proceedings have been instructed, and immediately before drafting the proposed resolution, the interested parties or, where appropriate, their representatives, who, within a period of no less than ten days or more than fifteen, may allege and submit the documents and justifications they deem relevant, must be made aware of them.

10) Do the alleged victims have access and/or the right to receive a copy of the full judgement/decision?

Yes. As we have indicated in the answer to question 6, unless the alleged victim has declared his or her wish not to be informed, he or she should be notified of all the decisions adopted in the proceedings, including the sentence that ends the proceedings. If the alleged victim has not been a party to the proceedings (in which case he/she should receive a complete copy), this information must contain, at least, the operative part of the judgement and a brief summary of the grounds for it.[68] In the case of a foreign judgement, it must be provided in translation. The victim not only has the right to be informed of the different phases of the proceedings and of the sentence in the terms indicated, but also of the execution of the sentence. Thus, it is provided[69] that victims of certain crimes, including crimes against sexual freedom and indemnity, can request information about

68 Statute of the Victim (n 29) article 7.1.

69 Ibid. article 13 e.

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a) the possible classification of the convict in the third grade before the expiration of half of the sentence (the possibility of leaving the prison during the day, having to go back only to sleep);
b) certain prison benefits, such as the concession of release from prison;
c) the order granting parole to the convict.

And, in view of these notifications, the victim of the crime, even if he or she has not appeared as a party in the case, may either appeal against these decisions or request that the measures or rules of conduct provided by law be imposed on the conditionally released person that they consider necessary to guarantee his or her safety, when he or she has been convicted of acts from which a situation of danger to the victim may reasonably be derived.

11) Can the alleged victims, in one way or another, appeal the court decision?

Yes. As we have seen, in all cases involving resolutions that directly affect them, alleged victims may file an appeal provided that they have appeared as a party in the appeal.

As indicated in question 5, any child alleged to be a victim may appear, duly represented, in criminal proceedings and be a party to them, regardless of his or her age.[70] Likewise, any child allegedly harmed by the crime can appear in person to exercise the civil action for reparation that he/she

70 LECrim (n 29) new article 109 bis after its reform by LO 8/2021: "The victims of the crime_who have not waived their right may exercise the criminal action at any time before the qualification of the crime, although this will not allow [them] to go back or reiterate the actions already practiced before their appearance. If they appear once the term to file the indictment has elapsed, they may exercise the criminal action until the beginning of the oral trial by adhering to the indictment filed by the Public Prosecutor's Office or the rest of the defendants".

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is considering.[71] Finally, any alleged child victim may appear as a private prosecutor at any time during the proceedings.[72]

In all such cases, the child has the right to appeal the court decision.

LO 8/2021 explicitly provides that any decision to dismiss the case shall be communicated to the direct victims of the crime who reported the facts, as well as to the other direct victims whose identity and address are known, and that the victim may appeal the decision to dismiss the case in accordance with the provisions of the Criminal Procedure Act, without it being necessary for him or her to have previously appeared in the proceedings.[73]

In addition, as indicated in question 10, the victim of the crime, even if he or she is not a party to the case, may appeal, in the context of the execution of the sentence, against decisions on the classification of the convicted person in the third grade, on leave of absence or on parole.

12) To what extent do criminal and disciplinary issues coincide with claims for damages and how does this play out procedurally in the different proceedings?

The general principle is that any person criminally liable for a crime is also civilly liable if damage or harm results from the act.[74]

The procedure for claiming liability for damages may be carried out together with the criminal procedure. Pursuant to art. 100 of the *Criminal Procedure Act*, once criminal proceedings have been initiated when a public

71 Ibid. new article 110 after its reform by LO 8/2021: "The persons harmed by a crime who have not waived their right may become parties to the case if they do so before the qualification procedure of the crime and exercise the appropriate civil actions, as appropriate, without this being a step backward in the course of the proceedings. If they become a party after the term to file an accusation has elapsed, they will be able to exercise the criminal action until the beginning of the oral trial by adhering to the accusation filed by the Public Prosecutor's Office or the rest of the accusations.
Even when the injured parties do not appear as parties in the case, it is not understood that they waive the right to restitution, reparation or compensation that may be agreed in their favour in a final judgement, being necessary that the waiver of this right be made in a clear and definite manner".

72 LO 8/2021 (n 31) article 14.6 "Minors who are victims of violence may appear as private prosecutors at any time during the proceedings, although this will not allow the proceedings already carried out prior to their appearance to be taken back or reiterated, nor may it entail a reduction in the right of defence of the accused".

73 Ibid. article 12.

74 Article 116 of the Penal Code.

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employee is accused of criminal conduct, the corresponding civil action may also be brought in addition to the criminal action for the reparation of the damage and compensation for damages caused by the punishable act.

However, the victim may also directly exercise the claim against the party responsible in a civil proceeding separate from the criminal proceeding (for example, for not having appeared as a party in the criminal proceeding).

If the offender is an employee or civil servant, the party affected may exercise the liability claim both against the perpetrator and against the legal person on which he depends. However, it must be taken into account that the claim against the company or the administration due to their connection with the liable party is within the framework of a subsidiary liability.

Article 120 of the Penal Code specifies this subsidiary liability with respect to private companies and Article 121 with respect to public administrations.

Pursuant to Article 120 PC, they are also civilly liable, in the absence of those who are criminally liable:

> "3. Natural or legal persons, in cases of crimes committed in the establishments of which they are owners, when those who direct or administer them, or their dependents or employees, have violated the police regulations or provisions of the authority that are related to the punishable act committed, in such a way that the latter would not have occurred without said infraction.
>
> 4. Natural or legal persons engaged in any kind of industry or trade, for offenses committed by their employees or dependents, representatives or managers in the performance of their duties or services.
>
> 5. Natural or legal persons owning vehicles susceptible of creating risks for third parties, for crimes committed in the use of those by their dependents or representatives or authorized persons".

And Article 121 states:

> "The State, the Autonomous Community, the province, the island, the municipality and other public entities, as the case may be, are subsidiarily liable for the damages caused by those criminally responsible for intentional or negligent crimes, when these are authorities, agents or public officials in the exercise of their positions or functions, provided that the injury is a direct consequence of the operation of public services entrusted to them, agents and employees thereof or public officials in

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> the exercise of their positions or functions, provided that the injury is a direct consequence of the operation of the public services entrusted to them, without prejudice to the patrimonial liability arising from the normal or abnormal operation of such services, which may be demanded in accordance with the rules of administrative procedure, and without, in any case, there being a duplicity of compensation.
>
> If the civil liability of the authority, its agents and employees or public officials is demanded in the criminal proceeding, the claim must be directed simultaneously against the Administration or public entity alleged to be vicariously liable".

In other words, the company or administration for which the party responsible works may be held liable when it acted within the scope of its duties, to the extent that it is considered that there was a lack of due diligence on the part of the employer.

13) A special point of attention is the physical (and cultural) distance between the alleged victim (anywhere in the world) and the court (in Rome). Is there any provision in Spanish law on how to solve this problem?

Spanish law does not foresee the situation of the existence of a great physical distance between the victim and the place of prosecution. But everything explained about pre-constituted evidence can be considered as an effective way to overcome this possible distance. Indeed, if the evidence was properly pre-constituted, the victim does not have to appear in court, and it will be sufficient to send the recording of such evidence to the place of trial. Naturally, this implies that in the victim's place of residence there are expert personnel who can perform such evidence with due guarantees.

On the other hand, what Spanish law does provide for is the cultural difference between the victim and the court. For this purpose, the intervention of cultural mediators is explicitly foreseen, which is progressively being implemented due to requirements, particularly in the area of foreigners.

The cultural mediator helps, on the one hand, the victim to understand the procedure better and, on the other hand, the judge to understand the victim's situation and, in particular, how he/she has been affected by the judged facts.

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14) Is there a role for an office such as the child/victim advocate to ensure the exercise of his/her rights in criminal matters?

Yes. In its article 10, entitled "Right to information and advice", LO 8/2021 establishes, on the one hand, a right to information on the existing mechanisms or channels of information or complaint of the alleged child victim;[75] and, on the other hand, that children alleged to be victims of violence will be referred to the corresponding *Victims Assistance Office*, where they will receive the information, advice and support that is necessary in each case, in accordance with the provisions of the Victims' Statute.

In any case, such information and advice

> "must be provided in clear and understandable language, in a language they can understand and in formats accessible in sensory and cognitive terms and adapted to the personal circumstances of the addressees, guaranteeing universal access. In the case of territories with co-official languages, the child or adolescent may receive such information in the co-official language of his or her choice".[76]

Furthermore, in case such information or advice has not been properly provided, it is also provided that when criminal proceedings are initiated as a result of a situation of violence against a child, the Attorney for the Administration of Justice shall refer the minor victim of violence to the competent *Victim Assistance Office*, when this is necessary in view of the seriousness of the crime, the vulnerability of the victim or in those cases in which the victim so requests.

What are the functions of the Victim Assistance Offices (Oficinas de Atención a la Víctima OAV) when the victim is a child?[77]

The OAV circumscribes its competence to two essential functions when dealing with child victims of crime: firstly, a *function of advice to the victim* and his/her legal representative and/or adult person of his/her confidence who accompanies him/her, in the sense of providing information on the

75 Information that can be given directly to him, "in accordance with his personal situation and degree of maturity, and, where appropriate, to his legal representatives, and to the person of his trust designated by him", LO 8/2021 (n 31) article 10.1.

76 Ibid. article 10.3 1.

77 Ministerio de Justicia, Guía de recomendaciones para. las oficinas de asistencia a las víctimas en el ámbito de la atención a las víctimas del delito en la infancia y la adolescencia, 2/04/2021, available on https://www.mjusticia.gob.es/es/Ciudadano/Victimas/Documents/1292430354241-Guia_de_Recomendaciones_para_las_OAVD_en_la_asistencia_a_victimas_en_la_infancia_y_adolescencia.PDF, access 02.09.2022.

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possibility of filing a complaint in case it has not yet been formulated, referring him/her to the competent authority, and secondly, *a function of accompaniment* by the staff of the Office to the victim from the first moment the complaint is filed and during all the procedural actions in which their intervention is necessary throughout the legal proceedings.

The OAV assists the *victim*, offering a warm welcome, using clear and simple language adapted to the victim's age and avoiding the use of legal terms that cannot be properly understood.

The OAVs do not conduct examinations of child victims of crime, nor do they receive statements. Their intervention consists of an initial emotional containment of the victim and, where appropriate, of the family, bringing the matter to the attention of the competent authorities by means of accompaniment by personnel from the Office, either before the police units specialised in dealing with minors or before the Juvenile Prosecutor on duty.

The OAVs do not intervene with persons under three years of age. And with respect to victims between the ages of four and eleven, they must in any case receive this first intervention of emotional containment through psychology professionals specialised in child victimology in friendly rooms.

If necessary, the OAVs carry out a brief therapeutic intervention for the child victim of the crime. According to their action protocol, the psychology professionals must prioritise their actions to a first emotional containment so that the victim feels that he/she has come to the right place, where they will do their best to meet his/her needs, offering help in those difficult first moments of reflection, and during their intervention they will carry out a psychological support plan for each victim, and this without prejudice to the OAV staff accompanying the victim, if necessary to the corresponding specialised resources that exist in each Autonomous Community according to their own social and health policies.

The general purpose of this psychological support plan will be to enable the minor victim to follow the criminal process without experiencing anguish again, strengthening his/her self-esteem, strengthening decision-making and, in particular, those decisions related to judicial measures.

After the initial emotional containment, psychological assistance will be developed in each case according to the individual needs of each child who is the victim in the crime, and mainly under the following guidelines:

- Evaluation of the child to minimise the crisis caused by the crime, coping with the judicial process derived from the crime, accompaniment

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throughout the judicial process derived from the crime and the empowerment of the victim's strategies and capabilities, enabling the help of the victim's family and closest environment.
- Study and proposal for the application of protective measures that minimise the psychological disorders derived from the crime and avoid secondary victimisation, in accordance with the provisions of the Statute of the Victim of the Crime.

When the alleged victim is over 14 years of age and, therefore, it is not mandatory for the judge to use the pre-constituted evidence, the OAV may *issue a report on the special vulnerability of the child victim of the crime and decide on the appropriateness, if necessary, of performing the judicial examination as pre-constituted evidence.*

In any case, when the judicial examination of the victim takes place, he/she will be accompanied by personnel from the OAV, when necessary.

If the OAV becomes aware that the victim has been summoned again to appear at the trial or hearing, a new report will be issued, if necessary, on whether or not it is advisable to repeat the victim's statement, given the harm that this would cause to his or her emotional well-being, specifying the individual reasons that advise against it.

The OAVs do not, in any case, carry out expert reports on children and adolescents who are victims of crime, or summons and/or judicial notifications to the victims.

15) What role can/should secondary victims play in different types of proceedings?

If by “secondary victims” we mean other minors exposed to the same violence, through observation or witnessed by them, their treatment in criminal proceedings is the same: they receive protection measures and a guarantee of all their rights, as described above.

If by “secondary victim” we mean legal guardians/relatives, who suffer collateral damage because of the victimisation of the minor, a distinction must be made as to whether this “secondary victim” has suffered assessable damage (psychological, for example) or not.

In the first case, he/she will act as a victim, as such, acting on the same plane, since it is a fact that derives directly from the crime.

In the event that this is not the case, a possible means of redress for the secondary victim is the claim for moral damages. Moral damages that

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jurisprudence has recognised are, among others, those in crimes against sexual freedom.

Thus, the Judgement of the Supreme Court of May 31, 2000, pointed out that the proof of moral damages, although related to the general doctrine on the burden of proof of the damage, presents certain peculiarities, especially due to the variety of circumstances, situations or forms in which moral damages can be presented in practical reality. The Judgement referred to explains that the lack of proof is not enough to reject moral damages outright, or that it is not necessary to provide specific proof or a demanding demonstration of it, or that the existence of moral damages does not depend on direct evidence.

Thus, when the non-pecuniary damage emanates from material damage, or results from singular data of a factual nature, it is necessary to prove the reality that supports it, but when it depends on a value judgement resulting from the litigious reality itself, which justifies the operation of the doctrine of *in re ipsa loquitur*, or when there is a situation of notoriety, a specific evidentiary activity is not required. In Ruling 514/2009, of May 20, 2009, the Supreme Court explained that the moral damage does not need to be specified in the proven facts when it "flows directly and naturally from the historical account"[78] contained in the ruling. This judgement requires the following for compensation to be awarded for pain and suffering damages:

a) The need to explain the cause of the indemnity.
b) The impossibility of imposing greater compensation than that requested by the prosecution.
c) To temper the Tribunal's discretionary powers in this area with the principle of reasonableness.[79]

The grounds on which the amount of damages and compensation for moral damages is based must be established, in any case, in a reasoned manner in the decision.[80] In the same sense, the Supreme Court, in its Ruling 636/2018 of December 12, recalls that "the need to motivate judicial decisions [...] with regard to ex delicto civil liability imposes on Judges and Courts the requirement to give reasons for setting the amounts of

78 Tribunal Supremo España, STS 514/2009, 20 May 2009.
79 Ibid.
80 Article 115 of the Penal Code.

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compensation that they recognize in sentences, specifying, when possible, the grounds on which they are based (reviewable in cassation)".[81]

16) The necessary specialisation in childhood for the operators involved in the procedure

Although this question was not asked in the questionnaire, I think it is of particular relevance to the topic at hand and is, moreover, the last right that we exposed when talking about international standards.

Spanish law requires the specialisation of all those involved in proceedings that affect children.

Thus, in the first place, Article 2.5 of the Organic Law on the Legal Protection of Minors, in terms of the assessment and determination of the best interests of the child, provides that:

> "Any resolution of any jurisdictional order and any measure in the best interests of the minor must be adopted respecting the due process guarantees and, in particular:
>
> (b) The involvement of qualified professionals or experts in the process. If necessary, these professionals must have sufficient training to determine the specific needs of children with disabilities. In particularly relevant decisions affecting the minor, the collegiate report of a technical and multidisciplinary group specialized in the appropriate fields shall be counted on".

On the other hand, LO 8/2021 on the *Integral Protection of Children and Adolescents against Violence* regulates the specialised, initial and continuous training of professionals who have regular contact with minors.[82]

This begins with the police, who, on the one hand, should have units in all their offices specialised in the investigation, prevention and detection of and action against situations of violence against children and be prepared for correct and adequate intervention in such cases and, on the other hand, the law also guarantees that in the processes of admission, training and updating of all the personnel of the Security Forces and Corps, specific

81 Tribunal Supremo España, STS 636/2018, 12 December 2018.
82 LO 8/2021 (n 31) article 5.

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content on the treatment of situations of violence against children and adolescents from a police perspective are included.[83]

Specialised training also includes the obligation for lawyers defending child victims of violence to acquire specific training on the material and procedural aspects of violence against children and adolescents, both from the perspective of Spanish Law and European Union and International Law, as well as the provision of continuous training programmes in the fight against violence against children and adolescents.[84]

In addition, the law regulates the need for specialised training on violence against children in judicial and prosecutorial careers, in the corps of attorneys and other personnel in the service of the Justice Administration.

It also provides that, in administrative units, among which are the Institutes of Legal Medicine and Forensic Sciences and the Victims' Assistance Offices, under the Ministry of Justice, other professionals specialised in the different areas of action of these units will be incorporated as civil servants, thus reinforcing the multidisciplinary nature of the assistance to be provided to the victims.[85]

Article 11.2 of LO 8/2021 also provides that "adequate preparation and specialization of professionals, methodologies and spaces shall be ensured to guarantee that the obtaining of testimony from underage victims is carried out with rigor, tact and respect. Special attention will be paid to professional training, methodologies and the adaptation of the environment for listening to victims at an early age".

Along with all this, LO 8/2021, within one year after its entry into force, provides the specialisation of both the judicial bodies and their holders in the instruction and prosecution of criminal cases in crimes committed against minors. To this end, the inclusion of Courts for Violence against Children and Adolescents will be considered, as well as the specialisation of the Criminal Courts and the Provincial Courts. The selective tests that allow access to the specialised organs will also be adapted in the same sense.

In addition, within the same period, the approval of a bill amending the Organic Statute of the Public Prosecutor's Office, for the purpose of

83 Ibid. article 49.

84 To this end, Article 14 of LO 8/2021 provides that: "The Bar Associations [...] shall ensure specific training in the rights of children and adolescents, with special attention to the Convention on the Rights of the Child and its general comments, and shall receive, in any case, specialized training in violence against children and adolescents".

85 Fourth final provision of Law 8/2021 amending the Organic Law of the Judiciary.

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establishing the specialisation of prosecutors in the field of violence against children and adolescents, in accordance with their statutory regime, is foreseen. And, finally, in the same term, the competent administrations will regulate the composition and functioning of the technical teams that provide specialised assistance to the judicial bodies specialised in childhood and adolescence, and the form of access to them in accordance with the criteria of specialisation and training contained in this law.

Finally, the same law foresees the provision of professionals and teams specially trained in the early detection and assessment of and intervention against violence against minors, both by social services[86] and law enforcement agencies.[87]

The aim is to ensure that children who are presumed victims of crimes are always attended to by specialised personnel throughout the entire process.

4. Possible Application to Canon Law

As the Apostolic Constitution *Pascite Gregem Dei* of 23 May 2021 points out, the three ends that make the penal system necessary in ecclesial society are: the restoration of the demands of justice, the amendment of the offender and reparation for scandals.

These purposes mean that canon law, while sharing many things with the criminal systems of the states, has a nature of its own derived from a series of characteristics that should not be forgotten. Among them, the following stand out:

– The direct care of the ethical and religious world corresponds to a religious society and for that reason the infliction of a penalty aims at the amendment of the offender and the reparation of the injured order in terms of its transcendent value.

86 LO 8/2021 (n 31) article 42.

87 Ibid. article 49, which not only provides that all national, regional and local police forces will have units specialised in the investigation, prevention and detection of and action against situations of violence against children and adolescents and prepared for correct and adequate intervention in such cases, but also establishes that in the processes of admission, training and updating of personnel of the Security Forces and Corps, specific content on the treatment of situations of violence against children and adolescents from a police perspective will be included.

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- The general purpose of ecclesiastical society, the ultimate supernatural end, is the sanctification and salvation of the faithful (*salus animarum* principle), to which all canon law is subordinated as supreme law and, therefore, also its penal law.
- Attention to the human person constitutes a peculiar value of the legal system that leans towards a kind of personalism insofar as it aims at the protection of subjective spiritual rights and pays special attention to the personal circumstances of the offender.[88]
- To all these peculiarities can be added others, such as the existence and prevalence of sanctions of a spiritual nature, the right to absolution of penalties in certain circumstances, the amplitude allowed to the judge in the estimation of the criminal condition, the application of *latae sententiae* penalties, etc.

These characteristics clearly differentiate canon criminal law from civil criminal law. But, as we pointed out above, there are also many shared characteristics. Among them is the neglect of the victim in the criminal process. In this sense, although the demands of the victims constitute the highest point of concern in the moral conscience of the Church today, it must be recognised that its procedural system manifests its Achilles' heel in this respect.

And, as the same Apostolic Constitution cited above points out, “the canonical sanction also has a function of reparation and salutary medicine and seeks above all the good of the faithful”. For this reason, within the framework of canonical penal law, it is necessary, even urgent, to assign a greater role to the victim who, normally, is also part of the Church and for whom, in any case, the Church has a special moral obligation of assistance, accompaniment and compassion.

88 The exhortative tone of the ecclesiastical legislator in reproducing the concepts of love, goodness, patience, benevolence, charity, human frailty, etc., among the penal canons is surprising in this sense, since it does not exist in civil penal codes. As John Paul II pointed out to confessors: “I exhort you to consider carefully that canonical discipline concerning censures, irregularities and other penal or precautionary determinations is not the effect of formalistic legalism. On the contrary, it is an exercise of mercy towards penitents in order to heal them in spirit, and for this reason censures are called medicinal”. (“Address to the Apostolic Penitentiary of 1990”, text available on http://www.vidasacerdotal.org/index.php/documentos.del.romano.pontifice/mensajes-a-la-peninteciaria/61-discurso-del-papa-juan-pabo-ii-a-la-penitenciaria-apostolica-de-1990.html, access 02.09.2022).

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And the lack of regulation on the participation of victims in the process does not favour one of the most important objectives of restorative justice, i.e., to prevent the imposition of sanctions from excessively separating common interests from the interests of the persons directly harmed by the crime.

A first step in this direction was taken in the Apostolic Letter in the form of a Motu Proprio by the Supreme Pontiff Francis *Vos estis lux mundi*, hereafter VELM article 5, which explicitly foresees:

> "§ 1. The ecclesiastical Authorities shall commit themselves to ensuring that those who state that they have been harmed,[89] together with their families, are to be treated with dignity and respect, and, in particular, are to be:
>
> a) welcomed, listened to and supported, including through provision of specific services;
> b) offered spiritual assistance;
> c) offered medical assistance, including therapeutic and psychological assistance, as required by the specific case.
>
> § 2. The good name and the privacy of the persons involved, as well as the confidentiality of their personal data, shall be protected".[90]

But this provision needs to be developed to guarantee the rights of the alleged victims in the sense required by international human rights standards, using the example of the guarantee of rights in criminal proceedings that civil criminal rights adopt.

But before we focus on some recommendations in this regard, it is imperative to highlight one last essential characteristic of the canonical criminal process in relation to the civil criminal process: the non-existence of the *ne bis in idem* principle between them. Both systems seek redress for injustice in two distinct orders: the ecclesiastical and the civil. The accused can and must be judged by the two orders on the same facts. This

89 This refers to those affected by the crimes of forcing someone, by violence or threat or by abuse of authority, to perform or suffer sexual acts; to perform sexual acts with a minor or vulnerable person; or to produce, exhibit, possess or distribute, including by telematic means, child pornographic material, as well as to confine or induce a minor or vulnerable person to participate in pornographic exhibitions.

90 Francis, Apostolic Letter in the form of Motu Proprio *Vos estis lux mundi,* available on https://www.vatican.va/content/francesco/es/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html, access 20.09.2022.

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means that the canonical process has a certain analogy with the disciplinary procedures that also take place in the civil order when the victimiser is part of an organisation whose norms of conduct he has violated, disciplinary proceedings which, like the canonical penal process, are not incompatible with the penal process carried out by the state using the same facts.

In any case, as we have indicated when speaking of Spanish law, the victim is not absent in disciplinary proceedings either, and, in any case, the Church cannot disregard the fate of the victim, even if state criminal law has also taken the victim into consideration (and even more so if state criminal law has not done so).

Now, although canonical criminal law must judge the facts in the sexual abuse of minors by priests or religious figures, even if the criminal law of the state has also done so (just as the state must judge the facts even if there has been a canonical criminal process), it should not be forgotten that the principle of prudence in the appearances of the minor victim of abuse must suppose that, if the criminal process in the civil jurisdiction has already been carried out with the due guarantees, the canonical criminal process should assume the same conclusions (as do the disciplinary procedures in the civil order). The objective would be to avoid duplication of proceedings, as well as to prevent secondary victimisation and the victim being subjected to a new process with all that this entails. This does not, I insist, imply that the victim cannot participate in the canonical criminal process and that the Church does not have to assist, accompany, sympathise with and participate in the reparation for the victim.

In any case, whether the criminal process has been carried out in the civil jurisdiction, has not been initiated or is being carried out incorrectly, the canonical criminal process should have clear and precise rules on the guarantee of the rights of the victims in general and of the alleged victims, who are minors in particular.

Among these guarantees, based on the experience of Spanish law and in light of the international standards required by the Convention on the Rights of the Child, I would like to highlight three points that I consider to be particularly relevant:

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a) Full respect for the child's right to report and to be treated with dignity and respect with the assistance of a victim assistance office.

The child, alleged victim of a crime against sexual integrity and indemnity, has the right to report the case, either directly or through someone who represents him/her. This implies the existence of safe, confidential, effective, adapted and accessible communication mechanisms, in a language that children can understand, including electronic means of communication.

These resources must also be accessible, with a guarantee of confidentiality, to all persons, even if they are not the victim, to be able to report cases of which they may have become aware.

Once the report is made (or before if known by other resources), the child's hearing should be carried out by professionals who are experts and qualified in child psychology.

Each diocese should have an Office of Victim Assistance to which the alleged victim would be referred when there is any indication of abuse. As we have seen with the OAV in Spain, the primary functions of this Office would be, first of all, to *advise the victim* and his/her legal representative and/or a person of legal age of trust who accompanies him/her, in the sense of providing information about the possibility of filing a complaint in case it has not yet been formulated; secondly, *a function of accompaniment* by the personnel of the Office from the first moment of the filing of the complaint, and during all the procedural actions in which its intervention is necessary throughout the judicial procedure.

This Office would provide the services that Article 5 of VELM explicitly foresees, namely:

a) reception, listening and follow-up, including through specific services;
b) spiritual care;
c) medical, therapeutic and psychological assistance, as the case may be.

This would be done by expert personnel who offer the alleged *victim* a warm welcome, using clear and simple language, adapted to his or her age, and avoiding the use of legal terms that cannot be properly understood.

The experience of the protocols followed in the FVO in Spain (as well as in other countries) can serve as a model for these offices.

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b) Full respect for the right of the child to be heard, to participate if he/she so wishes in the process, avoiding his/her revictimisation through the use of pre-constituted evidence, with full guarantees for the child and for the accused.

Children who are alleged victims of abuse should be able to exercise their right to be heard and, if they wish, to participate in the process.

The hearing of children should be done in accordance with the principle of prudence and avoiding revictimisation. In this regard, we reiterate that if the child has already testified in the civil penal system and it has been done with full guarantees, the canonical procedure should accept such evidence, unless the child wishes to testify again.

In the case where the child is to be heard, the example given of the hearing in the Spanish system would be suitable for the canonical system: that the hearing be carried out by psychosocial teams that will support the court in an interdisciplinary manner, gathering the work of the professionals who have previously intervened and studying the personal, family and social circumstances of the child, in order to improve their treatment and the performance of the test. In this case, the parties will send the questions they deem appropriate to the person in charge of the procedure, who, after checking their relevance and usefulness, will provide them to the experts. Once the hearing of the minor has been held, the parties may request, in the same terms, clarification from the witness. The declaration will be recorded and the instructor, after hearing the parties, will be able to request from the expert a report giving an account of the development and result of the hearing of the minor.

This type of pre-constituted evidence has the advantage that, while guaranteeing the principle of contradiction (and therefore the guarantees of the accused), it nevertheless avoids the re-victimisation of the child and, in addition, allows the problem of the physical distance between the Court in Rome and the victim's place of residence to be overcome, since only the recording of the evidence and, if necessary, the accompanying report need to be sent.

The victim's participation, if he/she so wishes, in the process should also allow him/her to have access to information about the process and, if necessary, to request an appropriate remedy within the framework of canon law.

In order to be able to participate in the process, access to a lawyer or legal counsel should be guaranteed.

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c) The need for specialised training for all those involved in the procedure.

The third element I wish to insist on in the framework of the canonical criminal process is the need for interventions with children claiming to be victims to always be carried out by specialised expert personnel with specific training in violence against children and, in particular, in sexual abuse.

It is not only a matter of providing specialised initial and ongoing training on child psychology and violence against children in the formation of the clergy and all those who work in the Church and have regular contact with minors (which is also the case), but also of providing each Diocese with specially qualified and expert personnel.

Likewise, all legal operators involved in canonical criminal proceedings in cases of child abuse, in addition to being supported by interdisciplinary teams of experts, must have received specific training on both the material and procedural aspects of violence against children.

In this regard, protocols should be developed for the prevention, awareness, early detection and investigation of and intervention in situations of violence against children in general, and sexual abuse in particular, in order to ensure correct and adequate intervention in such cases.

5. *Assistance and Rights During Penal Procedures in Spain for Persons of Legal Age Who Report Having Been Victims as Minors*

A. Concept of Assistance to Victims of Crime: Developments

Victim assistance is essentially aimed at reducing the negative consequences of the crime on the victim and his or her environment.

The Spanish system has been evolving on the need to provide a comprehensive response to the needs and protection of victims, also avoiding those damages produced after the crime has been committed that are caused by the legal and institutional system itself.

Within the framework of this evolution, without forgetting the traditional forms of assistance to victims (financial compensation, financial aid to cover medical costs or other expenses; restitution, or the aggressor's obligation to reimburse the victim for the damages suffered; or the most recent forms of assistance through the provision of a wide variety of services in a direct and immediate manner), the development of a new model is now

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sought. The Statute of the Victim itself indicates in its Statement of Motives the purpose for which it was created: "to offer from the public authorities the broadest possible response, not only legal but also social, to the victims, not only to repair the damage in the framework of criminal proceedings, but also to minimize other traumatic effects in the moral aspect that their condition can generate, regardless of their procedural situation".

The normative changes in this context are directed towards comprehensive, specialised and individualised assistance. In terms of distributive justice, the aim is to promote reparation more in line with the specific needs and circumstances of the victims; in terms of restorative justice, the objective is to empower the victims and make them participants in the possible peaceful responses to the conflict, as well as to promote reparation, reintegration and encounter, through dialogue and a commitment to the truth.

B. Victims' Rights

They are set out in the Statute of the Victims of Crime, articles 3 to 11 and in its regulations.

In general terms, the law establishes that all public authorities shall ensure the recognition and protection of the rights of victims and, specifically, it provides that every victim has the right to protection, information, support, assistance and care, as well as to active participation in criminal proceedings.

The recognition of these rights extends during the operation of victim assistance and support and restorative justice services, throughout the criminal justice process and for an appropriate period of time after its conclusion, regardless of whether or not the identity of the offender is known and regardless of the outcome of the process, including prior to the filing of the complaint.

The Statute contemplates a series of basic rights that can be grouped into:

a. Right to protection

At all stages of their work, the offices must adopt the necessary protective measures to guarantee the life of the victim and his/her family members, their physical and psychological integrity, liberty, security, sexual freedom

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and indemnity, as well as to adequately protect their privacy and dignity, particularly when they receive statements or have to testify in court, and to avoid the risk of secondary or repeated victimisation.

To this end, accompanying and other actions (such as the preparation of separate spaces) are envisaged to avoid contact between the victim and the offender. In addition, statements must be made without undue delay, as few times as possible and only when strictly necessary, and they may be accompanied by a person of their choice.

Privacy will be protected, and an individual assessment of victims will be carried out to determine their special protection needs.

b. Right to information

In general terms, this right implies receiving, without unnecessary delay, up-to-date information adapted to your personal circumstances and conditions and to the nature of the offence committed and the damages suffered.

This includes the right of victims to understand and be understood. To this end, all communications with victims, whether oral or written, shall be in clear, simple and accessible language, in a manner that takes into account their personal characteristics.

On the other hand, in the criminal field, this right includes receiving information on the date, time and place of the trial, as well as the content of the accusation against the offender, and being notified of the decisions. The communications shall include, at least, the operative part of the decision and a brief summary of the grounds for the decision; information regarding the status of the proceedings shall be provided upon request.

In addition, the Victims' Statute includes the obligation addressed to lawyers and solicitors to respect a reflection period after the criminal act before contacting the victims as a guarantee of their rights.

c. Right to support, assistance and care

These rights include access to the services provided by the public administrations in their sphere of action to provide support, assistance and care. This includes assistance in offices and other public services such as health services, social services, social and labour insertion services, etc.

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d. Right to active participation in the penal procedure

It also recognises the right of victims to participate in the penal procedure at the time of filing a complaint, the right to obtain a certified copy and free linguistic assistance and to a written translation of the copy, when he/she does not understand or speak any of the languages that have official status in the place where the complaint is filed.

In the criminal sphere, this right takes the form of the right to bring criminal and civil actions:

- to appear before the authorities in charge of the investigation in order to provide them with the sources of evidence and the information that it deems relevant to the clarification of the facts;
- to the communication and review of the dismissal of the investigation;
- to participation in the execution;
- reimbursement to the victim of the expenses necessary for the exercise of his/her rights and the costs of the proceedings incurred by him/her;
- to apply for free legal aid;
- to lodge complaints with the Spanish authorities concerning offences committed in the territory of other countries of the European Union;
- to the prompt return of any returnable property owned by him/her that has been seized in the proceedings;
- access to restorative justice services, with the aim of obtaining adequate material and moral reparation for the harm caused by the crime, when certain requirements are met.

6. *Conclusion / Final Reflection*

We recognise that the path towards the recognition of the obligation to denounce and the need to take into account the victims and their rights has already begun in canon law. But a change of perspective is needed in which the Church advises, accompanies, sympathises with and compensates the victims within the framework of a process that fully respects their guarantees and rights and that is in itself restorative.

It is with this in mind that we have made the suggestions in the last section of this paper on canonical criminal procedure.

But, in any case, we must be aware that when criminal law acts, it has already failed since it implies that the violence has already occurred. The main effort to put an end to child abuse in the Church must focus on

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prevention, establishing protocols, mechanisms and any other measure necessary for the creation of safe and inclusive environments for all children, in which they are treated well, in all areas where the Church has contact with children. A safe environment is one that respects the rights of children and promotes a protective physical, psychological and social environment.

Biography

Prof. Dr. Jorge Cardona, professor of international law at the University of Valencia (Spain). Former member of the Committee on the Rights of the Child. Associate member of the Institute of International Law.

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Rights of Alleged Victims in Penal Procedures in Argentina and Current Approach to Victims' Rights in Canon Law

María Inés Franck

Abstract

The statute of the victims of crimes constitutes one of the novel contributions to penal law in recent decades. Both in international treaties and in the legislation of the states, it has been opening the way with force, generating the transition towards a paradigm centred on people who have suffered violations of their rights. This article refers to the reception of this change in Argentine legislation and concludes with a brief reference to the state of the issue in canon law.

Keywords: *statute of victims; victims' rights; victim-centred paradigm; canon law; penal law; child sexual abuse*

1. *Introduction: A Change of Logic*

The final objective of the process is to arrive at the truth of the facts, as far as possible. Even so, the question of victims' rights has become a topical issue in all legal systems. And it is not that these rights are not enumerated in the laws and codes in a sufficiently comprehensive manner, but rather that we are faced with a change in the way crime is dealt with.

It is the system, or rather the way we look at it, that is changing. We come from a form of criminal logic in which the emphasis was almost exclusively on the prosecution of crime, the determination of responsibility and the punishment of offenders, a system in which there was little interest in who the victim was and what he or she needed. A system in which the focus was on the need to rigorously eradicate crime, and it was to that end that the law and law enforcement agencies were empowered.

In contrast, there now seems to be a shift towards putting the focus on those who suffer crime (the victims), so that it is they who sometimes seem to drive the criminal justice process according to their rights and needs.

In recent times, legal regimes – both international and national – have paid much less attention to victims than to perpetrators or to the state or legal order per se. This shift in focus, of course, goes hand in hand with

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the consideration of the individual as the centre of the legal order and no longer so much the state and its rights. Indeed, 'just as the ius puniendi of the State embodied in criminal law has traditionally focused on the perpetrator without considering the victim, so too international law has focused exclusively on the perpetrator, be it the State or the individual, forgetting the victim'. The change of perspective now consisted in conceiving the criminal process as an instrument of guarantee, of safeguarding the system of values, of recognised fundamental rights and freedoms.

2. Towards a Legal Status for Victims

Over the last few decades, we have witnessed the emergence and development of a certain legal status for victims, which has been shaped by various international norms referring both to the victim in general and to different categories of victims depending on the crime they have suffered or on some particular situation affecting them.

The emphasis, therefore, seems to have shifted from determining the guilt of the perpetrator and the sanction to be applied to that criminal conduct, to the rights, feelings and expectations of those who have suffered the crime.

In 1985, the UN General Assembly issued a first document reflecting this change: the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'.[1]

This Declaration defines victims of crime as 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, financial loss or substantial diminution of fundamental rights, through acts or omissions that are in violation of the criminal laws in force in the Member States'.[2] Paragraph 2 of that resolution adds that 'a person may be considered a victim [...] regardless of whether the offender is identified, arrested, prosecuted or sentenced and regardless of the family relationship between the offender and the victim'.[3] In other words, the category of "victim" would apply even in the absence of an explicit criminal conviction or even a complaint. It is a category which, rather than being based on a legal status, is based on an existential narrative.

1 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985).
2 UNGA Res 40/34 (29 November 1985), paragraph 1.
3 Ibid. paragraph 2.

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Furthermore, the term “victim” includes 'family members or dependants who have an immediate relationship with the direct victim and persons who have suffered harm in intervening to assist the victim in distress or to prevent victimisation'. Here the concept of 'indirect victim' appears, which is sometimes referred to as 'secondary victim', although the latter term also applies to the re-victimisation of the primary victim.

The Declaration we are commenting on assumes a number of rights for victims of crime, grouped in a number of categories:

- *Access to justice and fair treatment*: including the right to be treated with compassion and respect for their dignity; access to justice mechanisms and prompt redress for the harm they have suffered; the existence of judicial and administrative mechanisms that enable them to seek redress through formal or informal procedures that are prompt, fair, inexpensive and accessible; and to be informed of their right to seek redress through such mechanisms.
- *Adequacy of judicial and administrative procedures to their needs*: this includes the right to be informed about their role and purpose, the chronological progression and conduct of proceedings, as well as decisions relating to their cases, especially when serious crimes are being dealt with and when they have requested such information; that their views and concerns are presented and considered at the appropriate stages of proceedings whenever their interests are at stake; and to receive appropriate assistance throughout the judicial process; to take measures to minimise inconvenience to victims, to protect their privacy where necessary and to ensure their safety, as well as that of their families and witnesses on their behalf, from any acts of intimidation and retaliation; to avoid unnecessary delays in resolving cases and enforcing orders or decrees granting them compensation; the use, where appropriate, of informal dispute resolution mechanisms, including mediation, arbitration and customary or local justice practices, to facilitate conciliation and compensation for victims.
- *Compensation and reparation*: the right to fair compensation and reparation, where appropriate, for victims and their families or dependants; in cases where the perpetrators are public officials or other agents acting in an official or quasi-official capacity, to be compensated by the state, whose officials or agents were responsible for the damage caused; the creation, strengthening and expansion of national reparation funds.

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- *Assistance*: i.e. to receive necessary material, medical, psychological and social assistance, through governmental, voluntary, community and local means; to be informed of the availability of health and social services and other relevant assistance, and to have easy access to them.

3. The 2005 United Nations Documents

In 2005, two key international documents appeared on this issue. The first concerns the rights of all kinds of victims of human rights violations. This is the 'Basic Principles and Guidelines on the Right to Reparation and Redress for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'.[4]

This text explicitly adopts a "victim-centred approach", and the following rights are made explicit:

- Be treated with humanity and respect for their dignity and human rights and have appropriate measures in place to ensure their safety, physical and psychological well-being, and privacy, as well as that of their families.
- Ensure that their domestic law, as far as possible, provides victims of violence or trauma with special consideration and attention, so that legal and administrative procedures for justice and reparation do not result in re-traumatisation.
- To have fair and effective access to justice.
- Achieve adequate, effective and prompt reparation of the damage suffered.
- Be able to access relevant information on violations and redress mechanisms.
- Have access to administrative and other bodies, mechanisms, arrangements and procedures used in domestic law.
- Receive information on all available remedies for serious violations of international human rights law and serious violations of international humanitarian law.
- To be able to use measures to minimise inconvenience to victims and their representatives, to protect their privacy from unlawful interference,

4 Basic Principles and Guidelines on the Right to Reparation and Redress for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005).

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where appropriate, as well as from acts of intimidation and reprisal, and to protect their relatives and witnesses, before, during and after judicial, administrative or other proceedings.

- Have appropriate assistance for victims seeking access to justice.
- Have remedies for serious violations of international human rights law or serious violations of international humanitarian law.
- Ensure that the state establishes procedures for victim groups to make claims and obtain redress, where appropriate.
- Have access to all available and appropriate international procedures to which a person is entitled, without prejudice to any other domestic remedy.
- Obtain adequate, effective and prompt redress commensurate with the gravity of the violations and the harm suffered.
- To have domestic programmes of reparation and other assistance for victims when the party responsible for the harm suffered is unable or unwilling to meet its obligations.
- Receive full and effective reparation in the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees that crimes will not be repeated.
- Obtain reparation for all economically assessable damages resulting from serious violations of international human rights law or serious violations of international humanitarian law, such as physical or mental harm; loss of opportunities, including employment, education and social benefits; material damage and loss of income, including loss of earnings; moral damages; costs of legal or expert assistance, medication and medical services and psychological and social services.
- Access to rehabilitation, including medical and psychological care and legal and social services.
- Existence of effective measures to ensure that violations do not continue.
- Possibility of obtaining verification of facts and full and public disclosure of the truth, to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, their family members, witnesses or persons who intervened to assist the victim or prevent further violations.
- Obtain an official statement or court decision that restores the dignity, reputation and rights of the victim and those closely associated with the victim.
- Receive a public apology that includes an acknowledgement of the facts and acceptance of responsibility.

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- Apply judicial or administrative sanctions against those responsible for violations.
- The commemoration and honouring of victims.
- Inclusion of an accurate account of violations in the teaching of international human rights law and international humanitarian law, as well as in teaching materials at all levels.

The second of the documents that appeared in 2005 relates specifically to child victims of crime. These are the 'Guidelines of the United Nations Economic and Social Council on Justice in Matters Involving Children Victims and Witnesses of Crime'.[5] Here the emphasis is on the following rights:

- To be treated with dignity and understanding throughout the justice process, taking into account their personal situation, their immediate needs and personal wishes and feelings, their age, gender, physical disabilities and level of maturity with full respect for their physical, mental and moral integrity.
- To receive interference in their private lives limited to the minimum necessary.
- Ensuring that interviews, examinations and other investigations are carried out by trained professionals who act with tact, respect and rigour to avoid further suffering.
- Ensuring that interactions with the child are conducted in a manner sensitive to the child, in an environment appropriate to the child's needs and special abilities, age, intellectual maturity and evolving capacities, and in a language the child speaks and understands.
- Ensure protection against any kind of discrimination during the process.
- To have access to special services and protection where necessary.
- Participate in the proceedings and be treated as a capable witness whose testimony is not considered invalid or unreliable on the basis of age alone.
- As far as possible and appropriate, to be duly and promptly informed, from the first contact with the judicial process and throughout the process, inter alia, of the availability of medical, psychological, social and other relevant services; of the relevant services, as well as the means to access them, together with legal or other advice or representation,

5 Guidelines of the United Nations Economic and Social Council on Justice in Matters Involving Children Victims and Witnesses of Crime, ECOSOC Res 2005/20.

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compensation and emergency financial support, where appropriate; the procedures applicable in the criminal justice process for adults and children, including the role of child victims and witnesses of crime, the importance, timing and manner of giving evidence and the manner in which 'cross-examination' will be conducted during the investigation and trial; the support mechanisms available to the child when making a complaint and participating in the investigation and court process; the specific dates and locations of hearings and other important events; the availability of protective measures; the mechanisms in place to review decisions affecting them; their rights; the progress and substance of the case affecting them; the opportunities available for them to seek redress from the offender or the state through the judicial process, alternative civil proceedings or other processes.

- Be able to be heard and freely express their opinions and concerns.
- To obtain effective assistance from professionals, including assistance and support services such as financial, legal, counselling, health, social and educational, physical and psychological recovery, and other services necessary for the reintegration of the child.
- Not being re-victimised through excessive interventions.
- Receive assistance from support staff from the initial report and on an ongoing basis until such services are no longer needed.
- Having their special needs addressed by specialists in child victims and witnesses.
- Having support staff, including specialists and appropriate family members, accompany them while they testify.
- Ensure that their privacy is protected, as well as all information relating to their participation in the judicial process.
- Be protected from excessive public exposure.
- Be protected from suffering during the course of justice.
- Not to be questioned by the alleged offender and to have private rooms in court.
- To be interrogated in a manner suitable for them.
- Ensure appropriate measures to safeguard their safety before, during and after the judicial process.
- Receive, where possible, redress for their full compensation, reintegration and recovery.
- To offer special preventive measures and strategies for child victims and witnesses of crimes, who are particularly vulnerable to repeated victimisation or outrage.

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4. Victims' Rights in Argentine Law

The recognition of international standards for victims' rights in Argentina was reflected in 2017 in the so-called 'Bill of rights and guarantees of victims of felonies people'.[6]

That law considers that a victim is not only the person offended directly by the felony but also its spouse, partner, father, mother, sibling or guardian if the crime results in the death of the person offended or if they had been affected physically or psychically in a way that prevents them from practising their rights.

The law aims especially to recognise and guarantee the right to be advised, assisted, represented, protected, fairly treated and repaired. It also endeavours to search for the truth, access to justice and celerity during procedures. Its other objective is to establish and coordinate measures and actions to promote, get respected, protect, and allow the effective practice of victims' rights and to implement mechanisms for all the authorities to fulfil their duty of preventing, investigating and penalising crimes and achieving reparation of violated rights.

With regard to victims' rights, Argentine law lays down three main principles in dealing with felonies:

a) Rapid intervention: the measures of help, attention, assistance and protection that the victim's situation requires will be adopted as quickly as possible, and in the case of pressing needs, they will be immediately satisfied.
b) Differential approach: the measures of help, attention, assistance and protection of the victim will be adopted according to the degree of vulnerability that they present.
c) No revictimisation: the victim will not be treated as responsible for the crime suffered, and the inconvenience caused by the criminal process will be limited to that which is strictly essential.

The law names several victims' rights, whose list is not exhaustive: to receive the report of the crime that affects them immediately; to receive dignified and respectful treatment and that the inconvenience derived from the procedure is minimal; to have their privacy respected to the extent that it does not obstruct the investigation; to request protection for their

6 Ley de Derechos y Garantías de las Personas Víctimas de Delitos, N°. 27, 372 (2017) Argentina.

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safety; to be assisted in a specialised way in order to promote their mental, physical and social recovery; to be informed about their rights when they make the complaint or in their first intervention in the procedure; to intervene as a plaintiff or civil actor in criminal proceedings, in accordance with the provisions of the constitutional guarantee of due process and local procedural laws; to examine documents and proceedings, and to be verbally informed about the status of the process and the situation of the accused; to provide information and evidence during the investigation; to be heard before each decision that implies the termination or suspension of the criminal action, and those that provide measures of coercion or the freedom of the accused during the process, whenever expressly requested; to be notified of the resolutions that may affect their right to be heard; to promptly adopt the coercion or precautionary measures that may be appropriate in preventing the crime from continuing to be committed or reaching subsequent consequences; to be granted the suffrage of the expenses demanded by the exercise of their rights when, due to their personal circumstances, they are financially unable to solve them.

When the victim presents situations of vulnerability, the authorities must provide specialised care. A situation of special vulnerability will be presumed if the victim is a minor or over 70 years of age or is a person with a disability; also, if there is a relationship of economic, emotional, labour or subordination dependency between the victim and the alleged perpetrator of the crime.

The authority receiving the complaint shall advise the victim about their rights and the means they have to enforce them; inform them of the names of the judge and the prosecutor who will intervene in the case and the location of their offices, and inform them of the location of the nearest victim assistance centre and transfer them there in the shortest possible time, if the victim requests it and does not have their own means of locomotion.

The authority must attend to the suffrage of the expenses of transfer, temporary accommodation and emergency food support that may be necessary when, due to their personal circumstances, the victim is financially unable to do so.

The authorities will adopt all measures that prevent an unjustified increase in the inconvenience caused during the process, concentrating the interventions of the victim in the fewest possible acts, avoiding recurring calls and unnecessary contact with the accused. To this end, the victim may give a statement at their home or in an office specially adapted for this purpose. Also, in the act in which the victim participates, the accompaniment

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of a professional may be arranged. The victim may also give testimony at the trial or hearing without the presence of the accused or the public.

During the execution of the sentence, the victim has the right to be informed and to express their opinion and everything they deem appropriate. All provisions will be interpreted and executed in the way that best guarantees the rights recognised to the victim.

A Centre for Assistance to Victims of Crimes was created by the law. The centre is aimed at comprehensively assisting victims of crimes.

As regards the term of the statute of limitations, our Criminal Code states that the prescription is suspended while the victim is a minor and until they have reached the age of majority, make the complaint or ratify the complaint made by their legal representatives during their minority.[7]

In Argentina, sexual abuse against children or people declared incapable is considered a felony of public action, which means that the prosecutor will proceed ex officio (Penal Code, art. 72).

5. The Efforts of Canon Law

Canon law, it is fair to say, is making an effort to explicitly incorporate some victims' rights into its formulations. It is not that they did not have them, but rather that, regardless of whether they were applied correctly or not, the paradigm followed in the canonical criminal process was focused, like in so many other legal systems, on the objective prosecution of the crime. The focus was on the law and on those responsible for its application and the consequent restitution to the rest of the social body of a resolved and repaired situation. It is assumed that the interest of those charged with prosecution in criminal proceedings coincides with that of the persons offended: the pursuit of justice. It is not the person offended who bears the burden of prosecution, but there is someone who bears it for them and is supposed to look after this common interest.

In this sense, the issue of victims' rights was not put first, but somehow sublimated into the task of the accusing officer. The victim's request for greater protagonism in the process is subsequent to the drafting of the Code of Canon Law.

The *Motu Proprio Vos estis lux mundi* (2019), the *Instruction on the Confidentiality of Cases* (2019) and the *Vademecum on Certain Procedural*

7 Ley de Respeto a los Tiempos de las Víctimas de Abusos Sexuales, N°. 27, 206 (2015) Argentina.

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Issues in Cases of Sexual Abuse of Minors Committed by Clerics (2020) added certain provisions regarding victims' rights to the existing canonical norms. Nevertheless, everything would seem to indicate that canon law, like many other judicial systems, is still following the old paradigm and trying to include some provisions on victims' rights without fully assuming that we are facing a rather radical change of perspective.

The fact that the paradigm has not changed does not necessarily mean that victims in canon law are in the background. It could also indicate that the modern approach to victims' rights has not yet been fully embraced.

The question seems to revolve around whether a more radical change in this direction is needed. Does canon law necessarily have to accommodate the contemporary paradigm? Can victims' rights be addressed only in one way, or is there any possibility that legislation will opt for another way of understanding it?

Certainly, as a Church today we are in a difficult position on this issue: the choice would seem to be either to bow to this paradigm, or to accept the accusation that we are not doing anything for the victims.

Today, it seems that it is difficult to get out of this dilemma and propose something thoughtful and based on the desire to protect victims. And here another question arises: does the enumeration of a long catalogue of victims' rights necessarily mean that we have fulfilled our duties towards them, or is there something more fundamental that needs to change in order to allow progress in fraternal accompaniment and just reparation?

I believe that these are very interesting debates necessary to be able to respond to the expectations and claims of many people and organisations in relation to the Catholic Church, while remaining faithful to the vocation of protecting the most vulnerable.

Biography

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The Rights of Alleged Victims in Penal Procedures in France

Raphaële Parizot

Abstract

In the context of the publication in France of the report submitted in 2021 by the Independent Commission on Sexual Abuse in the Church (CIASE), it is important to examine victims' rights in French criminal procedure in order to stress the margin for improvement in the consideration of victims in a canonical trial. French criminal procedure is indeed particularly protective of victims: victims are informed, supported, protected, involved in the trial and repaired. Minors are given special attention.

Keywords: *commission indépendante sur les abus sexuels dans l'Eglise (CIASE); right to information; right to protection; right to participation; notion of victim; right to reparation; minor victims.*

1. Context

The report submitted in October 2021 by the Independent Commission on Sexual Abuse in the Church (*Commission indépendante sur les abus sexuels dans l'Eglise*) (CIASE), chaired by Jean-Marc Sauvé, was a real thunderclap in France and beyond.[1] Beyond the heavy state of affairs,[2] the report denounces the inadequacy of the Church's legal responses, which are centred on the sinner and hide the fate of the victims. Victims are not involved in the legal procedure, not having the status of a party to the procedure but simply of a third-party intervener, a status which in theory gives them

1 Commission indépendante sur les abus sexuels dans l'Eglise, Les violences sexuelles dans l'Eglise catholique. France (1950–2020). Rapport de la Commission indépendante sur les abus sexuels dans l'Eglise. October 2021 (Report); Christine Lazerges, La politique criminelle implicite de la Commission indépendante sur les violences sexuelles dans l'Eglise catholique, *Revue de science criminelle et de droit pénal comparé (RSC 2022)*, 141.

2 The estimated number of minor victims of sexual assault by priests, deacons, religious men and women is 216,000 over the period 1950–2020 and 330,000 if the analysis is extended to include all persons connected with the Church (staff in Catholic schools or boarding schools, lay people providing catechism or chaplaincy services and leaders in scouting or other Catholic youth movements) (§ 0066 of the Report [n 1]).

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the possibility of requesting reparation as soon as they are informed of the procedure, which in practice is never the case.[3] In response to these offences, CIASE proposes, for the past, putting in place "an ambitious system of recognition and compensation that is not purely internal to the Church, that relies on significant means and uses a range of restorative justice tools"[4] and, for the future, remedying the dysfunctions observed by opening up canonical criminal procedure to the rights of victims.[5] On the first point, CIASE seems to have been heard since, following the French bishops' conference in Lourdes in November 2021, two independent commissions for reparation were created: the Independent National Instance for Recognition and Reparation, (*Instance nationale indépendante de reconnaissance et de réparation*) (Inirr), created by the French bishops, and the Independent National Commission for Recognition and Reparation (*Commission nationale indépendante de reconnaissance et de réparation*) (Cnirr), created by the religious men and women of France. On the question of victims' rights in the canonical process, the page has yet to be written.[6]

2. *General Presentation of the French Criminal System*

Historically, the French criminal system is an inquisitorial system. French criminal law procedure is traditionally presented as written, secret and non-adversarial.

This did not change for a long time; now the preliminary article of the code of criminal procedure (which came into force in 1958) provides that

3 Report (n 1), § 0813 s.

4 Report (n 1) 389.

5 Ibid. 450.
It should be noted that the Vatican is not a member of the Council of Europe and is not a party to the European Convention on Human Rights. However, it has had observer status with the Council of Europe since 1970. While it is not possible to verify the extent to which observer states must respect the Council's human rights standards and values, it should be noted that the Holy See has a clearly stated position in favour of human rights and fundamental freedoms (see Pope Francis' visit to Strasbourg on 25 November 2014).
The European Court of Human Rights recently considered that the dismissal of a civil action against the Holy See in Belgium, because of the immunity of jurisdiction it enjoys, is not contrary to Article 6 § 1 of the Convention of Human Rights (ECHR, 12.10.2021, J.C. *et autres contre* Belgique).

6 In doctrine, although there are no developments on this point as such, there is an interesting PhD thesis by Elsa Déléage, Les droits de la personne selon l'Eglise catholique de 1891 à 2013, Institut universitaire Varenne, Collection des thèses 2014.

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“Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties”. Now a trial is without doubt oral, public and adversarial.

But these remarks apply only to the trial as it is strictly understood. In contrast, the pre-trial is always written,[7] secret[8] and rather not adversarial. But under this last aspect, it is necessary to distinguish between the two possible frames of investigation in French criminal procedure:

- On one hand, the inquiry (*enquête*), which is the investigation conducted by judicial police officers under the supervision of the district prosecutor (*procureur de la République*). The inquiry is actually the common frame of the investigation in France.
- On the other hand, the judicial investigation (*instruction*), which is the investigation made by an investigating judge (*juge d’instruction*), who is an independent magistrate. The judicial investigation is required for the most serious offences (criminal offences) and possible for other offences, in particular for complex cases.

The choice of the frame for investigating has important effects. During the inquiry, neither the suspect nor the victim is considered a party. It is only after the public prosecution has been initiated (by referral to an investigating judge or to the trial judge) that the persons concerned (suspect, victim) can become parties and then acquire all the rights associated with this status. The victim, in particular, sees the full deployment of these rights from the moment he or she becomes a civil party. However, even without becoming a party, the victim benefits in France from a certain number of rights.

3. *General Presentation of Victims’ Rights in French Criminal Procedure*

Victims are treated well in French criminal proceedings. In accordance with *Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, which was transposed into

7 Each act of the investigation must be written in an official report.
8 Art. 11 CCP: ‘Except where the law provides otherwise and subject to the defendant’s rights, the inquiry and investigation proceedings are secret’.

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French law by *Law n°2015–993 of 17 August 2015 adapting criminal procedure to European Union law*, they have rights to information, to active participation in the criminal trial and to reparation.[9] When the victim is a minor, a number of these rights are reinforced.

A. Rights Common to All Alleged Victims

Consideration of the rights of victims in French criminal procedure appears in the preliminary article of the code of criminal procedure, which states that "criminal procedure must be fair and adversarial and preserve the balance of the rights of the parties" and that "the judicial authority shall ensure that victims' rights are informed and guaranteed in the course of all criminal proceedings". This preliminary article is followed by a preliminary title, a sort of introduction to the code of criminal procedure, which is composed of three subtitles, the first relating to penal and civil proceedings, the second to restorative justice and the third to victims' rights. In line with the 2012 directive, the victim thus clearly has a right to information, support and protection (A) but also a right to participation in a French criminal trial (B) and a right to reparation (C).

a. Right to Information, Support and Protection

In the same way as the defendant, victims must be informed, according to Article 10–2 of the Code of Criminal Procedure (CCP), of their right:

- To obtain compensation for the harm suffered by any appropriate means, including a restorative justice measure.
- To be a civil party, i.e., to become a party to the criminal proceedings (and consequently to have access to the file of the proceedings, to be able to make observations and to exercise remedies under certain conditions).
- To be assisted by a lawyer, if they are a civil party.
- To be assisted by a victim support association.

9 For a comparative (Spain, France, Italy) and European approach to the issue, see Luca Lupària (ed), Lo statuto europeo delle vittime di reato. Modelli di tutela tra diritto dell'Unione e buone pratiche nazionali, Coll. Giustizia penale europea, Wolters Kluwer / CEDAM, 2015.

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- To refer the matter to the Commission for Compensation of Victims of Crime (Commission d'indemnisation des victimes d'infractions: CIVI) for serious personal injury or certain property offences.
- To be informed of the protection measures available to them.
- To be assisted by an interpreter or translator.
- To be accompanied at all stages of the procedure by their legal representative and by the adult of their choice, unless the competent judicial authority decides otherwise.
- To declare the address of a third party as their place of residence if the third party agrees.
- To be given the medical examination certificate verifying their state of health that is required by a judicial police officer when the person claims to have been a victim of violence (Art. 10–5–1 CCP).

Information

Information is generally provided through the distribution of a guide to victims' rights.[10] More specifically, on a case-by-case basis, information is provided mainly by the victim support offices (Bureaux d'aide aux victimes: BAV, art. D. 47–6–15 CCP) near the courts. The BAVs are created by an agreement between the president of the court of appeal and associations and are composed of representatives of one or more victim support associations. The aim of these offices is to inform victims and respond to the difficulties they may encounter throughout the criminal proceedings. At the request of the victim, the BAV informs him or her of the course of the criminal proceedings and assists him or her in his or her efforts. The BAV can inform the victim about the status of the proceedings (whether or not the victim is a party to the proceedings): before the public prosecutor, about investigations by the judicial police, about the investigation, about the closure of the case, about the court in which the case is pending, about the date of the hearing, about the date of the judgement and about the appeal by the public prosecutor or the convicted person. The BAV can also take responsibility for providing the victim with all the information he or she should receive in accordance with the Code of Criminal Procedure

10 Ministère de la Justice et des Libertés, Les droits des victimes (2012), available on http://www.justice.gouv.fr/art_pix/guide_enrichi_des_victimes.pdf, access 09.09.2022.

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(Article 41 CCP). It can also help the victim to obtain the compensation due to him or her.

Support

Support is provided through the possibility of being assisted by a victim support association and through assistance with the application for compensation.

Protection

Protection involves, first of all, a personalised assessment of the victim (Art. 10–5 CCP), which must be carried out early in the proceedings and which must, in particular, make it possible to assess whether the victim needs specific protection measures (such as removal of or a ban on approaching the person suspected of having committed an offence against him or her). This personalised assessment is carried out by the judicial police officer, in particular, in the light of the extent of the harm suffered by the victim, the circumstances of the commission of the offence, resulting, in particular, from a discriminatory motive or the links existing between the victim and the accused, the particular vulnerability of the victim (due to his or her age, pregnancy or the existence of a disability), and the existence of a situation of control exercised over the victim by the accused. In cases of sexual violence, the victim is heard by an investigator of the same sex if he or she so requests (Art. D. 1er-3 s. CCP).

b. Right to Participation

In application of the 2012 Directive, the victim must be able to participate, or at least be heard, in the criminal trial. The victim can thus be heard at any time during the proceedings, including by using audio-visual means of communication (art. 706–71 CCP). Furthermore, in France, the opportunity given to the victim to participate in the proceedings is very important insofar as the victim can constitute a civil party. Indeed, in parallel with the proceedings (criminal action also known as public action) brought by the public prosecutor's office, which requires the application of criminal law and, where appropriate, the conviction of the accused person, the victim

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may decide to act before the criminal court by means of a private action, which does not require the application of criminal law or the conviction of the person, but damages and therefore the recognition of a civil fault committed by the accused person. This action brought by the victim is called a civil action. It is defined in Article 2 of the Code of Criminal Procedure: “The civil action for compensation for damage caused by a crime, offence or contravention belongs to all those who have personally suffered damage directly caused by the offence”.

Right of action

Article 2 of the Code of Criminal Procedure means *firstly* that the victim's role can take the form of an action, in the common sense of “right to sue”. This is a right, not an obligation (so the victim may well decide not to take legal action).

Civil action presupposes a minimum of formalisation of the victim's complaint, so that he or she can become a party to the criminal proceedings, so that he or she can claim compensation, but also so that certain effects can be achieved (in particular, the interruption of the limitation period).

In other words, *a simple complaint* is not enough and does not meet the conditions for becoming a party. A (simple) complaint is the act by which a person who considers himself or herself to be the victim of an offence informs the public prosecutor, either directly or through a police or gendarmerie service. It can be filed against an identified person or against X if the identity of the perpetrator is unknown. Anyone can file a complaint, including a minor who can even file alone. The complaint can be sent directly to the public prosecutor, but in most cases, it is filed with the police or gendarmerie. In 2019, the possibility of filing a complaint online was also created (Art. 15–3–1 CCP, but the system has not yet fully entered into force).

Once a complaint is filed, it is forwarded to the public prosecutor. Every complaint is recorded in a report, a copy of which is given to the victim (Art. 15–3 CCP). The person may withdraw the complaint at any time, but this does not mean that the criminal proceedings are stopped, which remains the prerogative of the public prosecutor. This simple complaint is not enough for an alleged victim to become a party to the criminal proceedings; it is in some ways similar to a denunciation and the victim is treated in a way similar to a witness.

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In order to be a party to the trial, the victim must register as a civil party. There are two ways to do this:

- Firstly, it can be done once the public prosecutor has initiated the public prosecution: this is known as constituting a civil party by way of intervention; the victim then joins the public prosecution initiated by the public prosecutor.
- It can also be done (this is a formidable power available to the victim, which has existed since a 1906 decision by the Court of Cassation) even if the public prosecutor has not yet initiated the public prosecution or has refused to do so. In this case, the civil party's constitution forces the public action to be set in motion: this is known as the constitution of a civil party by way of action.

The effect of filing a civil action is therefore to make the victim a party to the criminal proceedings but also, when it is done by way of action, to set in motion the public action.

Formally, a complaint with civil party status is not subject to any particular formality. Most of the time, the complaint is made in a simple letter addressed to the investigating judge in which the complainant expresses a formal and unequivocal desire to be a civil party. Following the filing of the complaint, the victim must declare an address (Art. 89 CCP) and pay a deposit (except in the case of legal aid), the amount of which will be determined by the investigating judge, and which is intended to guarantee payment of the civil fine that may be imposed (Art. 88 and 88–1 CCP) in the event of an abusive or dilatory civil party (Art. 177–2 CCP).

The constitution of a civil party

This allows the victim to become a "party" to the criminal proceedings and therefore:

- to be regularly informed of the progress of the proceedings and to have access to the file through their lawyer;
- to appeal, if necessary, against certain decisions taken in the course of the proceedings if their interests are prejudiced;
- to make observations and requests for additional investigations during the course of the judicial investigation;

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- to be directly summoned before the court as a civil party during the trial;
- to claim damages as compensation for the harm suffered.

It is best for a victim to register as a civil party as soon as possible, so as to be involved in the proceedings from the outset. However, it is always possible for him or her to do so at any time during the proceedings up to the day of the hearing at first instance (Art. 418, 419, 420 CCP). On the other hand, it is not possible for a victim to constitute a civil party on appeal for the first time (Crim., 20 April 2017, n°16–83199).

A victim who is a civil party may seek the advice of a lawyer, even if his or her assistance is not compulsory (conversely, if the victim is not a civil party, he or she may not be assisted by a lawyer at the hearing).

Action for damages

Article 2 of the Code of Criminal Procedure means, *secondly*, that a person can ask the criminal court for compensation for damage suffered, but only for damage caused by an offence. The civil action is therefore an action for damages (which most of the time takes the form of damages), but an action for damages brought before the criminal court (which may seem strange insofar as the action for damages is normally the prerogative of the civil court and the criminal court is, in principle, called upon to pronounce on the sentence).

The civil action is above all an action for compensation for the personal damage caused by the offence. It is therefore a claim for damages, an action whose aim is "*to re-establish, as accurately as possible, the balance destroyed by the damage and to put the victim back in the situation in which he or she would have been if the harmful act had not occurred*" (Civ. 2, 9 July 1981, Bull. n°156). In the case of a civil liability claim, the victim can always decide to act before the civil court. In other words, the victim can always choose to file for compensation for the damage caused by an offence, either before the criminal court or before the civil court. He or she is said to have the choice between the civil and criminal options. Each of the two options has its advantages. The civil option has the advantage that it is less easy and less burdensome to incur liability for an action that proves to be abusive or dilatory; moreover, it is more discreet. The criminal option, on the other hand, is quicker and allows the benefit of the evidence that the criminal procedure (the investigations carried out by the judicial police) makes it possible to discover.

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However, while civil action before the criminal court is an action for compensation, it also often has a vindictive purpose: seeking the conviction of the offender. Indeed, by bringing a civil action, the person who claims to be the victim of an offence automatically initiates the public prosecution. In addition, he or she participates in the search for the truth by exercising the rights conferred on him or her by being a party to the criminal proceedings. Lastly, the victim may be a civil party without claiming damages. Article 418(3) of the Code of Criminal procedure provides that: "The civil party may, in support of his or her claim, request damages corresponding to the harm caused to him or her". It follows that the request for damages is 'a simple option which the civil party is free not to use' (Crim., 10 October 1968, Bull., n°248).

Who can claim to be a victim?

Thirdly, Article 2 of the Code of Criminal Procedure states that this action "belongs to all those who have personally suffered damage directly caused by the offence". Any natural person of legal age may bring a civil action if he or she has an interest in acting, i.e., if he or she has suffered personal and direct damage:

- *The immediate victim* is the first to be affected by the offence and obviously has an interest in acting. This is, for example, the person who has suffered a sexual assault.
- Moreover, the Court of Cassation increasingly accepts compensation *for damage not directly caused by the offence* (flexible assessment of the need for direct damage), based in particular on Article 3(2), which provides that civil proceedings 'shall be admissible for all types of damage, whether material, personal or moral, arising from the facts which are the subject of the proceedings' (for example, the reduction in a company's activity following the accidental death or another offence suffered by its director).
- In addition, the Court of Cassation is increasingly admitting *compensation of the victim's relatives*, i.e., "less" personal damage. The principle on this point was the inadmissibility of a civil action brought by a third party. However, for heirs and relatives, the Court of Cassation has evolved.

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It accepts that relatives may bring a personal action for compensation for personal injury suffered as a result of damage caused to the direct victim of the offence. The victim's relatives may bring a personal action for compensation for the material and moral damage they have suffered personally as a result of the damage suffered by the victim (death, injury, sexual assault, etc.). Some recent examples of this flexible conception of vicarious damage by the Court of Cassation can be given. In the particular case of a child born of rape, the Court of Cassation has recognised that the civil action by the child, a victim by ricochet of the incestuous rape committed on its mother, is admissible, and that the harm suffered, which does not result solely from its birth, but also from the knowledge that the child will have of the facts when it grows up, from the difficulty of constructing it, and from the impossibility of establishing its link to paternal filiation, is compensable (Crim., 4 February 1998 and Crim., 23 September 2010). This is also the case for parents whose two daughters were raped when they were minors (Crim., 26 February 2020).

The Court of Cassation also accepts, but only for heirs, that they can exercise a succession action for compensation for the damage suffered by the deceased. The Court of Cassation considers here that the civil action by the deceased is transferred to their heirs by succession. If proceedings were initiated while the victim was alive, the heirs can pursue the civil action before the criminal court; if no proceedings were initiated before the victim's death, only the civil court can be seized.

A legal entity (i.e., one that has legal personality) may also bring a civil action if it has an interest in acting, i.e., if it has suffered direct personal injury (e.g., an association that has suffered theft). However, in certain cases, it is also considered that a legal person defending a collective interest that has been harmed (e.g., a trade union) may have an interest in bringing an action. As regards associations, they do not have a general authorisation to intervene, but the legislator has increased the number of special permissions by means of authorisations (Art. 2–1 s. CCP) given to associations for combating discrimination (Art. 2–1), combating sexual and domestic violence (Art. 2–2), defending children at risk and abused children (Art. 2–3), combating crimes against humanity and war crimes (Art. 2–4), defending the moral interests and honour of the Resistance and deportees (Art. 2–5), the fight against gender discrimination (art. 2–6), the fight against discrimination due to illness, disability or age (art. 2–8), assistance to victims of crime (art. 2–9), the fight against social and cultural exclusion (art. 2–10), defence of the moral interests and honour of veterans (Art. 2–11) and the

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fight against road crime (Art. 2–12). In particular, Article 2–3 of the Code of Criminal Procedure states:

- Any association that has been duly registered for at least five years on the date of the events and whose statutory purpose includes defending or assisting children who are at risk and victims of all forms of abuse may exercise the rights recognised as civil parties in respect of deliberate attacks on life and limb, assaults and other sexual offences committed against a minor and offences of endangering minors punishable under Articles 221–1 to 221–5, 222–1 to 222–18–1, 222–23 to 222–33–1, 223–1 to 223–10, 223–13, 224–1 to 224–5, 225–7 to 225–9, 225–12–1 to 225–12–4, 227–1, 227–2, 227–15 to 227–27–1 of the Penal Code, when the public prosecution has been initiated by the public prosecutor's office or the injured party.
- Any association, registered with the Ministry of Justice under conditions set by decree in the Council of State, is admissible in its action even if the public prosecution has not been initiated by the public prosecutor or the injured party in respect of the offence mentioned in Article 227–23 of the Criminal Code. The same applies when the provisions of the second paragraph of Article 222–22 and Article 227–27–1 of the said code are applied.

In other words, an association for the defence of minors who are victims of abuse (including sexual assault) may act before the criminal court once the matter has been referred to it by the public prosecutor. Furthermore, once the victim has been constituted as a civil party, he or she may exercise the remedies associated with his or her action (Art. 497 CCP). In other words, he or she can appeal on the question of reparation, but only on this question (and in no case on the question of the defendant's guilt).

c. Right to Reparation

Compensation

The victim, who is a civil party, can obtain reparation, i.e., compensation through damages before the criminal court. This compensation will be paid by the convicted person or, in certain more limited cases, by national solidarity. Although, in principle, in order to obtain compensation for the damage caused by an offence, the victim must take action against the offender after the public prosecution has been initiated and since 1977, in certain

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cases and under certain conditions, even before criminal proceedings have been initiated or even if the prosecution has not resulted in sufficient effective reparation or compensation, the victim may bring an action for compensation before a jurisdictional commission set up within the jurisdiction of each judicial court (CIVI: Commission d'indemnisation des victimes d'infraction). This action is available to victims of bodily injury, rape or material damage resulting from certain offences against property (theft, fraud, breach of trust, etc.), which place the victim in a serious material or psychological situation (Art. 706–3 and Art. 706–14 CCP.). In addition to this commission, mention should be made of the Guarantee Fund for Victims of Terrorism and Other Offences (Fonds de garantie des victimes des actes de terrorisme et d'autres infractions: FGTI) created in 1986, which provides compensation for victims of terrorist acts (Art. L. 126–1 and L. 422–1 of the Insurance Code).

Restorative justice

In addition, and also because compensation is not always reparation,[11] at any stage of the criminal procedure (including during the execution of the sentence) and therefore in parallel with the criminal trial, any victim (whether a civil party or not) may, since 2014, be offered a restorative justice measure. Article 10–1 of the Code of Criminal Procedure states:

> "During any criminal proceedings and at all stages of the proceedings, including during the execution of the sentence, the victim and the perpetrator of an offence, provided that the facts have been acknowledged, may be offered a restorative justice measure.
>
> A restorative justice measure is any measure that enables a victim and the perpetrator of an offence to participate actively in resolving the difficulties resulting from the offence, and in particular in repairing the damage of any kind resulting from its commission..."

In other words, criminal proceedings could be an opportunity to restore, i.e., to help the victim and the offender (note that the text refers to the meeting between the victim and an offender and not the offender) to

11 Christine Lazerges, L'indemnisation n'est pas la réparation, in Geneviève Giudicelli-Delage / Christine Lazerges (eds), La victime sur la scène pénale en Europe, Puf 2008, 228ff.

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resolve the difficulties arising from the offence, through reconciliation and dialogue. For this to happen, the facts must have been recognised, but also the victim and the offender must have been fully informed about the measure and must have expressly consented to participate in it.

B. Specific Rights for Minor Victims

Minor victims benefit from the rights provided for all victims. However, due to the fact that they do not have full legal capacity and that their young age makes them vulnerable, minors benefit from specific provisions aimed at ensuring their protection.[12] These specificities can be seen in the question of the statute of limitations for public action (*prescription*),[13] but also in the various specific procedural mechanisms for detecting offences and conducting investigations.

a. Detection of Offences Committed Against Minors.

The protection of minors who are victims of crime depends above all on improving the visibility of crimes committed against minors. This improved visibility is based on three points:

1) The development of a system to prevent offences against minors, and in particular ill-treatment, notably through information and raising awareness on child abuse in schools (medical visits to schools to detect such violence, training of staff dealing with children, information

12 Philippe Bonfils / Adeline Gouttenoire, Droit des mineurs, Dalloz 2021, n°1559ff.

13 In France, the statute of limitations for public action (*prescription*) is, in principle, 20 years for felonies, 6 years for misdemeanours and one year for contraventions (art. 7 s. CCP). Exceptions are made for offences committed against minors. Firstly, the limitation periods are longer for certain felonies, including sexual crimes (30 years instead of 20 years) and for certain misdemeanours, including sexual offences (10 years instead of 6 years). Secondly, the starting point of the limitation period, which in principle is set on the day the offence is committed, has been postponed to the day the victim reaches the age of majority (Art. 7 and 8 CCP). Finally, Law No. 2021–478 of 21 April 2021 aimed at protecting minors from sexual crimes and offences and incest introduced a 'sliding limitation' mechanism by providing that, from now on, the limitation period for a sexual offence is extended, in the event of the commission of a new offence against another minor by the same person, until the date on which the new offence becomes time barred.

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for the children themselves: Art. L. 542–3 of the Education Code), raising awareness among a wider public, particularly through public broadcasting (art. 43–11 of the law of 30 September 1986 on freedom of communication) or by setting up a toll-free telephone number, 119, which permanently answers requests relating to situations of abuse.[14]

2) The development of the means available to the investigating authorities, whether intellectual means (training on abuse: art. L.542 – 1 of the Education Code) or structural means (creation of structures appropriate for dealing with victimised minors, creation of juvenile brigades in the police since the 1970s and creation of juvenile delinquency prevention brigades in the gendarmerie in 1997, which deal with both juvenile offenders and victimised minors).
3) The detection of offences committed against minors. Although any minor can lodge a simple complaint with the police and gendarmerie, he or she cannot lodge a civil claim on their own. This partly explains why the legislator encourages the reporting of cases to the authorities (art. L. 226–3 of the code of social action and families: "The president of the departmental council is responsible for collecting, processing and evaluating, at any time and from any source, information of concern relating to minors in danger or at risk of being so. The representative of the State and the judicial authority shall assist him/her") and judicial reporting. In terms of judicial reporting, it should be emphasised that not only is any civil servant who, in the course of his or her duties, becomes aware of the commission of a crime or offence required to inform the public prosecutor without delay (art. 40 CCP applicable to all offences and whatever the age of the victim),[15] but in addition, since 1998, so is any person who has knowledge of deprivation, ill-treatment or sexual offences inflicted on a minor or on a person who was not in a position to protect himself or herself (due to age, illness, infirmity).

14 The law of 10 July 1989 on the prevention of abuse of minors and the protection of children created a national telephone helpline for abused children, available on http://www.allo119.gouv.fr, access 09.09.2022.

15 According to Article 40 of the Criminal Procedure Code, 'The public prosecutor receives complaints and reports and decides what action to take in accordance with the provisions of Article 40–1.
Any constituted authority, public officer or civil servant who, in the exercise of his duties, acquires knowledge of a crime or offence is obliged to notify the public prosecutor without delay and to transmit to this magistrate all information, reports and acts relating to it'.

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That person is required to pay a €45,000 fine for not reporting the crime, except in the case where the person is bound by professional secrecy and is therefore left with a choice of conscience (art. 434–3 c. pén.[16]).[17]

b. Specific Provisions Applicable to the Minor Victim During Criminal Proceedings.

Once an offence committed against a minor has been brought to the attention of the investigating authorities, the criminal proceedings begin in

16 According to art. 434–3 of the Penal Code, ‘The fact that anyone who is aware of deprivation, ill-treatment or sexual assault or abuse inflicted on a minor or on a person who is unable to protect himself or herself due to age, illness, infirmity, physical or mental deficiency or pregnancy, fails to inform the judicial or administrative authorities or continues to fail to inform these authorities until such time as these offences have ceased, is punishable by three years' imprisonment and a fine of 45,000 euros.
Where the failure to inform concerns an offence referred to in the first paragraph committed against a minor of fifteen years of age, the penalties shall be increased to five years' imprisonment and a fine of 75,000 euros.
Except where the law provides otherwise, persons bound to secrecy under the conditions laid down in Article 226–13 are exempt from the foregoing provisions’.
In other words, this obligation to denounce is neutralised by professional secrecy and therefore allows an option of conscience between reporting the facts or keeping them secret (except in cases where the law provides otherwise and therefore obliges the official in question to report them, which does not seem to be the case in religious matters). On this point, see Marie-Elisabeth Cartier, Le secret religieux, *Revue de science criminelle et de droit pénal comparé (RSC 2003)*, 485; Bruno Py, Le secret professionnel et le signalement de la maltraitance sexuelle. L’option de conscience : un choix éthique, *Archives de politique criminelle (APC 2012),* 71; Alain Sériaux, Le secret de la confession et les lois de la République, Recueil Dalloz 2021, 2245; Laëtitia Atlani-Duault, Didier Guérin, Secret de la confession et signalement des violences sexuelles sur mineurs, *Droit pénal (6–2022),* étude n°16.

17 On this point, see the conviction of the Bishop of Bayeux by the Bayeux criminal court on 4 September 2001 with various doctrinal comments: Olivier Echappé, Le secret professionnel de l’ecclésiastique, Recueil Dalloz 2001, 2606; Yves Mayaud, La condamnation de l’évêque de Bayeux pour non-dénonciation, ou le tribut payé à César…, Recueil Dalloz 2001, 3454; see also the decision of the Criminal Chamber of the Court of Cassation of 14 April 2021 confirming the acquittal of Cardinal Barbarin (Archbishop of Lyon at the time of the events), on the grounds that the victims had come of age, which removed the obligation to denounce him (Crim., 14 April 2021, n° 20–81196 and doctrinal comments: Audrey Darsonville, La fin de la mise en cause du cardinal Barbarin et le renouveau du délit de non-dénonciation de mauvais traitements, AJ Pénal 2021, 257; Emmanuel Dreyer, Aide-toi et l’archevêque t’aidera, Recueil Dalloz 2021, 937.

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earnest and the minor victim benefits from certain specific provisions (Art. 706–47 s. CCP).

First of all, the minor victim may be the subject of a "*medical and psychological assessment to evaluate the nature and extent of the harm suffered and to establish whether this makes appropriate treatment or care necessary*".

Then, the child's hearing may be conducted in the presence of a third party (psychologist, child specialist doctor or family member). The purpose of this presence is to reassure the child. The third party cannot speak, except perhaps to explain a question to the child. This presence of a third party, which is carried out by decision of the public prosecutor or the investigating judge, is in reality quite rarely admitted because of the risks of influencing the child's account of the alleged offence.

Above all, the major innovation lies in the way in which the child's word is collected. It seems normal that the child's word is not collected in the same way as the adult's word, on the one hand because it is more fragile than the adult's word (difficulty for the child to put the acts into words, difficulty for the interlocutor to interpret these words, risk of manipulation of the child...), and secondly because it is necessary to avoid adding the trauma of a sometimes repeated statement (at the level of the investigation, the inquiry, the judgement) to the child's trauma from the offence. This is why provision is made for audio-visual (or exclusively audio) recording of the hearing.

Moreover, as the minor is incapable of acting in court, he or she must be represented. This representation is, in principle, the responsibility of the legal representatives (parents, guardian). However, a problem arises when it is this legal representative who is prosecuted for an offence against the minor or when the latter is not able to protect the minor's interests properly. In this case, the minor will be represented by an *ad hoc* administrator: "the public prosecutor or the investigating judge, seized of acts committed voluntarily against a minor, appoints an *ad hoc* administrator when the protection of the minor's interests is not fully ensured by his or her legal representatives or by one of them" (art. 706–50 CCP). The appointment is at the discretion of the public prosecutor or examining magistrate and is based on a fairly broad criterion: "when the protection of [the minor's] interests is not fully ensured by his or her legal representatives or by one of them". The *ad hoc* administrator is either someone close to the child or a person from outside the family; he or she ensures the protection of the minor's interests and on the minor's behalf exercises, if necessary, the rights granted to the civil party. In other words, the *ad hoc* administrator

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can bring a civil action, appoint a lawyer, etc. He or she also listens to the minor.

Moreover, associations for the defence of the collective interests of minors in danger may also, under certain conditions, bring a civil action (art. 2–3 CCP, see above).

Biography

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Rights of Alleged Victims in Criminal Proceedings in Italy, with Reference to Canon Law

Livia Pomodoro

Abstract

This paper addresses the issue of sexual and psychological abuse of minors and vulnerable persons, comparing the Italian penal system with canon law. In recent years, the Church, like the state, has chosen to act in the fight against sexual abuse and violence against minors and vulnerable persons. Most Italian dioceses (including the Ambrosian) have set up a special service headed by a diocesan delegate, who coordinates the various activities: training and raising awareness on the one hand, listening and collecting reports on the other. At the Curia of the Archdiocese of Milan, the Commission for the Protection of the Rights of Minors was also set up to develop a network between Italian and canon law.

Keywords: *protection of sexual abuse of minors and vulnerable persons; Italian and canonical order diocesan delegate; commission for the protection of the rights of minors at the curia; cooperation between church and state*

1. Introduction

Sexual and psychological exploitation and abuse of vulnerable individuals (minors, but not only) are among the most severely punished crimes in terms of the estimation of penalties. They also imply severe social disapproval because they find nourishment and manifest themselves within a family or parental relationship, or within a relationship of strong role inequality, where the deep bond between the victim and the perpetrator tends to hide or not recognise the violence and, consequently, protect the perpetrator.[1]

The phenomenon can occur in all those contexts where there is a close relationship between the adult and the victim: in recovery communities, in sports centres, in schools and in church-related centres such as seminaries

1 Servizio analisi criminale della direzione centrale polizia criminale, *Decimo Dossier indifesa di Terre des Hommes* (2021), available on https://terredeshommes.it/indifesa/pdf/Dossier_indifesa_tdh_2021.pdf, access 09.09.2022.

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or oratories. It is therefore important that, for the effective suppression of this type of crime, measures are taken to help victims find a listening ear and protection. Fundamental in this sense is the role of education, knowledge and training, which must extend to all those involved on a daily basis in helping vulnerable individuals to grow up in appropriate contexts and in catching and interpreting signs of distress.

Minors and vulnerable persons cannot be left alone on the difficult path of denouncing violence but rather must, from the very beginning, find adequate support and assistance programs to rebuild their psychophysical integrity and sexual identity, which are sometimes severely compromised and harmed by the violence they have suffered.

The Lanzarote Convention was ratified in Italy in 2012, constituting the first international instrument that comprehensively regulates the repression of the various forms of sexual exploitation and abuse committed against persons under the age of 18.

The framework outlined by the Convention is aimed at making national and international legislation more effective. In the realisation of these principles, Italy has provided, with the ratification law no. 172/2012, rules for the adaptation of domestic legislation, both substantive and procedural, in order to transpose the contents of the Convention. For example, our legal system has long provided for significant instruments to protect and safeguard vulnerable individuals.

2. Differences Between the Italian Legal System and the Canonical System

A. The Victim

One of the most obvious differences between the canonical and the Italian legal systems is the role of the victim assumed within the trial, as well as the relative precautions to be taken towards the minor or vulnerable person during his or her hearing and throughout the proceedings.

In a canonical penal trial, the alleged victims are not "parties" to the trial, but witnesses: the actor in a penal trial – given its public nature, i.e. its protection of the public good and not exclusively of a private good – is the Promoter of Justice. In the Italian legal system, as a result of the trial incapacity of the minor or the fragile subject, the action is exercised by the persons entitled – pursuant to Article 90, para. 2 of the Italian Code of

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Criminal Procedure – to represent him/her, i.e. the parent, the curator or the guardian, who may act in a subsidiary manner.

On this point, therefore, it is important to highlight what the protected legal interest is and why it is important that, in addition to the public interest, the legal interest of the minor or of those who lack the use of reason is also protected.

In cases of violence against children under the age of 14, the protected legal interest is found in the sexual intangibility of the victim, in view of the legal presumption of the subject's incapacity to give valid consent to the performance of any kind of sexual act. In cases of sexual violence against children over the age of 14, the protected legal interest is diverse, and it is related to the child's freedom of self-determination, especially sexual freedom and the free expression of one's will, as well as the child's balanced, healthy and free psycho-sexual development.

Pursuant to Article 90(2) of the Italian Code of Criminal Procedure: 'The offended person who is a minor, interdicted by reason of insanity or incapacitated exercises the faculties and rights attributed to them by means of the persons indicated in articles 120 and 121 of the Criminal Code'. In the case of minors as well as for legal persons and de facto bodies, the Code makes a dissociation between the ownership of the right to sue and its exercise, identifying two hypotheses, provided that the ownership of the right lies with the offended person tout court.

The first hypothesis is that of the person under the age of 14 or of those who lack the use of reason. In this case, 'the right to sue is exercised by the parent or guardian' (art. 120, p.2, Criminal Code).

The law presumes that a person under the age of 14 does not possess the necessary maturity to determine his or her own case. Such a young person may be afraid to report the alleged perpetrators of a crime against him or her because he or she most often has relations with them.[2]

The second hypothesis concerns those over 14 years old and those who lack the use of reason. They 'may exercise the right to sue, and the parent or guardian or curator may also exercise it on their behalf, notwithstanding any contrary will, expressed or implied, of the minor or the incapacitated person' (Art. 120, paragraph 3, Criminal Code).

2 Eleonora Luzi and others, Il minore vittima di abusi sessuali e le garanzie del giusto processo penale, *International Journal of Developmental and Educational Psychology* (2018) 1(1), available on https://www.redalyc.org/journal/3498/349855553014/html/, access 10.08.2022.

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B. Damages

On damages, Article 10 of the Code of Juvenile Criminal Procedure expressly states the inadmissibility of civil action in criminal proceedings. With regard to the damage caused by the injury to the child's health in civil proceedings – in addition to the pecuniary component, relating to the medical expenses incurred for psychotherapy treatment – one must deal with the quantification of the non-pecuniary damage resulting from the disability, both permanent and temporary, ascertained for the victim.

C. Extended Notion of Victim

The harm suffered by the parents is noted as an offence that may cause damage not only to the primary victims, but also to the secondary victims, who are entitled to compensation for the harm as they have a situation resulting from a certain relationship with the victim. The compensation for the damage in question is made by taking into account the moral suffering of the parents, while damage of a dynamic-relational character must be proven. The parameters taken into consideration, for the purposes of the compensation, are the repetition of the crime, the circumstances of time and the place in which it was committed and the personal relationship existing with the offender.

D. The Sequence of the Processes

In the relationship between the canonical process and the civil process, moreover, one of the problems that is noted is that, many times, the canonical process is held before there is a civil investigation. Often in the canonical setting, testimony is taken, as, in some cases, is the confession of the accused, which could be of interest to the civil authority. There are certain situations in which the civil authority may have access to these documents, e.g. an enforceable judicial order or the seizure of the ecclesiastical archives. This evidence given in canonical proceedings could be used in civil proceedings.

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E. The Principle *ne bis in idem*

Another element to be highlighted concerns the Latin proverb *ne bis in idem*, which expresses a civic principle guaranteeing that no legal action can be taken twice for the same cause against a defendant previously and definitively judged.

In the Italian legal system, the prohibition of double jeopardy for the same action is enshrined in Article 649 of the Italian Code of Criminal Procedure, which states that:

> a defendant who has been acquitted or sentenced by a final judgement or criminal decree cannot be prosecuted again for the same offense, not even if the conduct is considered differently in terms of the legal definition, degree or circumstances, except as provided for in Articles 69(2) and 345(2) of the criminal code, provided for in Articles 69 paragraph 2 and 345. If, notwithstanding this, criminal proceedings are again commenced, the judge at any stage and level of the proceedings shall pronounce a judgement of acquittal or of non-prosecution, stating the cause in the operative part.

This is a principle that already existed in Roman Law and is recognised in European legal systems, in some of which it has constitutional status. The principle of *ne bis in idem* does not fall within the sphere of inviolable human rights and does not have the nature of a principle of international law capable of taking precedence over that of territoriality. It can, if anything, be applied in the presence of conventions ratified and implemented between states and is binding only to the contracting parties and within the limits of the agreement reached.[3]

In general, the Italian state, like most modern states, is inspired by the principle of territoriality and the general mandatory nature of criminal law. This is done with the clear justification of ensuring a justice system that takes into account the different social and political evaluations of human behaviour, especially in the criminal field, where the importance attributed to certain crimes is also different in the popular conscience.

The *ne bis in idem* principle cannot be considered applicable as a result of agreements between the Holy See and Italy or Conventions to

3 Elena Scozzarella, La questione del 'ne bis in idem' nella giurisprudenza della CEDU e nella giurisprudenza nazionale di merito, di legittimità e della Corte Costituzionale, *Diritto Penale Contemporaneo 2019* https://archiviodpc.dirittopenaleuomo.org/upload/9936-scozzarella2019a-2.pdf, access 10.08.2022.

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which both have acceded. The Holy See remained outside the *Convention implementing the Schengen Agreement,* having signed only the *European Monetary Convention.*

On this point, the conclusion reached by the Court of Cassation (Section Three, 17 September 2021) is that *ne bis in idem* is not applicable in this case, with the consequence that a subject can be judged and punished both by the Holy See and by the Italian jurisdiction for the same fact, but under certain conditions.[4]

3. *State and Church in the Fight Against Abuse: First Results*

The Church, like the state, has chosen to act in the fight against child sexual abuse and violence against children. Its canonical legal system includes a recently reformed section of the canonical penal law aimed at defining criminal behaviour.

Moreover, at the express wish of the Pope and – in Italy – in accordance with the indications of the Italian Episcopal Conference, from 2019–2020 most Italian dioceses (including the Ambrosian diocese) set up a special Diocesan Service for the Protection of Minors and Vulnerable Adults, headed by a Diocesan delegate, who coordinates the various activities: training, prevention and raising awareness on the one hand; listening and collecting reports on the other.

In the Archdiocese of Milan, in particular, by the Archbishop's Decree of 18 November 2021, a specific Listening Service has been given to the delegate, with the task of ‘the first reception and listening to those who declare themselves victims of abuse in the ecclesial context, either past or present, as well as to people who are aware of a situation of alleged abuse in the ecclesial context’ against minors and vulnerable people.

The Listening Service was set up with the intention of offering the most humane, attentive and welcoming listening to those who have been victims

4 In the relevant case, the defendant had been brought to trial for engaging in sexual acts against a minor of 16 years of age entrusted to him for reasons of religious upbringing (art. 609 quater no. 2 of the Penal Code) after having been tried for the same actions, in the canonical jurisdiction, at the conclusion of an "administrative penal trial," he was sentenced, by the delegate of the Archbishop of Pescara-Penne, by penal decree, to the perpetual expiatory penalty of exercising priestly ministry in perpetuity with minors of age, as well as to the temporary penalties of suspension from priestly ministry for a term of three years and from the obligation to reside, for a period of five years for a life of prayer and penance, to be spent in a community.

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of abuse, sexual misconduct or inappropriate behaviour in the ecclesial sphere.

At the Curia in Milan the Commission for the Protection of the Rights of Minors was also set up with the aim of creating a network between the Italian and canonical legal system. In fact, the intention is to highlight an initial form of best practice that can be a guide for other realities, both national and international, through an in-depth knowledge of the phenomenon of protection systems that are more and more suited to the needs of individuals and victims. We consider this to be an appropriate framework to allow the two legal systems to function better with absolute autonomy.

Also, within the Diocesan Service for the Protection of Minors, the Diocesan Commission for the Protection of Minors was set up in 2019, with a specific task: to identify, formulate and disseminate – in all the different diocesan ecclesial contexts – the Guidelines for the prevention of and training on the subject of abuse and sexually inappropriate behaviour towards minors (and vulnerable adults).

The Guidelines adopted by the Archdiocese of Milan then served as a kind of best practice for other Italian dioceses.

Since its establishment in 2019, the network of diocesan contact persons and related services for the protection of minors and vulnerable persons in all 226 Italian dioceses has been strengthened. It will now be supported with training courses aimed at people working in pastoral ministry (priests, religious men and women, catechists, educators, religious teachers...) and those called to deal with the legal aspects. This action is intended to promote, even more widely, a culture of respect and dignity for minors and vulnerable persons.

A first national report will also be produced on prevention and training activities and on cases of abuse reported to diocesan and interdiocesan services in the last two years (2020–2021). The data will be collected and analysed by an academic research centre. The reports will be annually and will be a valuable tool to improve, in terms of quality and effectiveness, the training action of the services and the reception and listening in the centres. They will also be a sign of transparency since they will be made public.

Thanks to a recently opened new area of collaboration with the Dicastery for the Doctrine of the Faith, it will then be possible to know and analyse, in a quantitative and qualitative manner, the data held at the Congregation while guaranteeing due confidentiality. These data refer to alleged or

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ascertained crimes committed by clerics in Italy in the period 2000–2021. The analysis will be conducted in collaboration with independent research institutes, which will guarantee high-level scientific and moral profiles, and will provide deeper and more objective knowledge of the phenomenon. This will make it possible to improve prevention and counteracting measures, to accompany victims and survivors with more awareness and to refine the criteria for further research.

In this context, on 5 June 2022 the Dicastery for the Doctrine of the Faith published the second Vademecum online to help deal with cases of child abuse committed by priests from a canonical point of view. The text, which does not have the force of law but responds to a need for knowledge of the practice, provides guidelines for dealing with the phenomenon, from the *notitia criminis* to the prior investigation and penal procedure. The revision compared to the version of 16 July 2020 took into account contributions from academic centres and studies in the sector, as well as constant comparison with ecclesial realities.

Biography

Prof. Dr Livia Pomodoro is a former president of the Court for Minors and the Court of Milan. She is the diocesan delegate for the protection of minors in the Archdiocese of Milan. She directs the Spazio Teatro No'hma Teresa Pomodoro, is President of the Brera Academy and holder of the UNESCO Chair 'Food System for Sustainable Development and Social Inclusion'.

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The Rights of (Minor) Victims of Sexual Violence in German Criminal Procedure

Frauke Rostalski

Abstract

In criminal proceedings, the victim plays a special role. His/her legal position has been considerably reinforced by various provisions in the current law. Despite the criticism directed at individual regulations, some of it justified, this development in the law has proven to be beneficial. At the heart of it all is the legal institution of private accessory prosecution, which may well serve as an inspiration for other jurisdictions.

Keywords: *Private accessory prosecution; victim in criminal trials; statute of limitations; minor victims; sexual violence*

A criminal offence is an individual's violation of a legal prohibition or obligation.[1] Through punishment, we react to such misconduct. We oppose the individual's objectionable challenge to the legal order and further confirm the validity of the infringed legal norm by imposing a penalty. The defendant deserves punishment, because he/she continue to be an equal member of society despite his/her offence. Thus, his/her challenge cannot remain unobjected.

However, his/her criminal offence is not merely a violation of the law. Above all, it is a violation of a victim's legal position.[2] The 'de-privatisation' of the conflict through criminal law, i.e., the removal of the conflict from the private sphere, which forms the context for the relationship between perpetrator and victim, into the public sphere may lead us to losing sight

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1 Frauke Rostalski, Der Tatbegriff im Strafrecht, Mohr Siebeck 2019, 16ff; Georg Freund / Frauke Rostalski, Warum Normentheorie? Zur selbständigen Bedeutung vorstrafrechtlich legitimierter Verhaltensnormen, auch und gerade im strafrechtlichen Kontext, *Goltdammer's Archiv für Strafrecht (GA* 2020*)*, 618; Georg Freund / Frauke Rostalski, Normkonkretisierung und Normbefolgung, *Goltdammer's Archiv für Strafrecht (GA* 2018*)*, 264, 273; Frauke Rostalski, Normentheorie und Fahrlässigkeit. Zur Fahrlässigkeit als Grundform des Verhaltensnormverstoßes, *Goltdammer's Archiv für Strafrecht (GA* 2016*)*, 78.

2 The statement refers to criminal offences for the protection of individual legal rights.

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of the individual victim that suffered at the hands of the defendant.[3] The criminal offence is an attack on the rights of the society to which the victim belongs: the criminal offence is grounded in the specific violation of the victim's legally protected right, which in turn gives rise to the reaction of the state in the shape of punishment. Thus, the victim should be accorded an appropriate role in the criminal process – as a person who has a special interest in the resolution of the conflict.[4]

German criminal procedural law is able to take this into account. This contribution presents the legal position of the victim in the German criminal process and demonstrates its role against the background of the aims of criminal trials. Simultaneously, the article shines a light on the victims' role in disciplinary law. The matter at hand will be limited in two ways: first by focusing on the *rights of minor victims* in criminal trials, and second, in the context of *sexual offences*, i.e., offences against the sexual autonomy of the individual.

1. *The Development of Victim Rights in German Procedural Law*

National criminal procedural law aims to provide victims of crimes with the opportunity to pursue his/her legitimate interests by being able to influence the trial to a certain extent and to further account for his/her potential desire to partake, gain information and to receive remedies for losses.[5] The decisive instruments to realise this are private accessory prosecution (II. 1.) and the assertion of rights in adhesion proceedings (II. 2.). Such measures of victim participation are accompanied by the risk of further emotional damage following the crime against them. This may not only arise from direct confrontation with the perpetrator, but also in the process of recapitulating the criminal actions.[6] This tension must be considered in the creation of victim rights. The victim must have the opportunity to participate effectively in the trial – but as considerately as possible with

3 Tatjana Hörnle, Straftheorien, Mohr Siebeck 2017, 37.
4 Ibid. 36ff.
5 For details, see II. and III. below and VI. on the disciplinary procedure.
6 Jutta Bader, Legitime Verletzteninteressen im Strafverfahren: Eine kritische Untersuchung der Rechtslage und Vorschläge de lege ferenda, Springer 2019, 32; Claus Schroth / Marvin Schroth, Die Rechte des Verletzten im Strafprozess, C.F.Müller 2018, Part 2, VI., marginal no. 61.

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regard to his or her individual psychological constitution. This is especially relevant when underage victims are involved.[7]

Strengthening victims' rights in German procedural law has been a long-drawn-out process. As early as in the 1900s, criminal law allowed for private accessory prosecution in the context of civil claims for damages.[8] In the following, significance will be awarded to the Victim Protection Act from the 18.12.1986, which aimed to considerably improve the legal position of the injured party in criminal procedures. The initial law was followed by numerous additions to criminal procedural law to strengthen the role of the victim, e.g., by passing the Witness Protection Act from 30.04.1998 and the Violence Protection Act from 17.12.2001.[9] As regards offences against sexual autonomy, the Act to Strengthen the Rights of Sexual Abuse Victims (26.6.2013) should be noted, which brought about an extension of civil and criminal statutes of limitation periods, as well as a change to Section 58a of the Code of Criminal Procedure (StPO), preventing multiple interrogations of the same victim. Overall, the "origin story" of the role of victims in criminal procedures is one of continuous strengthening and improvement. However, this development also received criticism, urging equal adjustment of the legitimate procedural interests of the accused.[10] Furthermore, the Modernization of Criminal Procedure Act from 10.12.2019 puts a slight damper on the role of the victim by implementing Section 397b StPO. This provision grants a margin of discretion to courts, to allocate a "joint" lawyer to claimants that are pursuing similar interests.

7 See III.–VI. below for the specific system.

8 Bernhard Weiner, § 395, in Jürgen Graf (ed), Beck'scher Online-Kommentar StPO, C.H.Beck 2022, marginal no. 4.

9 A comprehensive account of the development of the law can be found in: ibid. marginal no. 4ff.

10 Bader (n 6) 50ff; Matthias Jahn, Schriftliche Stellungnahme im Rahmen der öffentlichen Anhörung des Rechtsausschusses des Deutschen Bundestages zu den Gesetzentwürfen am 13. Mai 2009, available on https://www.jura.uni-frankfurt.de/55029494.pdf, access 20.07.2022.

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2. Adhesion Proceedings and Private Accessory Prosecution as Legal Institutions

The institutions of adhesion proceedings[11] and private accessory prosecutions are significant legal instruments to strengthen victims' rights in criminal procedures.

A. Private Accessory Prosecution

According to Section 395(1) (no.1) StPO, victims of sexual violence are entitled to join proceedings as private accessory prosecutors. Subsection 4 of this provision allows this "joint action" to enter appellate remedies at every stage of the trial, even after the judgement is passed. The EU Victims' Rights Directive from 15.10.2012 defines "victim" not merely as the person whose legal rights were immediately violated but includes family members of victims who died in the commission of the crime. Section 395(2) StPO entitles relatives and spouses to join as private accessory prosecutors regarding the deceased individual.

Private accessory prosecution aims to give the injured party the opportunity to actively participate in order to pursue and realise his/her own interests in the criminal proceedings. The distinctive feature of this legal instrument lies in its ability to provide the private accessory prosecutor with rights to join the proceedings as an independent participant, wholly separate from the other parties involved.[12] Behind this lies the idea that victims are granted a special ability to communicate with the defendant and society as a whole, by having his/her own procedural standing.[13] The injured party is given the opportunity to present his/her specific situation and emphasise the suffering he/she endured, to strengthen his/her claim for redress. The latter may be pursued by combining it with adhesion proceedings that fall on the civil law side of the conflict.[14] Simultaneously,

11 Section 403 ff stopp.

12 Urs Kindhäuser / Kay Schumann, Strafprozessrecht, Nomos 2022, § 26 marginal no. 79.

13 Weiner (n 8), marginal no. 1; Karsten Altenhain, Angreifende und verteidigende Nebenklage, *Juristen Zeitung (JZ 2001),* 795ff.

14 Bertram Schmitt, Strafprozessordnung, in Lutz Meyer-Goßner / Bertram Schmitt (eds), Strafprozessordnung mit GVG und Nebengesetzen, C.H.Beck 2022, before § 403 marginal no. 2, 10.

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private accessory prosecution may function to protect the injured party from unjustified recriminations – even though this falls within the remit of the duty of care held by the prosecution and the courts.[15] It grants the claimant the opportunity to present to the court how he/she perceived the criminal offence that the defendant is being tried for.[16] Furthermore, the conviction of the guilty defendant may serve to provide a sense of justice, which affects the standing of the victim as a member of society. However, here it should be reiterated that this is not the only purpose of punishment. Against this background, academic views that assign the concept of private accessory prosecutions the purpose of providing a sense of satisfaction, even retribution, to the victim, should be regarded critically.[17] It is perceivable that such effects are the "byproduct" of a justified sentence given to the perpetrator. However, these are not the purpose of punishment and should thus not be identified as a function of a legal instrument such as private accessory prosecution instigated by the state.[18] Here it should be taken into account that private accessory prosecution is not a proper lawsuit in itself. Rather, it allows the injured party to join a lawsuit conducted by the state prosecution, if specific requirements are met.[19]

B. Adhesion Proceedings

Where the claimant instigates adhesion proceedings, he/she is able to claim damages in civil law in the context of a criminal trial. This cannot compare to private accessory prosecution, insofar as it does not give the injured party a role as an active participant in the trial. The idea behind this is to prevent conflicting decisions in criminal and civil law.[20] However, we

15 Dieter Rössner, § 395, in Dieter Dölling / Gunnar Duttge / Stefan König / Dieter Rössner (eds), Gesamtes Strafrecht Handkommentar, Nomos 2022, marginal no. 22; Kindhäuser (n 12), § 26 marginal no. 80; Werner Beulke / Sabine Swoboda, Strafprozessrecht, C.F.Müller 2020, marginal no. 889.

16 BT-Drs. 10/5305: 13; Brian Valerius, § 395, in Christoph Knauer (ed), Münchener Kommentar zur Strafprozessordnung vol 3, C.H.Beck 2019, marginal no. 5.

17 On the function of satisfaction, see Schmitt (n 14), before § 403 marginal no. 1; on the function of retribution: Rössner (n 15), marginal no. 3.

18 Critically also: Weiner (n 8), marginal no. 3.

19 For further details on the construction of Private Accessory Prosecution, see II. 1. below.

20 Reinhard Granderath, Opferschutz – Totes Recht?, *Neue Zeitschrift für Strafrecht (NStW 1984),* 399.

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widely view the use of adhesion proceedings as critical.[21] The concerns are of a complex and fundamental nature: Adhesion proceedings pose the risk of overlap between civil and criminal proceedings, which, considering his/her widely separate purposes and corresponding yet widely different procedural principles, may end up harming the legal positions of all parties involved. This may be especially detrimental to the investigation of civil law questions.

3. *The Legal Position of (Minor) Victims of Sexual Violence in Criminal Trials*

The focus of this contribution lies on analysing the legal position of minor victims of sexual violence in national criminal trials. This entails an analysis of the different forms of representation injured parties may have, along with their peculiar role as witnesses in the criminal process.

A. Right to Bring a Criminal Charge as a (Minor) Victim of Sexual Violence

The person whose legal position was violated by the criminal offence has the right to report and bring a criminal charge against this violation. According to Section 158(1)(1) StPO, this is directed towards the state prosecution, public authorities and members of the police or the district courts as an oral or written submission. Minors have this right as well.[22] However, in reporting the crime, he/she has the right to be represented by a legal

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21 For example, Georg Freund, Stellungnahme eines Arbeitskreises der Strafrechtslehrer zum “Eckpunktepapier zur Reform des Strafverfahrens”, *Goltdammer's Archiv für Strafrecht (GA 2002)*, 84; Thomas Weigend, Deliktsopfer und Strafverfahren, Duncker & Humblot 1989, 524ff; Christian Betmann, Das Adhäsionsverfahren im Lichte des Opferrechtsreformgesetzes, *Kriminalistik 2004*, 570; Amina Hoppe, Opfer, Verletzter, Zeuge: Was muss, kann und soll Opferschutz im Strafverfahren leisten?, in Markus Abraham / Jan Christoph Bublitz / Julia Geneuss / Paul Krell / Kilian Wegner (eds), Verletzte im Strafrecht (7. Symposium Junger Strafrechtlerinnen und Strafrechtler), Nomos 2019, 163; Alexander Poretschkin, Verfassungswidriges Adhäsionsverfahren, *Zeitschrift für Rechtspolitik (ZRP 2020)*, 123ff; Bernd-Dieter Meier, Nina Dürre, Das Adhäsionsverfahren, *Juristenzeitung (JZ 2006)*, 18ff. See also Schmitt (n 14), before § 403 marginal no. 2, 3 with further references.

22 Schmitt (n 14), § 158 marginal no. 12.

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spokesperson or his/her parents. One peculiarity of German law should be noted regarding offences that are only prosecuted upon the request of the injured party. According to Section 77(1) of the German Criminal Code (StGB), the charge must be brought forward by the victim, unless he/she is legally incapacitated or has limited legal capacity. In this case, the prosecution may be requested by legal representatives or legal guardians.[23] Nevertheless, offences against sexual autonomy do predominately fall outside this category.

B. Proceedings to Compel Public Charges

German criminal procedure law provides the injured party with the ability to defend themselves against a termination decision by the prosecution. If the prosecution services do not find sufficient reason to bring a public charge, they will terminate the proceedings as per Section 170(2) StPO. If the injured party puts forward a request for criminal prosecution and it is later terminated, he/she must be informed about the decision of the prosecution as stipulated in Section 171 StPO. He/she may then appeal this decision according to Section 172 StPO. If the claimant is underage, he/she must be represented.[24]

C. Access to Information Relevant to the Criminal Process and the Laws of Evidence

During the criminal proceedings the injured party has a number of different rights to demand and receive information, as well as the right to view relevant records. The private accessory prosecutor has a special relevance. Section 406d StPO contains a number of inquiry rights, which the injured party may rely on to be informed about the trial. Alongside the right to be informed about the termination of the proceedings, he/she may have the right to learn about where and when the main proceedings are held, as well as what charges are to be brought against the defendant. However, he/she do not have the right to receive a copy of the decision.[25] Thus, the duty

23 Section 77(3) StGB.
24 Ibid. Section 172 marginal no. 7.
25 Ibid. § 406d marginal no. 2; Carsten Grau, § 406d., in Knauer (n 16), marginal no. 8.

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to provide information entails that regarding the result of the proceedings (conviction, acquittal or the cancellation of the proceedings (nolle prosequi)[26] presented to the injured party in a comprehensive manner.[27]

Furthermore, Section 406d(2) StPO stipulates that the injured party must be provided with such information required to meet his/her safety needs regarding the recently convicted defendant. This may include, for example, instructions to not get in touch with the injured party, as well as an order for incarceration. Beyond that, the injured party has a right to review records, which however has to be exercised through a lawyer as per Section 406e(1) StPO. Section 397 (1)(3) StPO grants the private accessory prosecutor an absolute right to apply to take evidence according to Section 244 (3–6) StPO, as long as he/she may join a public charge.[28] The details of this right are controversial, however, especially considering that the Supreme Court considers it justifiable to apply it in a less restrictive fashion to the private accessory prosecutor than to the defendant.[29]

D. Other Extensive Procedural Rights of the Private Accessory Prosecutor

As a private accessory prosecutor, the injured party enjoys extensive procedural rights in addition to the ones listed above. Those are found in Section 397 StPO. Particularly noteworthy is the right to be present at the main proceedings, which extends to previous parts of the proceedings and continues into the part where he/she is questioned as witness.[30] The private accessory prosecutor may reject judges and experts. They are allowed to question the defendant, witnesses and experts themselves. They have a right to object to orders from the presiding judge and may even make applications to take evidence. The court has to hear the private joint prosecutor, especially when a termination of the proceedings in line with Section 153 ff. StPO is planned.

26 Petra Velten / Luís Greco / Andreas Werkmeister, § 406d, (2020) in Jürgen Wolter (ed), Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, Carl Heymanns 2020, marginal no. 10.
27 Ibid. marginal no. 10.
28 Schmitt (n 14), § 397 marginal no. 5.
29 BGH ruling dated April 28, 2010, 5 StR 487/09; Other view: BGH ruling dated April 7, 2011, 3 StR 497/10. In detail on the dispute: Jutta Bader, Legitime Verletzteninteressen im Strafverfahren: Eine kritische Untersuchung der Rechtslage und Vorschläge de lege ferenda, Springer 2019, 161ff.
30 Schmitt (n 14), marginal no. 2.

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E. Legal Remedies for (Minor) Victims of Sexual Violence

The right to appeal of (minor) victims of sexual violence depends crucially on whether he/she appear as private accessory prosecutors in the proceedings. Section 401 StPO grants the private accessory prosecutor the right to appeal independently of the public prosecutor. Section 400 StPO, however, limits the scope of the private accessory prosecutor's right to appeal by specifying that the judgement may not be challenged with the objective of having another legal consequence of the offence imposed or of the defendant being sentenced for a violation of the law which does not justify joinder by the private accessory prosecutor. Within the context of an appeal, the accessory plaintiff can thus not successfully pursue the goal of having a higher sentence imposed on the convicted individual,[31] but may challenge the acquittal of the offender or, for example, the failure of the court to take into account another offence committed through the same act.[32] Whether the private accessory prosecutor can file an appeal on points of fact and law (*Berufung*) or an appeal only on points of law (Revision) depends, in principle, on the court having jurisdiction at first instance. Given the victim's particular vulnerability, an appeal on points of law is the only possible option in cases of offences against a person's sexual self-determination. In addition, Section 400 (2) StPO provides for the possibility of an immediate appeal against the order not to open the main proceedings as well as against the order to terminate the proceedings pursuant to Sections 206a and 206b StPO, as long as the order in question concerns the offence entitling the accessory private prosecutor to join the proceedings.

F. The Representation of (Minor) Victims of Sexual Violence in Criminal Proceedings

There are different ways for (minor) victims of sexual violence to be represented in criminal proceedings. The specific arrangement depends not least

31 Petra Velten, § 400, (2020) in Wolter (n 26) marginal no. 8; Raik Werner, Nebenklage, in Klaus Weber (ed), Rechtswörterbuch, C.H.Beck 2022; Rössner (n 15), marginal no. 3; Brian Valerius, § 400, in Knauer (n 16), marginal no. 4.

32 Velten (n 31), marginal no. 8; Bernhard Weiner, § 400, (2022) in Graf (n 8), marginal no. 3; Valerius (n 31), marginal no. 11–13.

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on whether the injured person appears as a victim or as a private accessory prosecutor.

a. Representation of the (Minor) Victim in the Role of a Witness

If the victim is questioned as a witness, he/she may avail his/herself of the assistance of legal counsel, according to Section 68b (1), sentence 1 StPO. Pursuant to paragraph 2 of this provision, witnesses that do not make use of this option must be assigned counsel for the duration of their examination if their interests meriting protection cannot be taken into account in another way. This provision is equivalent to those on the assistance for aggrieved persons or private accessory prosecutors pursuant to Sections 406f, 406g StPO.[33] The rights of participation of the counsel are derived from the legal status of the witness. In particular, the counsel can object to inadmissible questions and help to prevent testimony errors or misunderstandings if the witness is restricted in his/her ability or willingness to testify. Representing the witness during the testimony itself, however, is not possible.[34]

b. Representation of the (Minor) Victim in the Role of a Private Accessory Prosecutor

Persons entitled to join proceedings as private accessory prosecutors may also avail themselves of counsel and be represented by them, according to Sections 397 (2), sentence 1, 406h (1), sentence 1 StPO. If the private accessory prosecutor is a victim of one of the offences against sexual self-determination listed in Section 397a (1), no. 4 StPO, a lawyer shall be appointed to assist them upon request, provided he/she had not reached the age of 18 at the time of the offence or cannot adequately represent his/her interests themselves. The powers of the counsel include, among other things, the right to be present at the entire main hearing (including during the questioning of the victim), which also extends to its non-public parts. Although he/she has no right of participation, he/she may be allowed

33 Schmitt (n 14), § 68b marginal no. 2.
34 On this and further aspects: ibid., § 68b marginal no. 4.

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to ask questions. In addition, he/she has the right to ask the person interrogated questions of his/her own.[35]

c. Representation of the (Minor) Victim Not Entitled to Private Accessory Prosecution

A victim not entitled to join proceedings as a private accessory prosecutor may also be represented, as follows from section 406f StPO. In this case, however, the counsel's powers are essentially limited to the right to be present at the examination of the victim in the preliminary proceedings and the main hearing.[36]

d. Additional Means of Support for (Minor) Victims of Sexual Violence in Criminal Proceedings

Section 406g StPO provides for the possibility of psychosocial assistance in legal proceedings for persons injured in a criminal offence. According to this provision, the person providing this assistance must be allowed to be present with the injured person during his/her examination and the main hearing. If the conditions of section 397a (1), no. 4 StPO are met – i.e., that the victim of an offence against sexual self-determination was under 18 years of age at the time of the act or is unable to sufficiently safeguard his/her own interests – the court must, upon request, appoint a person who provides assistance. The legal institution of psychosocial assistance is meant to meet the need for support of the victim during the proceedings, which includes non-legal aspects. The objective is to protect the victim from secondary victimisation by providing them with qualified support and relevant information. Last but not least, the victim is to be strengthened in this way in his/her ability to actively participate in the process by giving testimony. The psychosocial assistant is to clearly distinguish his/her activities from the counsel related to the criminal proceedings, so that no influence, even indirect or unconscious, is exerted on the victim as a witness. The

35 On further aspects, see Schmitt (n 14), § 406h marginal no. 4; Sabine Ferber, § 406h, (2022) in Dieter Dölling / Gunnar Duttge / Stefan König / Dieter Rössner (eds), Gesamtes Strafrecht Handkommentar, Nomos 2022, marginal no. 4; BGH ruling dated November 11, 2004, 1 StR 424/04.

36 Schmitt (n 14), § 406f marginal no. 2.

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psychosocial assistant may be present during the examination of the victim but does not have the right to ask questions or the like.[37]

4. *(Minor) Victims of Sexual Violence as Witnesses in Criminal Proceedings*

The role of a witness can be particularly difficult for (minor) victims of sexual violence. The direct confrontation with what he/she has experienced, and possibly also with the perpetrator, can bring back memories that force the victim to relive the suffering he/she has endured, cause trauma and severely disrupt the necessary psychological healing process.[38] Against this background, a particularly sensitive approach to the victim is imperative in criminal proceedings.[39] The German Code of Criminal Procedure takes due account of this concern through a number of provisions. First of all, victims of sexualised violence should, if possible, be subjected to only one examination by a judge.[40] Direct examination by a judge, as provided for in section 58a (1), sentence 3 StPO, is meant to guarantee this. This provision also prescribes the audio-visual recording of this examination, provided the witness consents. In addition, section 255a (2), sentences 1, 2 StPO allows for the showing of a record of an examination of a witness, especially in cases of sexual violence against minors, thereby relieving the witness from the burden of having to testify again during the main hearing. If a second examination should nevertheless be necessary and admissible, the defendant may be directed to leave the courtroom during the hearing by order of the court. Such an order is admissible if a considerable detriment to the well-being of a witness under 18 years is to be feared in the presence of the defendant, as is laid out in Section 247 sentence 2 StPO. If the victim

37 Bernhard Weiner, § 406g, in Graf (n 8), marginal no. 1–29; Schmitt (n 14), § 406g marginal no. 1ff.

38 Jan Gysi, Psychotraumatologie in Sexualstrafverfahren, in Jan Gysi / Peter Rüegger (eds), Handbuch sexualisierte Gewalt, Hogrefe 2018, 17ff.

39 Bundeskoordinierung Spezialisierter Fachberatung gegen sexualisierte Gewalt in Kindheit und Jugend (BKSF), Stellungnahme zum Referentenentwurf eines Gesetzes zur Modernisierung des Strafverfahrens 1ff, available on https://kripoz.de/wp-content/uploads/2019/12/Stellungnahme_BKSF_Modernisierung-Strafverfahren.pdf, access 21.07.2022.
Ute Nöthen, Vom Spannungsfeld polizeilicher Arbeit zwischen Strafverfolgung und Opferbedürfnissen am Beispiel des Deliktfeldes der sexualisierten Gewalt gegen Kinder in Deutschland. (2018) in Gysi / Rüegger (n 38), 280.

40 According to Section 241a (1) StPO, hearings of witnesses under 18 years of age in court are conducted by the presiding judge alone.

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is already over 18 years of age at the time of the examination, there must be an imminent risk of serious detriment to his/her health in order for the defendant to be removed from the courtroom. Moreover, Sections 168e, 247a StPO allow for the possibility of an examination via audio-visual means of witnesses who are particularly vulnerable. And finally, according to the provisions of Section 171b of the Courts Constitution Act, the presence of the general public may be excluded or restricted in order to safeguard the interests of minor victims of crimes against sexual self-determination.

In order to adequately assess the testimony of the (minor) victim of sexual violence, the court may use the services of an expert, as stated in Sections 72ff. StPO. This practice is very common in proceedings involving an offence against sexual self-determination committed against a minor.[41] In this context, the involvement of an expert is significant in two ways. It protects the legal position of the witness by helping the court to arrive at an adequate assessment of his/her testimony, taking into consideration the special characteristics of the testimony given by a minor victim of sexual violence, for which particular technical expertise may be required. At the same time, however, the expertise provided also serves the rights of the defendant, who likewise has an interest in a factually correct assessment of the witness's testimony.[42]

Section 52 StPO deals with an anomaly. This provision grants relatives of the accused the right to refuse testimony, and also applies to (minor) victims of sexual violence. Paragraph 2 specifies that minors who have no sufficient understanding of his/her right to refuse testimony (due to lack of intellectual maturity or mental or psychological influences, for example on account of a disability) may only be questioned if he/she is willing to testify and if his/her statutory representative, too, agrees to the examination. The agreement of the representative is, of course, not required if he/she themselves are accused of the offence, in which case a supplementary guardian must be appointed pursuant to Section 1909 (1), sentence 1 of the German Civil Code in order to decide on the exercise of the right to refuse testimony.

41 Klaus Haller, Ausgewählte Möglichkeiten des Opferschutzes, insbesondere bei Sexualdelikten, in Gysi / Rüegger (n 38), 457; Thomas Trück, § 72, in Hans Kudlich (ed), Münchener Kommentar zur Strafprozessordnung, vol 1, C.H.Beck 2014, marginal no. 6.

42 Monika Egli-Alge, Glaubhaftigkeitsbegutachtung der Zeugenaussage, in Gysi / Rüegger (n 38), 482.

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5. Statute of Limitations as a Strengthening of the Legal Position of (Minor) Victims of sexual violence

Statute of limitations rules are usually significant in proceedings for offences against sexual self-determination, due to the fact that victims of sexual violence are often minors at the time of the offence. Repression but also fear of the consequences are massive obstacles which prevent the victim from reporting the offence, especially when the person in question is close to the victim. The law has to take due account of this reality, especially when it comes to the relevant statute of limitations. In Germany, a statute of limitations of ten years applies to sexual offences, Sections 78 (3) no. 3, 174f. StGB. As a result of a legislative amendment, however, the statute of limitations is suspended for certain offences against sexual self-determination until the victim reaches the age of 30, as stated in Section 78b (1) no. 1 StGB. This amendment has significantly strengthened the rights of the victim, a development viewed critically by some.[43] It does not, in any case, violate the principle of non-retroactivity enshrined in Article 103 (2) of the German Basic Law.[44] This provision does not cover any retroactive changes to the statute of limitations.[45]

6. Reporting Obligations in Protecting (Minor) Victims of Sexual Violence

Certain institutions or associations foster the formation of intimate relationships to children and young people, for example due to his/her thematic orientation. These relationships can result in (emotional) dependence. Against this background, guidelines have been developed by various bodies on how to deal with the suspicion of a criminal offence having been committed within the institution.[46] However, there is generally no obligation enforced by penalty to report such suspicions to law enforcement authorities.

43 Thomas Fischer, Strafgesetzbuch, C.H.Beck 2022, § 78b marginal no. 3–3e.
44 Frank Saliger, § 78b, in Urs Kindhäuser / Ulfried Neumann / Hans-Ulrich Paeffgen (eds), Nomos Kommentar Strafgesetzbuch, Nomos 2017, § 78b marginal no. 7.
45 BVerfG ruling dated January 31, 2000, 2 BvR 104/00.
46 See for example: Aufsichts- und Dienstleistungsdirektion Rheinland-Pfalz 2022.

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7. Victim Rights in Disciplinary Proceedings

The question of the role of the victims' rights may also arise in disciplinary proceedings. The purposes of a disciplinary proceeding, however, differ greatly from those pursued in a criminal trial. Criminal proceedings serve communication with the potential offender. If the suspicion of a criminal offence is confirmed, the accused is given a societal response by the court to his/her unjustified challenging of the law. In this way, he/she is stripped of the additional freedom he/she has unjustifiably claimed for themselves, and the injustice is thus compensated.[47] Disciplinary proceedings, on the other hand, play out on a different level. These are forms of conflict resolution within specific institutionalised societal groups. Disciplinary proceedings are supposed to maintain order within the respective group[48]—meaning they are precisely not about compensating society as a whole for wrongs committed. The disciplinary bodies, in any case, lack the power to do so.

Even so, disciplinary proceedings are occasionally seen as having a repressive function – just as some consider criminal proceedings to serve a preventive purpose.[49] There is nevertheless a decisive difference between the two: criminal proceedings alone represent the legitimate societal response to the individual's wrongful conduct. Punishment is the response to the individual's violation of a legal norm, which amounts to a challenge to the legal order. Only the judge in criminal proceedings is in a position to determine the societal reaction to the wrong thus committed. Criminal laws are acts by the parliamentary legislature that grant the criminal justice

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47 Frauke Rostalski, Zur objektiven Unmöglichkeit schuldlosen Verhaltensunrechts im Strafrecht, in Anne Schneider / Markus Wagner (eds), Normentheorie und Strafrecht, Nomos 2018, 105; Rostalski (n 1) B. I. 2; Georg Freund / Frauke Rostalski, Strafrecht Allgemeiner Teil, Springer 2019, 14ff.

48 Gernot Steinhilper, Chapter 5. Disziplinar- und Entziehungsverfahren aus Sicht der Kassenärztlichen Vereinigungen, in Alexander Ehlers (ed), Disziplinarrecht für Ärzte und Zahnärzte, C.H.Beck 2013, marginal no. 818; Ulrich Herrmann, § 95, in Stefan Görk (ed), Beck'scher Online-Kommentar BnotO, C.H.Beck 2021, marginal no. 1.

49 Examples of measures with a usually repressive function: Klaus Weber, Disziplinarmaßnahme, (2022) in Weber (n 31).
On the preventive function of criminal law: Christoph Degenhart, Art. 74, in Michael Sachs (ed), Grundgesetz Kommentar, C.H.Beck 2021, marginal no. 12; Thomas Ullenbruch, Verschärfung der Sicherungsverwahrung auch rückwirkend – populär, aber verfassungswidrig?, *Neue Zeitschrift für Strafrecht (NStZ 1998)*; BVerfG ruling dated February 26, 2008, 2 BvR 392/07.

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system the authority to punish criminal offences.[50] Disciplinary sanctions, however, react to breaches of disciplinary law. The latter is a separate legal order for individual social groups such as lawyers, members of the Church, etc. In this respect, there is a crucial difference between the two kinds of procedure. The details of the different systems of disciplinary law will not be discussed here.

8. Conclusion

In criminal proceedings, the victim plays a special role. His/her legal position has been considerably reinforced by various provisions in the current law. Despite the criticism directed at individual regulations, some of it justified, this development of the law has proven to be beneficial. At the heart of it all is the legal institution of private accessory prosecution, which may well serve as an inspiration for other jurisdictions.

Biography

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50 Freund / Rostalski (n 1), 264ff.

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Polish Criminal Procedure in Respect of Sexual Offences Against Minors

Małgorzata Skórzewska-Amberg

Abstract

The objective of this paper is to provide a general overview of Polish criminal procedure in respect of sexual offences against minors. The basic regulation concerning victims and witnesses is outlined, including the basic framework of the commencement of criminal procedure, interrogations therein, as well as the rights of the victim. The discussion of criminal procedure provisions applicable to such offences are all preceded by a short overview of the substantive criminal law on sexual crimes against minors.

Keywords: *sexual offences against minors; obligatory crime report; interrogation of the minor; auxiliary prosecutor; child's rights ombudsperson*

1. Introduction

The purpose of this article is to provide a general overview of Polish criminal procedure in respect of sexual offences against minors, defined by Chapter XXV of the Polish Criminal Code. Due to the vastness of the topic, the text outlines only the basic principles of Polish criminal procedure applicable to such offences, such as the fundamental regulation concerning victims and witnesses, without delving into matters such as a witness's right to refuse to testify, release from privilege or secrecy, or the position of the defendant in criminal proceedings. The discussion of the basic framework of the commencement of criminal procedure, interrogations therein, as well as the victim's rights are all preceded by a short overview of the substantive criminal law on sexual offences against minors.

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2. *Sexual Offences against Minors in Polish Criminal Law*

In Polish law, a person below the age of maturity is referred to as a minor.[1] The age of maturity has been set at 18 years (Article 10(1) of the Civil Code). An exception to the terminological system of Polish law is the Act of 6 January 2000 on the Children's Rights Ombudsperson,[2] wherein the legislature used the term 'child', defined as any human being from conception to coming of age.

The age of maturity must be distinguished from the age of consent, i.e., the age defined in domestic law at which a person may give operative consent to sexual activity with another. In other words, any sexual activity with a person below that age is prohibited.[3] In its article 200(1), the Polish Criminal Code prohibits sexual activity with a minor below the age of 15. Accordingly, the age of consent in Polish law is 15. It must be emphasised that irrespective of the age of consent any person below 18 years is a child and should be treated as such.[4]

Sexual activities within the meaning of the Polish Criminal Code are divided into two categories – sexual intercourse involving penetration of the genitalia or their surrogates (anal or oral intercourse) and so-called other sexual activities, i.e., all other activities that are sexual in nature but that do not involve penetration of the victim's body. Both court decisions and scholarly works appear to indicate that the recognition of an activity

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1 A woman may come of age earlier than this age. Pursuant to Article 10(2) of the Civil Code, a minor comes of age by entering into matrimony, whereas Article 10(1) of Family and Guardianship Code provides that the guardianship court may permit a woman sixteen years of age to marry if it occurs from the circumstances that entering into matrimony will be in the new family's interest.

2 Uniform text: Polish Journal of Laws from 2014 item 243.

3 EU legislation defines the age of consent in Article 2(b) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (OJ L 335, 17.12.2011, pp. 1–14) as the: 'age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child'.

4 International documents also clearly define as a child any person who has not reached 18 years of age (the permissible exception are situations in which such a person has become an adult pursuant to domestic law prior to reaching 18 years of age), including without limitation Article 1 of the Convention on the Rights of the Child (United Nations, Treaty Series, vol. 1577, p. 3), Article 9 of the Council of Europe Convention on Cybercrime (ETS No. 185), Article 3 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) Article 2(a) of Directive 2011/93/EU

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as ‘other sexual activity’ necessarily requires bodily contact between the perpetrator and the victim (e.g., masturbation of the victim by the perpetrator or vice versa) or the victim’s sexual engagement resulting from the perpetrator’s conduct (e.g., the victim masturbating),[5] although one can also encounter the view that it would be unjustified to exclude from the category of other sexual activities masturbation by the perpetrator in the presence of the victim (especially if the presence of another is indispensable to the perpetrator for sexual gratification).[6]

Sexual activities with a minor below the age of consent are prohibited (Article 200(1) CC). This, however, does not mean that sexual activities with a minor above the age of 15 are always lawful. The necessary condition for the conclusion that such an activity is not prohibited is the child’s unfettered consent and a lack of any circumstances whatsoever suggesting that the consent was not voluntary. Such circumstances, as specified in the Criminal Code, are violence, threat or deceit, as well as abuse of a relationship of dependence or taking advantage of a critical situation and abuse of trust. The use of violence, an unlawful threat or deceit in order to procure sexual intercourse (Article 197(1) CC) or submission to or the performance of another sexual activity (Article 197(2)) fulfils the elements of the offence of rape, for which the perpetrator is criminally liable irrespective of the victim’s age,[7] although an age below 15 will result in aggravated liability.

5 Cf. Marcin Berent / Marian Filar in Marian Filar (ed), Kodeks karny. Komentarz, Wolters Kluwer 2016, 1214; Marek Bielski in Włodzimierz Wróbel / Andrzej Zoll (eds), Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–211 k.k., Wolters Kluwer 2017, 767; Marek Bielski, Wykładnia znamion “obcowanie płciowe” i “inna czynność seksualna” w doktrynie i orzecznictwie sądowym, *Czasopismo Prawa Karnego i Nauk Penalnych* 1 (2008) 227–228; Mateusz Rodzynkiewicz in Andrzej Zoll (ed), Kodeks karny. Część szczególna. Komentarz do art. 117–277 k.k., t.2, Zakamycze 2006, 601; cf. also Supreme Court’s resolution of 19 May 1999, I KZP 17/99, (1999) OSNKW 7/8.

6 Jaroslaw Warylewski, Glosa do uchwały SN z dnia 19 maja 1999 r., I KZP 17/99, *OSP* 12 (1999) 224; Jaroslaw Warylewski, Z zagadnień karnoprawnej ochrony małoletnich przed wykorzystywaniem seksualnym, *Przegląd Sądowy* 2 (2000) 116–117; Marek Bielski in Wróbel / Zoll (n 5), 678; Jaroslaw Wyrembak, W sprawie znamion przestępstw przeciwko wolności seksualnej i obyczajności, *Prokurator* 2–3 (2008) 46; cf. also the judgement of the Court of Appeals in Katowice of 6 November 2012, I ACa 688/12, LEX no. 1239888. More extensively on this subject cf. M. Skórzewska-Amberg, Prawnokarna ochrona dziecka przed wykorzystaniem seksualnym w cyberprzestrzeni, Poltext 2019, 160–169.

7 Aggravated liability will be the case with a minor victim below the age of 15 – Article 197(3)(2) CC.

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The liability of a perpetrator who induces a minor to participate in sexual activities by abusing a relationship of dependence, a critical situation or trust is regulated in Article 199 CC. Significantly, as opposed to Article 200(1) CC, the protection extended to a minor by sections 2 and 3 of Article 199 is not limited by the minor's age.

The abuse of a relationship of dependence, which is one of the elements of the offence defined by Article 199(2), means the abuse of an objectively existing relationship between the perpetrator and the victim. The essence of such a relationship is the factual dependence between them, enabling the perpetrator to influence the victim's living situation.[8] Factual dependency means that the relationship of dependence need not be formalised but: 'may arise from the specific configuration of factual circumstances attesting to the perpetrator's realistic influence on the victim's living situation',[9] and thus either from the operation of the law (parents and children) or facts (a teacher and a student).[10] A critical situation, which also belongs to the elements of the offence defined in Article 199(2) CC, means an objectively existing situation that threatens the victim with significant personal or economic harm. Such a situation can be the result, for example, of a fortuitous event, illness or economic distress. Doubts arise as to whether such a relationship of dependence or critical situation may be brought about by the perpetrator's own conduct. Two diverging positions have formed in academia on this topic. The former is that both the relationship of dependence and the critical situation must exist objectively and without the perpetrator's contribution,[11] and the latter is that the perpetrator's contribution to the formation of a relationship of dependence or to the occurrence of a critical situation is irrelevant to the perpetrator's liability.[12]

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8 Cf. Supreme Court order of 18 December 2008, V K.K. 304/08 (2008) OSNwSK 1, item 2691; SC judgement of 6 May 2014, V K.K. 358/13 (2014) KZS 9, item 9.

9 Cf. Bielski (n 5), 723–724.

10 Marek Mozgawa in Marek Mozgawa (ed) Kodeks karny. Komentarz, Wolters Kluwer 2017, 616; Violetta Konarska-Wrzosek in Violetta Konarska-Wrzosek, Kodeks karny. Komentarz, Wolters Kluwer 2016, 909.

11 Thus i.a. Berent (n 5). 1238; Joanna Piórkowska-Flieger in Tadeusz Bojarski (ed), Kodeks karny. Komentarz, Wolters Kluwer 2016, 574; cf. Hubert Myśliwiec, Granice penalizacji seksualnego nadużycia stosunku zależności, wykorzystania krytycznego położenia oraz nadużycia zaufania małoletniego, *Czasopismo Prawa Karnego i Nauk Penalnych* 3 (2012) 97; Jarosław Warylewski in Ryszard Stefański (ed), Kodeks karny. Komentarz, C.H. Beck 2018, 1310.

12 Thus, cf. Bielski (n 5), 725.

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The act criminalised by Article 199(2) CC consists in the minor's consent. It must be emphasised that this consent *de facto* is in no way voluntary and would not have been given in any other circumstances.[13] In the case of the act criminalised by Article 199(3), one of the elements of which is the perpetration of sexual activities vis-à-vis a minor or inducing the minor to participate in such activities by abuse of trust, the minor's consent to participate in sexual activities is voluntary but obtained, among other ways, by the abuse of such a minor's trust.

Abuse of trust is the taking advantage of the belief that the perpetrator's actions are taken in the interest of the minor who consents to the sexual activities on the basis of trusting the perpetrator. But if it were not for that trust, the victim might not have given such consent.[14] The purpose of Article 199(3) is to protect the minor primarily from the actions of persons who, by reasons of their profession, function, or social or family position enjoy a special position of authority and trust from the child (e.g., teachers, coaches, clerics).

The trace of protection of the child from sexual abuse can also be found in Article 198 CC, which criminalises the act of inducing the victim to participate in sexual activities by taking advantage of the victim's helplessness or inability arising from a mental handicap or mental illness, to discern the meaning of the act or guide their own conduct. As regards children, protection is extended primarily to minors above the age of consent, who are no longer protected by Article 200(1) CC. Helplessness is the condition in which the victim is no longer capable of making or carrying out a fully informed decision.[15] This can be the product of causes situated either in the physical sphere (e.g., physical disability, paralysis, shock, exhaustion, neurological illness, etc.) or the mental sphere, as long as the victim's incapacity is caused by transient mental distress and not the result of a mental illness or mental retardation (e.g., intoxication with alcohol, anaesthetics, endocrine disruption, etc.).[16] The taking advantage of the victim's

13 Similarly Myśliwiec, Granice (cf. n 11), 102; Magdalena Budyn-Kulik / Marek Kulik in Michal Królikowski / Robert Zawłocki (eds), Kodeks karny. Część szczególna, Tom I, Komentarz, Art. 117–221, C.H. Beck 2017, 706.

14 Cf. Bielski in Wróbel / Zoll (n 5), 727; Konarska-Wrzosek (n 10), 910.

15 Cf. Andrezej Marek, Kodeks karny. Komentarz, Wolters Kluwer (LEX) 2010, 453.

16 Cf. Mozgawa (n 10), 614; Bielski (n 5), 711–712; Marek (n 15), 453; Budyn-Kulik (n 14), 97; Jaroslaw Warylewski in Jarosław Warylewski (ed), System prawa karnego. Przestępstwa przeciwko dobrom indywidualnym, t. 10, C.H. Beck 2016, 759–761; Hubert Myśliwiec, Seksualne wykorzystanie bezradności lub niepoczytalności innej

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helplessness is the inducement, by the perpetrator, of sexual activity with the victim, provided that this would not be possible if the victim had not been in a condition that prevents opposition to the perpetrator.

Another extraordinarily dangerous and increasingly widespread phenomenon is the sexual abuse of a child with the use of the child's image, colloquially known as child pornography.

In Polish criminal law neither pornography nor child pornography have a formal definition. The Criminal Code does not use the term 'pornography'; instead, it mentions: 'pornographic content with the participation of a minor'. That, however, does not mean the complete absence of any legal definitions narrowing down the concept of child pornography.[17] The broadest of those is contained in Article 2(c) of the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography,[18] where child pornography is defined as any material depicting a child, a person appearing to be a child or realistic images of a child participating in actual or simulated sexual conduct or depiction of the sexual organs of a child or person appearing to be a child for mainly

osoby (art. 198 k.k.), *Czasopismo Prawa Karnego i Nauk Penalnych* 2 (2013) 97; differently Mateusz Rodzynkiewicz in Andrzej Zoll (ed), Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k., Zakamycze 2006, 632–633.

17 Cf. Article 3(1) (c) of the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (UNGA resolution A/RES/54/263 of 25 May 2000); Article 9(2) of the Council of Europe Convention on Cybercrime (ETS No. 185)—pornographic material depicting a minor engaged in sexually explicit conduct (a) or a person who appears to be a minor or the realistic image of a minor (b and c, provided that the decision as to the recognition of such material as child pornography has been left up to the member states); Article 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse – depiction of a child engaged in actual or simulated sexual activity or depiction of sexual organs primarily for sexual purposes (CETS No. 201) – any material visually depicting a child engaged in actual or simulated explicitly sexual activity or any depiction of a child's sexual organs mainly for sexual purposes (it was left to the member states' discretion whether to criminalise materials composed solely of simulated depictions or realistic images of a non-existing child or materials with the participation of children having reached the age of consent if such images were created by them and are possessed with their consent and solely for their private use – Article 20(3)).

18 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, pp. 1–14)

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sexual purposes, including without limitation of the realistic[19] depictions of a child's sexual organs.

As used in the Directive, the expression 'any material' may include textual or audio-visual materials. *Słownik języka polskiego* (Polish dictionary) defines 'pornography' as: 'periodicals, photographs, paintings, drawings and other articles with indecent contents, calculated to elicit erotic stimulation in the audience',[20] and thus the Polish Criminal Code's use of the term 'pornographic content with the participation of a minor' refers to any type of material, hence text, images, videos and other audio-visual materials – according to the linguistic definition.

Article 202(3) criminalises the following activities if perpetrated with a view to dissemination:[21] producing, fixing, storing or possessing pornographic content involving a minor or disseminating or presenting such content. Fixing, storing, possessing or gaining access to pornographic content which involves a minor is criminalised by sections 4 and 4a of Article 202.

An incredibly important matter from the perspective of protecting minors from sexual abuse is to take into account the broad accessibility of IT and telecommunication technologies in many cases which enable or facilitate committing sexual offences against minors. The most typical offences committed in cyberspace include those linked to child pornography. The transmission or generation of pornographic material featuring a minor is only one example of such activities. Telecommunication and IT networks enable someone to gain access to child pornography without gaining possession of it; hence, the great importance of the language of Article 202(4a) CC, which criminalises the gaining of access to pornographic material featuring a minor. Online presentation of pornographic content featuring minors, including the real-time representation of sexual abuse of a minor, is becoming more widespread. Participation in the presentation of pornographic material featuring a minor, including live material without

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19 This term implies so-called simulated (generated) pornography, i.e., materials created without involving any specific child, instead derived as a resultant of multiple 'innocent' photographs, generated in a wholly artificial way, etc.

20 Mieczysław Szymczak (ed), Słownik języka polskiego, tom II, PWN 1988, 823; Witold Doroszewski (ed), Słownik języka polskiego: 'literary works, periodicals, images or drawings with indecent contents, calculated to elicit erotic stimulation,' (19 August 2015).

21 In line with the literature of criminal law, disseminating pornographic content to an unlimited audience, including without limitation through the use of mass media, telecommunications and IT networks, etc.

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limitation, is criminalised by Article 202(4b) CC – provided that the purpose is one of sexual gratification.

Article 200(3) CC criminalises, among other acts, the presentation of pornographic content to a minor below the age of consent, and Article 200(4) CC the presentation to a minor of the performance of a sexual activity – for the purpose of the sexual gratification of the perpetrator or another.

The Polish Criminal Code also criminalises so-called grooming, an indispensable element of which is for the perpetrator to get into contact with a minor below the age of consent through an IT system or telecommunications network. In this provision, Polish legislature criminalises two kinds of perpetrator conduct. Firstly, establishing contact with a minor below 15 years of age for the purpose of involving such a minor in sexual activities,[22] or of producing or fixing pornographic materials, if the direct consequence of such an establishment of contact is the perpetrator's attempt, through misleading the minor, taking advantage of the minor's error or incapacity to adequately understand the situation, to induce a meeting with such a minor (Article 200a(1) CC). Secondly, it criminalises the conduct of a perpetrator who proposes to a minor below the age of 15 sexual intercourse, submission to or performance of another sexual activity or participation in the production or fixation of pornographic materials, where the direct consequence of such a proposition is the attempt to implement it.

3. *Reporting a Crime and Initiation of Proceedings*

Sexual offences, as defined in Chapter XXV of the Criminal Code, are prosecuted *ex officio*, on the public path, which means that the police and the prosecution service, having received the information about the suspicion that a crime has been committed, are required to institute proceedings in the matter. This path does not require the victim[23] to take any action, and

22 More narrowly, for the purpose of committing the offence of rape on a minor below the age of consent, gang-rape or incestuous rape, or the inducement of participation in sexual activities.

23 A victim is a person whose interests have been directly harmed by a criminal offence (Article 49(1) of the Code of Criminal Procedure).

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information about the suspicion that a crime has been committed may be provided by any person whatsoever, irrespective of the victim's intentions.[24]

Anyone who has obtained reliable information about a criminal offence having been committed has a right to report it.[25] This is provided that such information need not be objectively true; what is important is that the reporting party be convinced of its truth.[26]

In Polish criminal law, anyone who has become aware of a publicly prosecuted criminal offence having been committed has the obligation to report such an offence (Article 304(1) CCP). For individuals, in the majority of cases this is a social, not a legal obligation. A legal obligation visited by a penalty for non-compliance is applicable solely to cases set out in Article 240 CC and refers to the gravest offences. In respect of sexual offences this applies to the rape of a minor below the age of 15, gang rape or incestuous rape or rape committed with particular cruelty (sections 3 and 4 of Article 197 CC); sexual activities with a person who is helpless or, due to a mental illness, unable to discern the meaning of the act or guide their own conduct (Article 198 CC); sexual activities with a minor below 15 years of age, the presentation of pornographic content or articles to or the performance of sexual activities on such a minor (Article 200 CC).

State and local-government institutions always have a legal obligation to report a publicly prosecuted crime (Article 304(2) CCP). This applies not only to: 'offences against the institution's interests but also such other *ex-officio* prosecuted offences as the institution may have become aware of in connection with its statutory or charter activities',[27] and failure to report may result in criminal liability.

24 Cezary Kulesza, Article 10, in Katarzyna Dudka (ed), Kodeks postępowania karnego. Komentarz, wyd. II, Wolters Kluwer 2020.

25 Ryszard A. Stefański / Stanislaw Zabłocki, Article 304, in Ryszard A. Stefański / Stanislaw Zabłocki (eds), Kodeks postępowania karnego. Tom. III. Komentarz do art. 297–424, Wolters Kluwer 2021.

26 Stanislaw Cora, *Podstawy* społecznego obowiązku zawiadomienia o przestępstwie. Problematyka art. 304 § 1 k.p.k., art. 113 § 1 k.k.s. i art. 4 § 1 i 2 u.p.n. in Wojciech Cieślak / Slawomir Steinborn (eds), Profesor Marian Cieślak – osoba, dzieło, kontynuacje, Wolters Kluwer 2013, 687 and 688.

27 Wincenty Grzeszczyk, 'Obowiązek zawiadomienia o przestępstwie,' (1998) *Prokuratura i Prawo* 10, 124.

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A crime report may be made orally to the police or in written form by letter[28] to the prosecution service.[29] If reporting orally, the reporting person is immediately interrogated as a witness.

If a crime report concerning rape (Article 197 CC), taking advantage sexually of incapacity or helplessness (Article 198 CC.) or of a relationship of dependence or of a critical situation (Article 199 CC), is made by the victim, then it may be limited to the identification of key facts and evidence (Article 185c CC).

Immediately following receipt of the crime report the authority competent to conduct the pretrial investigation issues an order instituting or refusing to institute proceedings. Proceedings are precluded by the existence of so-called negative procedural grounds (Article 17(1) CCP), including without limitation the lack of data sufficiently substantiating the suspicion of the offence having been committed, if criminal proceedings are pending or have been finally resolved concerning the same act of the same person, or the statute of limitations has run out on punishment of the offence. In Polish criminal law, the statute of limitations on punishment of the offence means the perpetrator may no longer be prosecuted. For sexual offences against children, the statute of limitations, depending on the gravity of the act, is 10 to 20 years (Article 101(1) CC), provided that the statute of limitations cannot run its course on a criminal offence committed against a minor victim before the victim completes 30 years of age (Article 101(4)(2) CC).

An interlocutory appeal may be brought against the order instituting or refusing to institute proceedings. If the court reverses the disputed order and the procedural authority again issues an order refusing to institute proceedings or discontinuing the proceedings, then the order may be appealed to the prosecutor superior or to the authority conducting the proceedings. If the latter upholds the order, then the victim may bring a so-called subsidiary bill of indictment to the court (Article 55(1) CCP). Such a subsidiary bill of indictment must be drafted and signed by an advo-

28 Any such letter, affixed with a date and signature, must identify, without limitation, the reporting person and the victim (if they are not the same person), the time and place of the incident, a description of the incident, the identification of any witnesses and information about any evidence possessed.

29 In many cases, the report may be made to different bodies, for example in the case of sexual offences against minors below 15 years of age to the State Commission for Paedophilia (e.g., via call centre) and in the case of any criminal offences against a child to the Child's Rights Ombudsperson.

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cate or counsellor-at-law (professional counsel) or by a counsellor with the Treasury Solicitor's Office (Article 55(2)). The public prosecutor may at any time accede to a case instituted in this manner. Furthermore, the public prosecutor may not withdraw the indictment without the victim's consent (Article 55(4) CCP).

If a bill of indictment (either the public prosecutor's or a subsidiary one) is lodged with the court following the pretrial investigation, another stage of criminal proceedings commences, which is the court proceedings.

In principle, a minor may not appear independently in criminal proceedings. In accordance with Article 51(2) CCP, if the victim is a minor, their rights are to be exercised by the statutory guardian (usually the parents) or permanent carer.[30]

Accordingly, where a minor makes a crime report, such a report is inoperative. It must be emphasised, however, that in any such situation the law enforcement agency may, having heard the minor out, if there is a reasonable suspicion that a criminal offence has been committed, institute the proceedings *ex officio*.

The inactivity of parents failing to report a sexual offence committed against their child or obstruction by them of the making of such a report may be recognised as inadequate exercise of parental responsibility and justify the court in issuing the relevant orders, for example: 'instructing the parent to file a motion to prosecute or – in default of the parent's compliance with the obligation – appoint a special guardian-*ad-litem* to do so'.[31]

In no case is it admissible for a child in criminal proceedings to be represented by a parent if the other parent is the suspect or defendant in the same proceedings.[32] In such a case the guardianship court will appoint a *guardian-ad-litem* to represent the child in the proceedings (Article 99 of the Family and Guardianship Code).

30 Also, where the victim is a vulnerable person, in particular because of age or health, such a victim's rights may be exercised by their primary carer (Article 51(3) CCP).

31 Cf. judgement of the Court of Appeals in Katowice of 6 May 2009, II AKa 396/08, LEX no. 553873.

32 Cf. SC resolution (seven justices) of 30 September 2010, I KZP 10/10, OSNKW 2010/10, item 84; SC judgement of 1 December 2010, III KK 315/09, BPK 2011/2, item 1.2.4; SC order of 11 January 2011, V KK 125/10, OSNwSK 2011/1, item 27; SC order of 18 October 2011, V KK 209/11, OSNwSK 2011/1, item 1879; OSC order of 18 October 2011, V KK 210/11, OSNwSK 2011/1, item 1880; SC order of 30 September 2015, I KZP 8/15, OSNKW 2015/12, item 100.

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4. Rights and Obligations of the Victim in Criminal Proceedings

The victim is duty bound to appear at every summons of the authority conducting the proceedings (Article 177 CCP).[33] Fingerprints, hair and saliva samples, odours, etc. may be taken from the victim (Article 192a CCP). The victim may also be subjected to a visual inspection and medical examination where the punishment of a criminal offence depends on the victim's health condition (sections 1 and 3 of Article 192 CCP). If there are doubts as to the victim's mental condition or development, or their ability to perceive or recall perceptions, the court or prosecutor may order the victim to be interrogated with the participation of a physician or psychologist (Article 192(2) CCP).

A victim who is party to the proceedings may appoint counsel – an advocate or counsellor-at-law. In the pretrial investigation, the victim is a party to the proceedings (Article 299(1) CCP). In court proceedings, in principle, the parties are the prosecutor and the defendant, while the victim may only appear as a party if acting as an auxiliary prosecutor (Article 53 CCP).

In *ex-officio* prosecuted cases the public prosecutor is in charge of the prosecution (Article 45(1) CCP) and the victim may act as an auxiliary prosecutor – beside or in lieu of the public prosecutor (Article 53 CCP). Even where the public prosecutor withdraws the indictment, this does not strip away the auxiliary prosecutor's rights; moreover, in such a situation the victim, even if previously not having exercised their right to an auxiliary prosecutor, may accede as one to the proceedings (Article 54 CCP).

When a bill of indictment is brought to the court, the victim loses the status of a party in court proceedings. The victim ceases to be an active party to the trial (with a few exceptions provided for in the Code of Criminal Procedure) – thus, for example, they do not have the right to submit motions for evidence, ask questions to persons questioned or have access to the case files. The auxiliary prosecutor is an institution of the Polish criminal procedure which was introduced in order to enable the aggrieved party to actively participate in the trial and exercise the victim's rights as a party – alongside or instead of the public prosecutor.

33 Where the victim fails to attend without excuse, they may be fined or even compelled to attend (sections 1 and 2 of Article 285 CCP). The victim is entitled to be reimbursed for the costs of attending (Articles 618a-618e and 618j CCP).

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An auxiliary prosecutor may join the proceedings alongside the public prosecutor or make a complaint independently of the public prosecutor; or take action when the public prosecutor does not carry out the function of prosecution (in such a case as a subsidiary prosecutor).[34]

An auxiliary prosecutor, who is party to the proceedings, may appoint counsel. Also, a non-party person may appoint counsel[35] if such a person's interests in the pending proceedings so require (sections 1 and 2 of Article 87 CCP). Such counsel may only be an advocate, counsellor-at-law or counsellor with the Treasury Solicitor's Office (Article 88(1) CCP). The court, however, or the public prosecutor in pretrial investigation, may refuse to admit counsel to a non-party person upon finding such counsel's participation not to be required for the protection of the non-party person's interests (Article 87 CCP). Depending on the outcome of the case, the defendant may be ordered to pay the costs of retaining such counsel (Articles 627–629 CCP). The court may appoint *ex-officio* counsel for the victim if the victim demonstrates that their financial standing does not permit retaining counsel (Article 78(1), sections 1 and 2 of Article 87, and Article 88 CCP).

A social organisation also may participate in court proceedings if there is a need for the protection of a social or individual interest covered by such an organisation's charter objectives. Such participation is conditional upon at least one party's consent. In the absence of such consent, the court will admit the organisation's representative if doing so is in the interests of justice. Once admitted to participation in the proceedings, the representative of a social organisation may attend hearings, speak and make submissions in writing (Articles 90–91 CCP).

The victim may move to recuse a judge or prosecutor in circumstances of such kind as to give rise to a reasonable doubt as to the judge's or prosecutor's impartiality in a given case (Articles 42(1) and 47(1) CCP).

In pretrial investigation, the victim may move for procedural activities to be performed such as the interrogation of a witness, sourcing of a document or admission of an expert opinion (Article 315(1) CCP, Article 325a(2) CCP) and may attend such activities, also with the assistance of

34 Dariusz Świecki (ed), Kodeks postępowania karnego. Tom I. Komentarz aktualizowany (Lex/el), Article 53, Wolters Kluwer 2022.

35 The court, and in pretrial investigation the public prosecutor, may refuse to admit such counsel to the proceedings upon finding such counsel's participation not to be required for the protection of such a non-party person's interests (Article 87(3) CCP).

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counsel (Articles 315–316 CCP).[36] The victim may also participate in the expert's interrogation and read the expert's opinion (Article 318).

If the victim is acting as a party (auxiliary prosecutor) in the court proceedings, he/she has a right to submit evidentiary motions and pose questions to those being interrogated. The victim also has a right to attend the main hearing (sections 2 and 3 of Article 384 CCP) and the court's sittings prior to the main hearing in respect of conditional discharge (Article 341(1) CCP)) or dismissal on the grounds of the defendant's incapacity along with the application of protective measures (Article 354(2) CCP) or conviction and sentencing without a main hearing (Article 343(5) CCP).

The victim has a right to the assistance of a translator or interpreter, including without a limitation a sign-language interpreter (sections and 2 of Article 204).

In criminal proceedings the parties, counsel, statutory guardians and some others, have a right to inspect the files of the case and make copies. The parties and persons directly affected by a ruling have a right to receive a copy of each such ruling (Articles 156 and 157 CCP).

The victim,[37] until the closure of the trial, has a right to petition for redress of compensation for any harm suffered (Article 49a CCP). The victim has a right to sue for damages before the civil court in excess of the amount awarded by the criminal court. If the defendant has been found guilty in the criminal case, the victim, when bringing an action for damages to civil court, may rely on the criminal court's judgement, so that only the amount to be awarded will remain for the civil court to decide.

The victim and the persons closest to him/her may receive medical, psychological, rehabilitation, legal and material assistance from the Crime Victims Support Network (Article 43(8)(1) of Criminal Enforcement Code).

5. Interrogation of the Victim or Witness

The person being interrogated, in whatever capacity, should first and foremost be provided with the opportunity to speak freely before being asked

36 Transcripts of activities in criminal proceedings must not contain details of the address of residence and employment, telephone number or e-mail addresses of the victims and witnesses participating in a given activity. Such data are identified in an annex, with access to it restricted to the authority conducting the proceedings (Article 148a (1) CCP).

37 The public prosecutor also has this right.

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questions with a view to supplementing or narrowing down the answers given. This is of extraordinary importance also due to the fact that explanations, depositions and witness statements in conditions not guaranteeing free expression are inadmissible as evidence (Article 171(6) CCP). The questions – which, apart from the interrogating authority, also the parties, defence counsel, other counsel and experts may ask – ought to be posed directly (sections 1 and 2 of Article 171). Leading questions, coercion or threat, or hypnosis, chemical or technical agents affecting mental processes or intended to seize control of unconscious reactions of the organism must not be used (sections 4 and 5 of Article 171). The persons interrogated may be confronted with one another in order to explain any inconsistencies, and they may be exhibited a person, image of a person or item for identification (Articles 172–173 CCP).

Anyone summoned as a witness has a duty to attend and testify (Article 177(1) CCP), even if he/she do not know anything about the incident which is the subject matter of the pending proceedings or about circumstances connected therewith or which have any relevance to the proceedings.[38] A witness may be interrogated with the use of technical devices for remote interrogation, enabling direct, simultaneous transmission of video and audio. Proceedings before a court at the witness's place of residence must be attended by a court referendary, clerk or official employed by the court in whose district the witness is present (Article 177(1a) CCP), as well as a consular official if the witness is a Polish citizen abroad (Article 177(1b) CCP).

A witness unable to attend the summons due to illness, physical disability or some other insurmountable obstacle may be attended at the place they are staying (Article 177(2) CCP). The Code of Criminal Procedure also identifies categories of people who shall not be interrogated (Articles 178–179 CCP). Those include without limitation clerics who must not be interrogated about whatever facts they may have learned about in confession.

If the subject interrogated is a minor below 15 years of age, then any activities with his/her participation, in so far as it is possible, should be in the presence of his/her statutory guardian or *de-facto* carer, save where this would be opposed by the interests of the proceedings (Article 171(3) CCP).

38 Cf. SC judgement of 23 June 1981, III KR 6/81, LEX no. 21910.

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The duty to procure the attendance of a minor witness rests on the statutory guardians or carers. In no event may they oppose the interrogation of such a minor, but they have a right to make sure the minor is interrogated in special conditions prescribed for the interrogations of minors.[39]

In cases of sexual offences, a minor victim below the age of 15 will only be interrogated as a witness if his/her testimony may have a significant bearing on the outcome of the case. In principle, the interrogation must be held once only.[40] The interrogation will be conducted by the court in a sitting no later than 14 days following the arrival of the motion.[41] A psychologist's presence is mandatory, and the public prosecutor, defence counsel and victim's counsel may attend. The minor's statutory guardian, permanent carer or such other adult as the minor may specify may attend the interrogation if they do not have a restrictive effect on the interrogated subject's free expression (Article 185a(2) CCP). Any such interrogation must be recorded with a video- and audio-recording device (Article 147(2) CCP), and the record will be played, and the transcript read in the main hearing (Article 185a(3) CCP). A minor who has reached 15 years of age at the time of the interrogation will be interrogated in the same way if there is a reasonable concern that an interrogation conducted in different conditions could have an adverse impact on his/her mental condition[42] (Article 185a(4) CCP), as will a minor witness below 15 years of age at the time of the interrogation if his/her testimony may have a significant bearing on the outcome of the case (Article 185b(1) CCP). The same procedural path applies to victims above the age of consent[43] in cases involving the following offences: rape, taking advantage sexually of incapacity or helplessness, as well as sexual abuse in a relationship of dependence or a critical situation (sections 1a to 3 of Article 185c CCP). In proceedings in such cases, at the victim's motion it must be ensured that the expert appointed is a person

39 Aleksandra Antoniak-Drożdż, Przesłuchanie dziecka w polskim procesie karnym – uwagi praktyczne, *Prokuratura i Prawo* 6 (2006) 45–49

40 There is an exception when important new circumstances come to light, such that their explanation requires a new interrogation, or the interrogation is requested by a defendant who did not have counsel during the victim's first interrogation (Article 185a(1) CCP). More extensively see: Arkadiusz Łakomy, Przesłuchanie małoletniego w świetle nowelizacji kodeksu postępowania karnego, *Ius Novum* 1 (2016) 3–7.

41 Interrogations following this procedure are held in specially adapted rooms within or outside the courthouse (Article 185d(1)).

42 Article 185c CCP does not apply in such cases.

43 An adult or a minor above the age of 15.

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of the same sex as the victim, unless this would hamper the proceedings (Article 185c(4) CCP).

In cases of sexual offences, a minor victim who has reached 15 years at the time of interrogation may testify in the aforementioned way, i.e., with the use of technical devices for remote communication with the simultaneous transmission of audio and video, if there is a reasonable concern that the defendant's immediate presence at the interrogation might have an embarrassing effect on such a minor or an adverse effect on his/her mental condition (Article 185b(2) CCP).

For the time of the interrogation of a minor witness below 15 years of age, the court may exclude the openness of the case to the public in whole or in part (Article 360(1) CCP).

6. Appellate Remedies – Challenging the Decision

In its article 176(1), the Constitution of the Republic of Poland provides for the availability of at least two instances in judicial proceedings. In criminal proceedings appellate remedies include the ordinary appeal against the judgement of the court of first instance (Article 444 CCP) and the interlocutory appeal ('complaint') available in statutorily specified cases against orders and procedural orders[44] (Article 459 CCP). Criminal procedure also provides for extraordinary appeals against a final and binding judicial decision, namely the cassatory appeal (Article 519 CCP), complaint against reversal and remand (Article 539a CCP) and the reopening of the proceedings (Article 540 CCP).

The ordinary appeal is available to the parties and others specified by the legislation. A first-instance court decision may be appealed in whole or in part. The absence of a specific decision-making point may also be appealed. The appellant, save for the public prosecutor, may only appeal decisions or findings that violate their rights or are prejudicial to their interests. The appellant must have so-called *gravamen*, i.e., a legal interest to appeal

44 Interlocutory appeals are also available against the orders of the public prosecutor or another authority conducting the pretrial investigation (Article 465 CCP).

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(Article 425 CCP). The appeal must be filed with the same court that issued the disputed decision (Article 428(1) CCP).[45]

The appellate court either upholds the disputed decision or orders it modified or reversed in whole or in part (Article 437 CCP).

The cassatory appeal is an extraordinary appellate remedy against the final and binding judgement of the appellate court; it is heard by the Supreme Court. In principle, a cassatory appeal involves the examination of the consistency of the final and binding judgement of the appellate court that ends the judicial proceedings with the law. A cassatory appeal may be brought by the parties[46] (ordinary cassatory appeal, Article 520(1) CCP) or by the authorised organs specified in Article 521 CCP (extraordinary cassatory appeal), i.e., the Attorney General ('Prosecutor General'), Civic Rights Ombudsperson ('Human Rights Commissioner') or Child's Rights Ombudsperson – if the judgement violates the child's rights.

A cassatory appeal may be based only on absolute grounds of appeal[47] or some other manifest violation of the law if such a violation may have had a significant bearing on the outcome. A cassatory appeal may not be grounded solely in the allegation of disproportionality of the penalty[48] (Article 523(1) CCP).

A cassatory appeal must be drafted and signed by an advocate or counsellor-at-law or by a counsellor with the Treasury Solicitor's Office (Article 526(2) CCP). It may be brought within 30 days of the date of service of the reasoned decision (Article 524(1) CCP). It must be addressed to the Supreme Court and filed through the appellate court (Article 525(1) CCP). The extraordinary cassatory appeal is filed directly with the Supreme Court (Article 525(2) CCP).

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45 When not originating from the public prosecutor, any appeal against the judgement of a Regional Court must be drafted and signed by an advocate, counsellor-at-law or counsellor with the Treasury Solicitor's Office (Article 445(1) CCP).

46 A party that has not appealed the decision of the court of first instance may not lodge a cassatory appeal against the decision of the appellate court upholding the first-instance judgement or modifying it favourably to such a party (Article 520(2) CCP).

47 Absolute appellate grounds (Article 439(1) CCP) include, without limitation, the improper composition of the court; errors made due to the competence of the court; imposition of a penalty or punitive, compensatory or protective measures unknown to the law; inconsistencies in the holding that prevents enforcement; the lack of the defendant's counsel where mandatory; the absence of the defendant where their attendance is mandatory.

48 This does not apply to the Attorney General's cassatory appeals in cases of felonies, i.e., offences carrying a penalty of at least three years' imprisonment.

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Following consideration of the appeal, the appellate court may uphold the disputed judgement, modify it (supplanting a different decision on the merits) or reverse it, in whole or in part. Reversal may lead to dismissal ('discontinuation') of the proceedings or – in the presence of absolute grounds of appeal as set out in Article 439(1) CCP – remand to the court of first instance for reconsideration (Article 437 CCP). In such a situation, the parties have a right to lodge a complaint with the Supreme Court, thus delaying the enforcement of the disputed judgement (Article 539b CCP). The Supreme Court may dismiss the complaint or reverse the disputed judgement in whole or in part and remand the case to the competent appellate court for reconsideration of the appeal (Article 539e(2) CCP).

In special cases, judicial proceedings ended with a final and binding ruling may be reopened at a party's motion or *ex officio* (Article 540 CCP). The reopening of the proceedings against the defendant's interests is possible only in narrowly defined cases, including, without limitation, a criminal offence committed in connection with the proceedings with reasonable grounds to believe this had a bearing on the outcome. The decisive majority of cases in which the reopening of proceedings ended with a final and appealable decision involve situations in which the proceedings are reopened in the defendant's favour. When deciding to reopen the proceedings, the court may reverse the disputed decision and dismiss the proceedings or remand the case to the competent court for reconsideration or acquit the defendant if new facts or evidence indicate the manifest unfairness of the disputed decision (sections 2 and 3 of Article 547 CCP).

7. Child's Rights Ombudsperson in Criminal Proceedings

Special rights in criminal proceedings are afforded to the Child's Rights Ombudsperson, who is a monocratic constitutional organ (Article 72(4) of Polish Constitution) tasked with serving as the guardian of the child's rights set forth in the Constitution of the Republic of Poland, the UN Convention on the Rights of the Child and other provisions of the law, while respecting the responsibility, rights and obligations of parents (Article 1(2) of the Act on the Child's Rights Ombudsperson).[49] The Ombudsperson is independent in their activities from the other organs of the state and

49 Uniform text: Polish Journal of Laws from 2020 item 141.

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answerable only to the Sejm (lower house of Parliament) on terms set forth by statute (Article 7(1) of the Act on the Child's Rights Ombudsperson).

In criminal proceedings, the Child's Rights Ombudsperson may demand that the competent prosecutor institute a pretrial investigation in cases of criminal offences, including sexual offences (Article 10(1)(4) of the Act on Child's Rights Ombudsperson). Furthermore, the Child's Rights Ombudsperson is authorised to lodge a cassatory appeal (extraordinary cassatory appeal) against any final and binding decision ending court proceedings if the decision violates a child's rights (Article 521(2) CCP). In this, the Child's Rights Ombudsperson is not bound by the thirty-day time limit specified for the ordinary cassatory appeal (Article 523(4) CCP) or by the restriction of appeals unfavourable to the defendant only to acquittals and dismissals. The Child's Rights Ombudsperson lodges his/her cassatory appeal directly with the Supreme Court (Article 525(2) CCP) and is not subject to the mandatory use of professional counsel stipulated for the ordinary cassatory appeal. The Child's Rights Ombudsperson is authorised to demand access to court and prosecutorial files and to the records of other law-enforcement authorities even after the end of the proceedings and the decision having been rendered (Article 521(3) CCP).

8. *Conclusion*

'The administration of justice in criminal cases must be subjected to a specified *modus procedendi*. This is required by the importance and significance of the matters resolved in criminal proceedings and especially the type of cases and civic rights and freedoms that may be restricted by the outcome'.[50]

The essence of modern criminal procedure is breaking from the position grounded solely in the concept of retributive justice and rehabilitation in favour of restorative justice that aims to make good the harm done by the crime and especially to engage the offender in restorative activities. The purpose of such an approach is to: 'build crime response in a perpetra-

50 Jacek Kosonoga, Article 1, in Ryszard A. Stefański / Stanisław Zabłocki (eds), Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166, Wolters Kluwer 2017.

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tor–victim–community' configuration and create an adequate response to the social character of the crime.[51]

Accordingly, the primary goal of criminal procedure is not only to identify and punish the perpetrator of the offence but also to make amends in the social sense of justice. One of the manifestations of broadly understood restorative justice is paying heed to the victim's legally protected interests both within and outside criminal proceedings.[52]

It is with a wide scope that Polish criminal procedure heeds the victim's interests, protecting his/her rights at every stage of the proceedings. This is served by the Code of Criminal Procedure's regulation of matters such as the right of the victim to be informed of his/her rights and given the opportunity for active participation in the activities transacted in the proceedings, for the assistance of counsel, inspection of the record of the proceedings, appropriate procedure for interrogations, or appellate remedies against the decision. In its judgement of 12 February 2019, the Supreme Court emphasised that heeding: 'the victim's legally protected interests while respecting their dignity is one of the core directives in criminal procedure', while depriving the victim: 'of the possibility of the exercise of the procedural rights available to them must be regarded in terms of a manifest violation of the law'.[53]

Of particular importance here is the procedural treatment of a minor victim, especially a victim of sexual abuse. Polish criminal procedure affords special treatment to both the minor victim and the minor witness. It must be emphasised that especially in the case of sexual offences the minor witness may also be a victim of sexual abuse, if only through indirect participation in an incident for which they had not been prepared by their physical, mental, emotional and social development. Doubts can arise in the context of the different treatment, to some extent, of the minor victim (or witness) depending on whether they have reached the age of consent – especially considering that that legislature allows for the possibility of providing a minor victim below 15 years of age with the same treatment as if he/she had not reached that age.

An important objective pursued by criminal procedure is for it to be shaped in such a way as to achieve – by correct application of the measures

51 Wojciech Zalewski, Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego?, Arche 2006, 184.
52 Kulesza (n 24), Article 2.
53 Cf. SC judgement of 12 February 2019, II KK 291/18, LEX no. 2625016.

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prescribed by criminal law and discovery of circumstances conducive to crime – the objectives of criminal procedure, not only with regard to fighting crime but also preventing it and reinforcing respect for the law and the principles of social co-existence (Article 2(1)(2) CCP). Hence, public openness, not only about the penalty imposed but also about all of the circumstances of the offence committed, is as important as punishing the offender and obtaining redress for the harm done. Public openness and transparency are, therefore, enormously important aspects of criminal procedure. Here, though, one must remember that this public openness must be limited wherever the victim's interests are concerned, especially the need to protect the victim from repeated victimisation.

Accordingly, modern criminal procedure has undergone a certain subjectivation of the victim, allowing him/her to participate in the criminal proceedings, which previously focused solely on the crime and the offender.[54] In a way, the philosophy of restorative justice assumes the making of an attempt to have the offender and the victim act together for the purpose of reparation of the harm done and the cancellation of the social effects of the crime, for example by mediation. It must be noted that in the case of sexual offences, extreme caution must be observed with regard to any cooperation between the victim and the offender, for this type of offence is characterised by the infliction of very special harm primarily on the victim's mental sphere, especially where the victim is a minor. However, guaranteeing the realistic participation of the victim or his/her counsel throughout the criminal proceedings provides a tangible guarantee of amends being made to the sense of justice and therewith a factor enabling at least partial reparation of the harm done by the criminal offence. Here, it is a matter of utmost importance to develop and implement such solutions as will, on the one hand, enable the victim to participate in the proceedings (such as notifying the victim of the commencement of the proceedings, enabling him/her to appeal the refusal to institute proceedings or dismissal of proceedings, informing he/she about the outcome of the case or the completion or interruption of the perpetrator's sentence), and on the other hand protect the victim from anything that might expose he/she to any danger, including, without limitation, the deepening of the trauma he/she faces as a victim of crime. This, among other things, is the purpose of the availability of a special procedure for interrogation under the care of an

54 Magdalena Chalimoniuk-Zięba / Grzegorz Oklejak, Sprawiedliwość naprawcza i jej zastosowanie w praktyce, *Kwartalnik ADR* 1 (2013) 5.

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expert psychologist and with the attendance of trusted people (e.g., one of the people closest to the victim), in a safe environment and without contact to the perpetrator.

In the case of criminal proceedings concerning the sexual abuse of a minor in particular, especially if linked to the parallel proceedings of different authorities (e.g., disciplinary boards) or of a different nature (e.g., canon law proceedings), it would be an important solution for the victim's welfare to guarantee the avoidance of repeated interrogation of the victim (or minor witness), especially considering that in every situation the perpetrator, even if he/she is subject to special responsibility (e.g., a physician subject to disciplinary liability or a cleric subject to liability under canon law, etc.), is first of all subject to criminal liability before the state in whose jurisdiction he/she is residing – and to this rule there can be no exception.

The sexual abuse of children, more so, any abuse of a child, 'is one of society's most insidious crimes. It robs children of their dignity and places them at a disadvantage compared to non-abused children.'[55] The sexual abuse of a child especially may lead to consequences: 'so often so deleterious that the phenomenon has been aptly described as "soul murder"'.[56]

Biography

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55 Dante Chicchetti / Sheree L.Toth, A developmental psychopathology perspective on child abuse and neglect, *Journal of the American Academy of Child and Adult Psychiatry* 34(5)(1995), 541–565 and Dante Chicchetti / Sheree L. Toth / Angeline Maughan, An ecological-transactional model of child maltreatment, in A.J. Sameroff / M. Lewis (eds), Handbook of developmental psychopathology, Kluwer Academic/Plenum 2000, 689–722, quoted with Stefan C. Dombrowski / C. Emmanuel Ahia / Kathleen McQuillan, Protecting Children through Mandated Child-Abuse Reporting, *The Educational Forum*, vol. 67 (Winter 2003) 119.

56 Leonard Shengold, Soul murder: The effects of childhood abuse and deprivation, Yale University Press 1989, quoted with Dombrowski / Ahia / McQuillan (n 55),119.

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The Position of Alleged Victims in the Canonical Penal Process

Mark L. Bartchak

Abstract

In light of his experience as a diocesan bishop and 20 years of being a judge in canonical penal trials, the author participated in a seminar organised by the Pontifical Commission for the Protection of Minors on "Rights of Alleged Victims in Canonical Penal Procedures". His main question is: With regard to the rights of victims in penal procedures, what can canon law learn from considerations, developments and provisions in different jurisdictions around the world, while recognising that the canonical system per se is not simply "another" jurisdiction? He attends to six points: 1. The necessity to avoid harm that could be inflicted because of the canonical penal procedures themselves; 2. The connection between abuse and the sacrament of confession (*solicitatio*); 3. The need to approach the victim with an attitude of "care for persons" (*Vos estis lux mundi*), which on a practical level implies accompaniment of the victim. The author advocates provisions to appoint a *procurator partis laesae*; 4. Reflection on how different rights of victims as found in the USA justice system can be found or received by and implemented in the current canonical provisions; 5. The necessity to attend to the way a victim is interrogated, and 6. A victim's healing process requires that he/she will be seen as a necessary person participating in the trial.

Keywords: *victims' rights; sexual abuse of minors; penal law; penal canonical proceedings; victims as witnesses*

1. Introduction

In December 2021, the Working Group "Safeguarding Guidelines and Norms" of the Pontifical Commission for the Protection of Minors organised a seminar entitled "The Rights of Alleged Victims in Penal Procedures". This was a follow-up to the seminar organised in 2019 in which the same working group had reflected on "Promoting and Protecting the Dignity of Persons in Allegations of Abuse of Minors and Vulnerable Adults: Balancing Confidentiality, Transparency and Accountability".[1] Both

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1 The proceedings are published in their original version, be that in English or Italian, in *Periodica* 109 [2020] 401–676. A translation of each contribution in English or Italian is available on http://www.iuscangreg.it/seminario-tutela-minori, access

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seminars brought together the leaders and officials of different Roman Dicasteries, a few diocesan bishops, who as canon lawyers had great experience in handling allegations of sexual abuse of minors by members of the clergy, professors of canon law and judicial vicars who had been involved in penal procedures. I had the privilege to be invited to participate in both seminars because of my engagement in penal procedures as a canon lawyer and diocesan bishop in the USA.

Among the 2019 presentations was a contribution by the former promotor of justice and current Adjunct Secretary of the Dicastery for the Doctrine of Faith Archbishop Charles Scicluna on the role of victims in canonical penal procedures.[2]

The 2021 seminar focused on this topic while asking the question: What can the Church learn from considerations, developments and provisions in different jurisdictions around the world, while recognising that the canonical system per se is not simply "another" jurisdiction? This seminar was organised in such a way that a main speaker would present his or her thoughts and a respondent would react with some reflections. The organisers invited me to respond to the presentation by Professor Gianpaolo Montini, the former promotor of justice at the Apostolic Signatura and currently a professor at the faculty of Canon Law at Pontifical Gregorian University who specialises in the law on canonical procedures. The reflections offered in my current study will consequently take into consideration Montini's contribution[3] and others that were presented during the seminar.

2. *Avoid causing damage to victims because of the penal procedures*

Under the heading "7 Points of discussion following the exposition", in number 6, Montini points to the need for those who are responsible for conducting a canonical penal process to avoid causing damage to the dynamics of the healing process that has already begun before the penal

10.10.2022. A Spanish translation was published as: Myriam Wijlens / Neville Owens (eds), Confidencialidad, Transparencia y Accountability: La dignidad de las Personas en los procesos de denuncia de abuso sexual. PPC Editorial 2021.

2 Charles J. Scicluna, Rights of Victims in Canonical Penal Processes. *Periodica* 109 [2020] 493–503.

3 Gianpaolo Montini, The Rights of Alleged Victims in Canonical Penal Procedures. Current Penal Procedural Canon Law, in Charles J. Scicluna / Myriam Wijlens (eds), Rights of Alleged Victims in Penal Proceedings. Provisions in Canon Law and the Criminal Law of Different Legal Systems. Nomos 2023, 19-38.

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process is initiated. Although this seems so obvious and important, I have seen it neglected and disrespected by some in canonical practice.

In more than 20 years of experience as a judge in penal cases, I have interviewed a number of victims who suffer from post-traumatic stress disorder or other mental health issues resulting from sexual abuse as minors. I heard unfounded criticism from advocates who concluded that disjointed narratives in which victims responded to questions with seemingly disconnected verbal responses, or with silence, or with loud weeping were nothing more than play-acting that was intended to win the sympathy of the judges.

Sadly, I found it necessary to admonish advocates who attempted to discredit or berate a victim by accusing the injured party of putting on a show when he/she cried during the hearing. These advocates were unaware of the psychodynamics involved, and how victims recall the events of sexual abuse, or how the memory either haunts them or is triggered without warning.[4]

These experiences support Montini's suggestion that a *vademecum* for penal processes is needed for these cases. It would be helpful if it could be prepared by exceptionally qualified experts. While there are universal concepts that apply in these cases, a penal trial is not the place to indiscriminately adopt a "law section" that was formulated without reference to a specific case with a unique set of facts and circumstances. Most especially, it should offer insight into the mind of a child who has recently been sexually assaulted or an adult who was a victim many years ago, kept silent about the abuse and has now come forward. This manual should include practical guidance from experts in psychology, sociology, civil law and canon law.[5]

The Dicastery for the Doctrine of the Faith has published a *Vademecum,* which is intended as a resource for bishops, promoters of justice, advocates

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4 Dennis Sadowski, Clergy abuse survivors face a lifetime of recurrence of PTSD. *Catholic News Service* 2020, available on https://www.ucanews.com/news/clergy-abuse-survivors-face-a-lifetime-of-ptsd-recurrence/89608, access 19.02.2023; Edwin T. Collins, Victims of clerical sex abuse suffer from PTSD: They deserve better treatment. *America Magazine* 2020.

5 A coordinated interdisciplinary approach is envisioned in: Congregation for the Doctrine of the Faith, Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics (May 3, 2011). It is also evident in the papers presented in a 2012 symposium in Rome. See Charles J. Scicluna / Hans Zollner / David J. Ayotte (eds), Toward Healing and Renewal: The 2012 Symposium on the Sexual Abuse of Minors Held at the Pontifical Gregorian University, English edition, Paulist Press 2012.

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and others who participate in the adjudication of these cases.[6] This DDF *Vademecum* addresses only the procedures to be followed in prosecuting the perpetrator in a case involving grave delicts reserved to that dicastery. It presumes that those who are involved in these cases are well-versed in the jurisprudence concerning the nature of these offences and the standard canonical norms and procedures.

Canonists have access to volumes of commentaries and articles concerning the meaning of these delicts and the application of penalties. However, they also need to be aware of the nature of sexual abuse and the impact it has on victims. Judges and advocates should be aware of the psychology and the spirituality of victims. This would include a basic understanding of the trauma that may be caused by sexual abuse or assault. This trauma may impact victims spiritually.[7]

3. *Solicitation: Sexual Abuse and Sacramental Confession*

Another sensitive area concerns sexual abuse within the context of sacramental confession. In canon law, it is known by the term *solicitatio*. I have investigated, instructed or judged a number of cases involving this delict. It is extremely challenging for the victim who was solicited or sexually assaulted on the occasion of the sacrament of Penance to bring this forward for adjudication. Often, victims of sexual abuse by a cleric will seek assistance from their confessor because they are afraid or unsure of speaking with a psychological professional. Unfortunately, such an encounter between the victim and the confessor who is sought for counsel can become an opportunity for the confessor himself to initiate an offence against the sixth commandment with the victim.

Robert P. Deeley explains how the sacrament of Penance is used by some confessors to solicit information about the spiritual and emotional needs of penitents. This information is used to initiate a sexual relationship with the penitent. A typical scenario involves a penitent who is struggling with

6 Dicastery for the Doctrine of the Faith, Vademecum on certain points of procedure in treating cases of sexual abuse of minors committed by clerics, Version 2.0, 5 June 2022, available on https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html, access 10.10.2022.

7 Romeo Vitelli, How Can We Help Victims of Clergy Abuse? A new review explores what clergy abuse can mean for victims. *Psychology Today* 2019.

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sexual sins or temptation and therefore seeks assistance in the sacrament of Penance.

The confession of such a matter or a mere question about it may tragically result in an unscrupulous confessor soliciting (i.e., inviting, suggesting or encouraging) the penitent to engage in similar sinful acts against the sixth commandment with the confessor. The solicitation may occur through words or gestures (e.g., kissing, embracing, etc.). It is not necessary for any indecent acts to occur during the celebration of the sacrament.[8]

Given the hideous nature of the solicitation and the secrecy that attends to the internal forum of the sacrament of Penance, it should be noted that this offence may cause harm to victims in three dimensions of their life. I have heard these reported during interviews with victims in penal cases:

1) *It impacts physically* when indecent contact occurs. A simple kiss on the cheek may cause as much harm as touching an inappropriate part of the body when it occurs as a false substitute for the rubric of the sacrament.
2) *It impacts psychologically/emotionally*, especially when a penitent who is a minor may be insecure about his/her own psycho-sexual identity or experience.
3) *It impacts spiritually.* I have heard victims testify that when the offence began within sacramental confession, it felt like the victim's soul had been kidnapped or killed. That experience deprived the victim of the graces of the sacrament prospectively. It frequently caused the victim to feel abandoned by God or to conclude that God is not real to them.

The confession itself is used by the confessor to identify a minor or an adult person who appears to be vulnerable. The information is used to take advantage of spiritually and psychologically vulnerable adults, which results in sins against the sixth commandment.[9] What is important is that the sexual abuse would not have occurred without the confessor using information gained from the confession itself. Moreover, if the penitent

8 Robert P. Deeley, Some notes on graviora delicta and the delict of solicitation. *The Canon Law Society of Great Britain and Ireland Newsletter* 2006, 69–77. Bishop Deeley is a former official in the disciplinary section of the Congregation for the Doctrine of the Faith.

9 Norms Regarding Delicts Reserved to the Congregation for the Doctrine of the Faith, 11 October 2021, Art. 4, 4°, available on https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html, access 22.10.2022.

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refuses the advances of the confessor and there are no sexual offences, the punishable crime has been committed insofar as the solicitation has already occurred.

Unfortunately, given the disparity of age/authority in the context of the sacrament of Penance, a minor may not have the ability to resist the advances of a confessor, and this may result in the further offence of sexual abuse of a minor.

An important study of the Church's lack of attention to this grave delict and the resulting negative consequences is found in a reading list on the Vatican website.[10] John Beal suggests that the 1962 instruction issued by the Congregation for the Doctrine of the Faith concerning this offence was a harbinger for the sexual abuse crisis of recent times. He observes that one of the most damaging elements of the Church's response was that of secrecy in its treatment of egregious offences involving minors. Beal adds that it was a topic that was no longer treated in seminary training.[11] It was barely mentioned when I began my graduate canon law studies in the late 1980s.

4. Accompanying the Victim from A Church Perspective

The negative consequences of sexual abuse that have been reported by victims suggest additional questions for consideration in terms of the manner in which the diocese interacts with the victim. One of the main features of the narrative given by victims is that they feel no one listened and no one accompanied them. They had no one to turn to at the time of the offence. And when they are summoned by the Tribunal to be examined, they may once again experience being alone. The norm of canon 1481 § 2 indicates that in a penal case, the accused must always have an advocate either appointed by the accused or assigned by the judge. Unfortunately, the Code is silent about similar assistance for the victim.

10 Abuse of Minors. The Church's Response, available on https://www.vatican.va/resources/index_en.htm, access 07.11.22.

11 John P. Beal, The 1962 Instruction *Crimen sollicitationis*: Caught Red-Handed or Handed a Red Herring?. *Studia Canonica* 41 [2007] 199–236. Available on https://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf, access 28.10.2022. Beal is the Stephan Kuttner Distinguished Professor of Canon Law at the Catholic University of America.

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In response to that circumstance, I support the proposal already made in the 2019 PCPM seminar by Archbishop Scicluna, who suggested having a specific role in canonical penal processes which would be a representative for the victim; a *procurator partis laesae*.[12] This curator would be given the right to represent the victim and share information with the victim concerning the penal process. It would be imperative for this assistance and canonical representation to commence as soon as possible after a punishable offence has been reported, or no later than the start of the preliminary investigation (c. 1717).

Carlo Gullo observes, "Guardians and curators have the duty to exercise their mandate with the diligence of a good parent". Gullo's description of this duty is appropriate insofar as guardians and curators are appointed to substitute for a lack of mental or psychological competence and to represent a minor deprived of someone who will look out for his/her interests. This is precisely the manner of care that would be appropriate for a victim during the entire penal process; someone, a guardian or curator, who is competent in the practice of canon law, and who does it with the care of a mother or father who looks after their children in time of need.[13]

This role, as envisioned here, is consistent with the one that is frequently identified in practice as a victim assistance coordinator. This person is not an advocate for the victim in a legal sense, but rather one who, because of education, training and experience, is able to interact with public or ecclesiastical social services, as well as the bishop's office and tribunal. I would envision this person accompanying the victim to any meetings concerning the case, and even during the examination of the victim, who is the primary witness in the case. This role is consistent with a classic description of a curator as "one who takes care; one who overlooks the process; a guardian".[14]

Even the simple tasks of scheduling appointments for interviews or requesting documents can be challenging for a victim. It may be necessary in some instances for the victim to want someone to accompany him/her to interviews, meetings at the tribunal, etc. The opportunity to choose someone for this role who is not employed by the diocese but understands

12 Scicluna (n 2) 501.

13 Carlo Gullo, Canon 1479, in Ernest Caparros (ed), Exegetical Commentary on the Code of Canon Law (Midwest Theological Forum vol. IV/1[2004]), 968–970. Gullo is a former advocate at the Roman Rota, Roman Curia and the Holy See.

14 See "curator" in Cassell's Latin-English Dictionary, Funk & Wagnalls 1955. 147.

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how to exercise this function is an important and necessary role. One author recommends that "a diocese must have in place a clear praxis regarding the exchange of information between canonical personnel and those involved in pastoral care. Such a policy should be based on the distinction between secrecy and confidentiality".[15]

In the seminar presentation, "Rights of Alleged Victims in Penal Procedures in Spain", Professor Jorge Cardona underscores the points of accompaniment indicated by Pope Francis in article 5 of the Apostolic Letter *Vos estis lux mundi*:

> "The ecclesiastical authorities should commit themselves to those who claim to have been affected, together with their families, so that they may be treated with dignity and respect, and should offer them in particular, the following: a) reception, listening, and follow-up, including through specific services; b) spiritual care; c) medical, therapeutic and psychological assistance, as the case may be".[16]

The observation that *care* for the victim is simultaneously situated within the family, within the spiritual care of the Church and within the necessary medical and psychological assistance indicates a holistic approach in which victims should be accompanied by multiple persons in a cooperative and complimentary way.[17]

5. *Victims' Rights in the Criminal Justice System of the USA and their Application in Canon Law*

Professor Mary Graw Leary has identified a lacuna in the Church's approach to the victims of sexual abuse of minors committed by members of the clergy. As an expert in American criminal justice, Graw Leary argues that the Church hierarchy would benefit from affording victims of clergy

15 Amy Strickland, To Protect and Serve: The Relationship Between the Victim Assistance Coordinator and Canonical Personnel, *CLSA Proceedings* 71 [2009] 238.

16 Francis, Apostolic Letter in the form of Motu Proprio '*Vos estis lux mundi*', May 10, 2019, Art. 5, available on https://www.vatican.va/content/francesco/es/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html, access 22.10.2022.

17 Jorge Cardona, Rights of Alleged Victims in Penal Procedures in Spain, in Scicluna / Wijlens (n 3), 195. Dr. Cardona is a professor of international law at the University of Valencia, Spain.

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abuse substantive and procedural rights in the canonical system. Graw Leary noted that just 50 years ago, the American criminal justice system lacked a procedural system that provided a victim-centred approach in cases of sexual abuse of minors. It should be noted that this approach corresponds to the desire expressed by Pope Francis for the Church "to convert from a system of secrecy and clericalism to one more protective of victim-survivors and marked by transparency and accountability".[18]

From the perspective of US federal law, Graw Leary discusses ten rights that "victim-survivors" in the Church should receive on their own and that they should not need to request or fight to receive or exercise them. These proposed rights are indicated in italics. I have offered some brief observations in support of these rights.

1. *The right to be reasonably protected from the accused.* This can be safeguarded according to the norm of c. 1722 by the removal of the accused minister from ministry once the alleged offence has been reported and by announcing when these measures occurred. The bishop may impose residence in a certain place or otherwise restrict the activities of the accused. The accused should be precluded from having any contact with the victim.
2. *The right to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime or any release or escape or movement of the accused.* This is intended to protect the victim from any real or potential contact with the accused. According to the norm of c. 1723 §§ 1–2, the legal representative of the accused would be notified by the judge. Similar communication could be directed to the procurator advocate for the victim.
3. *The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.* Underlying this right is the tension that exists between a victim's dual status as both a victim and witness. Canonical proceedings are not public; however, allowing the participation of the victim in the fullest extent possible recognises the value of the victim-survivor and his/her inherent dignity.

18 Francis, Letter of his Holiness Pope Francis to the People of God, August 20, 2018, available on https://www.vatican.va/ content/Francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html, access 29.10.2022.

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4. *The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. The civil law does not indicate the method for being heard, but it is historically understood to allow a crime victim to address the court in person.* Should the victim be present at the time of the hearing, the exercise of this right suggests the need to provide additional safeguards for the well-being of the victim, as explicitly indicated in *Vos estis*, Art. 5.[19]
5. *The reasonable right to confer with the attorney for the Government in the case.* The corresponding ecclesiastical attorney is the promoter of justice. In a penal trial, the promoter of justice should act on behalf of the public good, which includes the good of the victim. The intervention of the promoter of justice is required in penal cases (c. 1430). The promoter of justice can appeal whenever the promoter considers that the repair of the scandal or the restoration of justice has not been provided for sufficiently in the decision of the judges (c. 1727 § 2). This norm would apply, for example, if the victim is not satisfied with the decision of the tribunal. This may occur if the victim is convinced that the punishment imposed by the judges is insufficient. If the victim is convinced that an appeal should be made concerning the punishment, the victim could confer with the promoter of justice in order to urge the reconsideration of a stronger penalty.
6. *The right to full and timely restitution as provided in law.* Insofar as many of the child sex abuse cases adjudicated in the Church have not been prosecuted in United States civil courts, the burden rests with ecclesiastical officials to enforce the prescribed restitution to the victim. This is explicitly indicated in canons 1729–1730, which recognise the twofold goal of restitution. It provides at least some relief to the victim, but it also has a punitive purpose. This would likely be seen in cases where the Church failed to act when it first received notice of child sexual abuse by a cleric.
7. *The right to proceedings free from unreasonable delay.* US law provides defendants with the right to a speedy trial. At the same time, it is noted that delays can result in further harm to the victim. It may also negatively impact the successful prosecution of the offence if the delay results in the loss of available witnesses or other evidence. *The Norms Regarding Delicts Reserved to the Congregation for the Doctrine of the*

19 Francis, '*Vos estis lux mundi*' (n 16).

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Faith[20] (revised 11 October 2021) provide for derogation from the time limits. This is used as an exception in individual cases and not as a general rule.

8. *The right to be treated with fairness and with respect for the victim's dignity and privacy.* It is known that in the past the criminal justice system has lacked recognition of the inherent dignity of crime victims and the need for fairness, dignity and privacy to be respected. The most challenging of these values is the respect for privacy insofar as the emphasis is on a public trial in which little is kept from being disseminated to the public. Protection of one's privacy and one's good reputation are fundamental rights in the Church (c. 220).
9. *The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.* As noted by Graw Leary, this right was added to the list of federal crime victim rights in 2015. It might occur in the canonical penal system that the injured party brings an action for damages. In canon law, the question of damages may be introduced prior to a penal process (c. 1718 § 4). However, judgement concerning this action is usually deferred until the penal trial is concluded in order to avoid delays (c.1730).
10. *The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990.* The 1983 Code of Canon Law, in canons 1717–1731 concerning the penal process, refers to victims (i.e., the injured party or *partis laesa*) only twice: in canon 1729 § 2 and canon 1731. Both canons deal with the procedural limits on the victim introducing an action to repair damages. According to the Dicastery for the Doctrine of the Faith, *Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics* (revised June 5, 2022), n 164, "the competent ecclesiastical authority (Ordinary or Hierarch) should inform the alleged victim and the accused, should they request it, in suitable ways about individual phases of the proceeding." Even though this instructs the diocesan bishop to inform the victim about the ca-

20 Francis, Norms regarding delicts reserved to the Congregation for the Doctrine of the Faith, available on https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html, access 09.11.2022.

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nonical penal process, it is indicated that the victim has the burden of requesting that information.[21]

6. *Examination of the Victim in the Penal Process*

An important aspect of the penal process is the interview or examination of the victim, who is the primary witness (and most often the only eyewitness) in cases of sexual abuse of minors. It is reported that experts in criminology and psychology tend to agree that victims want and need to be heard, especially by those who are responsible for the Church's response.[22] At the same time, some experts in criminal investigations have discerned that one of the more significant problems is that sexual assault cases are not even investigated primarily because victims are not believed.[23]

Archbishop Scicluna has frequently observed that respect for canonical procedural laws is a necessary expression of pastoral care in cases of the sexual abuse of minors.[24] This principle applies especially to the moment in the penal process when witnesses (including the victim) are examined by the judge, a judge's delegate or an auditor.

In my own experience as presiding judge in these cases, most victims want to be heard by the presiding judge, if not the full panel of judges. There is a sense that if they are to have justice, they should be heard by whomever is going to render a decision in the case. This desire of the victim to be heard is consistent with the norm of canon 1561, which determines that if the promoter of justice or the advocates present at the examination have any questions for the witness (including the victim), they are not to propose them to the witness. They are to propose questions to the judge (or

21 Mary Graw Leary, A Crime Victim Rights Framework in the USA, in Scicluna / Wijlens (n 3), 130-145.

22 Catherine Sheehan, Sexual abuse victims want to be heard by church hierarchy, Jesuit says, *National Catholic Reporter*, 5 September 2018, available on https://www.ncronline.org/news/sexual-abuse-victims-want-be-heard-church-hierarchy-jesuit-says, access 19.02.2023. The Jesuit is Rev. Hans Zollner SJ, Director of the Institute of Anthropology, Interdisciplinary Studies on Human Dignity and Care (IADC) at the Gregorian University, Rome.

23 Joanne Archambault / Kimberly Lonsway, Start by Believing: Participation of Criminal Justice Officials, Colville, WA, 2002, available on https://evawintl.org/wp-content/uploads/2016-09_TB-SBB-CJS-Response.pdf, access 28.10.2022.

24 Charles J. Scicluna, The Quest for Truth in Sexual Abuse Cases: A Moral and Legal Duty, in Scicluna / Zollner / Ayotte (n 5), 47–57.

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the one who takes the place of the judge) who is to ask the questions, unless a particular law provides otherwise.

Canon 1564 provides useful instructions concerning the formulation of questions that are to be posed to the victim:

1. The questions should be brief. This is especially applicable when asking about basic information such as time, place, location, etc. The questions must be appropriate to the mental capacity of the witness. This would include asking questions using vocabulary that the victim will understand and avoiding canonical terminology, which becomes even more obscure or confusing if the Latin expression is used.
2. The questions should not be crafty or deceptive. They may not to be leading questions. A leading question would prompt a witness to answer on the basis of what was heard in the question, rather than on the basis of what he or she knows. This sort of question may hinder the discovery of the truth. Leading questions may cause a judge to give the impression of being biased. This may impact the witness' response.
3. The questions must be relevant to the case. Going far afield to other topics may be problematic (confusing or distracting) when the questions do not apply to the alleged offence or are directed to a witness who would have no way of knowing the answer.
4. The questions should not give any form of offence or be off-putting to the victim. The judge's responsibility is to discover the truth as indicated by the facts and circumstances of the case. The judge needs to be prepared for the examination by studying the facts that caused the case to be brought to trial. Should the witness give a response that contains previously unknown information or refers to some other fact or circumstance of the case, the judge must be prepared to have the witness clarify the basis for that information.[25]

This fourth observation is made in view of a more or less typical situation of the victim. The victim may describe some details concerning the facts and circumstances in response to questions about some other matter. It is for the judge to discern the significance of repetitive information. This is in contrast to testimony where the responses of the victim (or other witnesses) are inconsistent and thus point to other inferences or conclusions (canons 1572–1573).

25 Feliciano Gil de las Heras, in Caparros (n 13), 1291–1294.

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A former dean of the Tribunal of the Spanish Rota offered these practical observations concerning the interviewing of witnesses, including the victim:

"In any case, the judge must know how to ask questions. He must not ask questions in such a way that an affirmative or negative reply or any other answer is suggested. He must not abuse his powers by preventing a witness from saying what he or she knows or wants to say. While a judge must avoid crafty and deceptive questions, at the same time he must not be indifferent to any concocted or suspicious stories told by a witness".[26]

Cardona adds that currently in Spain, there are centres where interdisciplinary teams made up of healthcare professionals, psychologists, social workers and legal professionals interact with alleged child victims of sexual abuse in one place (*casas del niño*) in a child-friendly manner. Pre-constituted evidence is also taken at that time.[27] This "team" approach is becoming commonplace in the USA, especially in cases where the victim is still a minor. However, because of the legal doctrine of the separation of Church and State, it is not certain that a representative from the diocese would be part of the interdisciplinary team. There is a greater likelihood of only limited sharing of information.

I am also in agreement with the position that, in order to protect the common good, it is necessary to research all possible legal means to achieve this protection. This includes the entire panel of judges being present at any hearing of witnesses and the accused. There is no substitute for seeing victims and listening to their responses in person. Certain nuances are perceived in tone of voice, the expression of the face, attitude, silences, pauses and other emotional reactions of the person being interrogated.[28] The same would apply in assessing the veracity of the accused.

All the norms cited above are provided for in the Code of Canon Law. They apply especially to situations in which an alleged delict causing potential harm to victims has occurred and requires a response. In these circumstances and according to the norm of canon 1752, "canonical equity is to be observed, and the salvation of souls, which must always be the supreme law of the Church, is to be kept before one's eyes".

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26 Ibid. c. 1564, 1292.
27 Cardona (n 17), 179.
28 See Book VII, Article 4, of the 1983 Code under the heading of *Trustworthiness of Witnesses*. In particular, the norm of c. 1572, 3° addresses the evaluation of testimony of witnesses in terms of reliability, consistently firm or inconsistent, uncertainty or vacillation.

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This equitable and pastoral approach in response to victims is given further expression in the USCCB *Charter for the Protection of Children and Young People* (revised 2018). The Charter outlines "a series of practical and pastoral steps" for providing safe environments for children and young people and for preventing sexual abuse of minors by members of the clergy into the future. The content of the following articles is intentionally victim-centred:

- Article 1. Dioceses/eparchies are to reach out to victims/survivors and their families and demonstrate a sincere commitment to their spiritual and emotional well-being. The first obligation of the Church with regard to the victims is for healing and reconciliation. Each diocese/eparchy is to continue its outreach to every person who has been the victim of sexual abuse as a minor by anyone in church service, whether the abuse was recent or occurred many years in the past. This outreach may include provision of counselling, spiritual assistance, support groups, and other social services agreed upon by the victim and the diocese/eparchy. Through pastoral outreach to victims and their families, the diocesan/eparchial bishop or his representative is to offer to meet with them, to listen with patience and compassion to their experiences and concerns, and to share the profound sense of solidarity and concern.
- Article 2. Dioceses/eparchies are to have policies and procedures in place to respond promptly to any allegation where there is reason to believe the sexual abuse of a minor has occurred. Dioceses/eparchies are to have a competent person or persons to coordinate assistance for the immediate pastoral care of persons who report having been sexually abused as minors by clergy or other church personnel. The procedures for those making a complaint are to be readily available in print form and other media in the principal languages in which the liturgy is celebrated in the diocese/eparchy and be the subject of public announcements at least annually.
- Article 4. Dioceses/eparchies are to report an allegation of sexual abuse of a person who is a minor to the public authorities with due regard for the seal of the Sacrament of Penance. Diocesan/eparchial authorities are to comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and cooperate

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in their investigation in accord with the law of the jurisdiction in question.[29]

These Articles coincide with the victim-centred recommendations proposed by Archbishop Scicluna, who has considerable experience in conducting interviews with victims. In the seminar mentioned before, organised by the Pontifical Commission for the Protection of Minors in 2019, Scicluna made the following intervention, which I strongly support:

> "I now conclude with some suggestions *de iure condendo*. My first suggestion is that we have a specific role in canonical penal processes, which would be a representative for the victim. I would call this a *procurator partis laesae*, the procurator for the person aggrieved. A direct reference to the representatives of people aggrieved can already be found under Art. 17 § 3 of *Vos Estis Lux Mundi* because this law specifically refers to the person who has alleged an offence or his/her representative. My suggestion is that there is a role which is created on a stable level by the law and that would give the right of representing the victim and also sharing information with the victim within the context of the canonical penal process. The norms of *CIC* can. 1481–1490 that deal with procurators in general would also apply to the procurator of the aggrieved party".[30]

7. The Victim as a Necessary Person in the Process

I have one final observation concerning the victim as "not a necessary party of the penal process", as Prof. Montini indicated in the opening to his presentation.[31] He correctly stated that the role of the victim in the canonical penal process is limited to two categories, i.e., as a witness to a crime and as the injured party. The interests of the victim are the responsibility of the promoter of justice in a role similar to a district attorney or prosecutor in the civil courts.

I wish to propose that the victim should always be understood and treated as a "necessary person" in the penal process. One of the most

29 United States Conference of Catholic Bishops, Charter for the Protection of Children and Young People, revised June 2018, available on https://www.usccb.org/offices/child-and-youth-protection/charter-protection-children-and-young-people, access 16.10.2022.

30 Scicluna (n 2), 501.

31 Montini, (n 3), 22.

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obvious yet profound ways for a victim to experience that recognition is in his/her examination as a witness, who is a real person and not simply an element of the process. As mentioned previously, according to the norm of canon 1561, the examination of a witness is conducted by the judge, or by his delegate or an auditor, with a notary present in either case.

In cases of an offence against the sixth commandment with a minor, the victim is an eyewitness. It is a rare occurrence that there are other eyewitnesses to the same offence. It is likely that at least some persons have observed other interactions between the victim and the alleged offender. And at an unspecified time, the victim may have shared some information about his/her interaction with the accused.

The information obtained in the investigation may indicate that there is no evidence of a punishable offence, or it may result in the bishop handing the matter to the promoter of justice for prosecution under canon law.

If the bishop does not have access to the findings of the investigation made by the state, it is even more important to conduct a preliminary investigation according to Church law.[32] Those who assist the bishop in conducting the investigation and assessing the findings of the investigation must have adequate knowledge of the norms of civil and canon law that apply in these cases. This will form the basis of confirming whether there is "knowledge which at least seems true of a delict", which is the predicate for initiating the preliminary investigation (c. 1717 § 1) and any subsequent response.

It often occurs that the victim makes the first report of an offence to the Church. The first response from the Church will be a report made to a civil authority (the police or prosecuting attorney), who will conduct a criminal investigation on behalf of the state. In the investigations where I am the diocesan bishop, a department of the county government provides a victim assistance person for the victim. Once the investigation has been conducted, the prosecution completed and the decision made by the state court, the Church is free to complete its own investigation and conduct a penal process.

It may happen that the victim assistance person will continue in that capacity during the Church's proceedings. This is significant for two reasons.

32 It should be noted that if the canonical investigation interferes with the state investigation, the diocese may come under scrutiny for obstruction of justice according to state laws. At the same time, it should be noted that there is no guarantee that the state will share the findings of its criminal investigation with the promoter of justice or the diocesan bishop.

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First, the state has the financial resources to provide qualified persons to provide this service even when the Church does not have corresponding resources. Thus, the state's victim assistance person is available at no expense to assist the victim.

The second reason is the realisation that the victim assistance person may be able to serve as a bridge between the civil and ecclesiastical forums. I have frequently heard victims refer to the canonical process as "my case", without reference to the role of the prosecuting attorney for the criminal prosecution of a punishable offence in the civil court, or the corresponding role of the promoter of justice for criminal prosecution in an ecclesiastical tribunal.

For the Church in the United States of America, these concerns are addressed in a particular law established in 2006. According to the USCCB, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons,* n. 3: "Each diocese/eparchy will designate a competent person to coordinate assistance for the immediate pastoral care of persons who claim to have been sexually abused when they were minors by priests or deacons".[33]

This norm corresponds to the recommendation made by Archbishop Scicluna that a "representative for the victim" be provided in the canonical penal proceedings. As mentioned, he has suggested a "*procurator partis laesae*, the procurator for the person aggrieved, as an appropriate title for this function".[34] However, the specific responsibilities of this procurator need to be delineated according to the needs of the victim in each case.

Such a designation is consistent with what has been established in Art. 5 "Care for Persons" of *Vos estis lux mundi,* as mentioned before:

"According to § 1, the ecclesiastical authorities shall commit themselves to ensuring that those who state they have been harmed, together with their families, are to be treated with dignity and respect, and in particular are to be:

a. welcomed, listened to and supported through provision of specific services;
b. offered spiritual assistance;

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33 USCCB, Essential Norms for Diocesan/ Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons, 5 May 2006, available on https://www.camdendiocese.org/wp-content/uploads/2013/07/B_Essential_Norms.pdf, access 07.11.2022.

34 Scicluna (n 2).

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c. offered medical assistance, including therapeutic and psychological assistance, as required by the specific case".

According to § 2, "the good name and privacy of the persons involved, as well as the confidentiality of their personal data, shall be protected".[35]

It should be noted that these provisions found in *Vos estis lux mundi* were approved on May 7, 2019 "*ad experimentum* for three years".[36] It remains to be seen how these provisions might be extended in a permanent fashion, even if some modifications are necessary. *Vos estis lux mundi* applies to Cardinals, Bishops and Papal Legates; clerics who are or have been leaders of Personal Ordinariates or Personal Prelatures; and those who have been supreme moderators of Institutes of Consecrated Life, Societies of Apostolic Life or autonomous monasteries.[37] However, the pastoral response to victims outlined in *Vos estis lux mundi* Art. 5 is universally applicable in all cases involving offences committed by members of the clergy and religious figures.

Hopefully, the shared wisdom, jurisprudence and recommendations expressed in the seminar on the "Rights of Alleged Victims in Penal Procedures" will be of assistance in assessing the effectiveness of *Vos estis lux mundi*. Until then, everyone dealing with these cases should remain mindful of the most commonly expressed needs of victims: 1) to feel safe; 2) to express their emotions; 3) to know what comes next after their victimisation. These three needs as expressed by victims underscore the continued need for victim assistance. They go beyond the limited scope of penal procedural law. It is hoped as well that the norms, procedures and recommendations expressed in this seminar may be brought together in a cohesive manner which will apply *mutatis mutandis* to the various circumstances that have been addressed in separate policies, letters and decrees cited in this report and discussed during the seminar. This is the stated desire of Pope Francis:

> "The crimes of sexual abuse offend our Lord, cause physical, psychological and spiritual damage to the victims and harm the community of the faithful. In order that these phenomena, in all their forms, never happen again, a continuous and profound conversion of hearts is needed, attested by concrete and effective actions that involve everyone in the

35 Francis, '*Vos estis lux mundi*' (n 16).
36 Ibid. Art. 19.
37 Ibid. Art. 6.

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Church, so that personal sanctity and moral commitment can contribute to promoting the full credibility of the Gospel message and the effectiveness of the Church's mission [...]. Even if so much has already been accomplished, we must continue to learn from the bitter lessons of the past, looking with hope to the future".[38]

Biography

Bishop Mark Leonard Bartchak was ordained and installed as the eighth Bishop of Altoona-Johnstown (Pennsylvania) on April 19, 2011. He attended The Catholic University of America School of Canon Law in Washington, DC, from which he received a Licentiate in Canon Law and in 1992 a Doctorate in Canon Law. That same year he was appointed Judicial Vicar and Director of the Office of Conciliation & Arbitration of the Diocese of Erie. He is a member of the USCCB Committee on Canonical Affairs & Church Governance. Pope Francis named him a member of the Supreme Tribunal of the Apostolic Signatura on June 21, 2021.

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38 Francis, '*Vos estis lux mundi*' (n 16).

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With Dignity and Respect: How Victims May Participate in Canonical Proceedings – Reflections on a Seminar by a Practising Canon Lawyer in Penal Matters

Aidan McGrath OFM

Abstract

"With dignity and respect": these words, taken from the Apostolic Letter *Vos estis lux mundi*, sum up this short contribution, which is a personal reflection on three interventions made in the course of an international conference promoted by a working group from the Pontifical Commission for the Safeguarding of Minors. This conference took place in Rome in December 2021 and addressed the topic of the "Rights of Alleged Victims in Penal Procedures". The three particular interventions on this issue, on which the author reflects, were rooted in the legislation of the USA, in international law and in canon law. The author is of the view that there is already scope within canon law to allow for the participation of victims in canonical penal proceedings. Nevertheless, it is clear from the interventions at the conference that, in working with victims in this area, the Church has a lot to learn from other jurisdictions.

Keywords: *dignity; respect; listening; participation; learning; child sexual abuse; canonical penal procedures*

1. Introduction

On June 1, 2021, Pope Francis promulgated the revised Book VI of the 1983 Code of Canon Law, entitled "Penal Sanctions in the Church".[1] It came into force on December 8, 2021. The new norms display a major shift with regard to delicts that concern the sexual abuse of minors. Until then, the law saw the sexual abuse of minors within the Church, particularly in relation to clerics, as a violation of the obligation of celibacy. The many cases of allegations of sexual abuse of minors by members of the clergy, as well as by brothers of religious institutes, brought about an awareness that

1 Francis, Apostolic Constitution *Pascite gregem Dei* on the Reform of Book VI of the Code of Canon Law, available on https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2021/06/01/0347/00751.html#DE, May 23, 2021, access 26.08.2022. The revised norms in English translation: https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2021/06/01/210601b.html, access 26.08.2022.

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the issue at stake is not simply a violation of celibacy: it is rather a violation of the dignity of the other person, who is used by the perpetrator for his own gratification. The legislator expresses this new perspective by changing the delict itself: whereas the former law listed the delict under the heading "Delicts against special obligations", the new penal law issued in 2021 lists it under the heading "Offences against human life, dignity and liberty". To place the delict under a different heading is more than mere reorganisation. It is a call for a shift in how to interpret the delict itself. However, the revised norms of the new Book VI do not attend to penal procedures.

In December 2021, the Working Group "Safeguarding Guidelines and Norms" of the Pontifical Commission for the Protection of Minors, hereafter PCPM, conducted a seminar on the "Rights of Alleged Victims in Penal Procedures". It was a follow-up from a previous seminar held in 2019 which was entitled "Promoting and Protecting the Dignity of Persons in Allegations of Abuse of Minors and Vulnerable Adults: Balancing Confidentiality, Transparency and Accountability". The insights of the latter seminar, as well as findings from a number of nationally conducted independent investigations about the handling of allegations of the sexual abuse of minors in the Catholic Church brought to the fore the need to reflect on the rights of the alleged victims in penal procedures.

The purpose of the 2021 seminar was to consider the current canonical provisions in penal procedures, while listening to criteria that international treaties have developed over the years and to the provisions that different jurisdictions around the world have for the participation of alleged victims in their procedures. This seminar, which was by invitation only, brought together staff members of the relevant dicasteries of the Roman Curia who handle complaints, diocesan bishops who are also canon lawyers, professors of canon law, canon lawyers with practical experience in the area of penal matters on the diocesan level or in religious institutes, acting, for example, as a judge or an investigating judge. I myself am a member of a religious institute and currently the major superior of a province that includes Ireland, Great Britain and Zimbabwe. In this capacity, as well as in my capacity as a canon lawyer, when I was involved in penal cases as the preliminary investigator, the advocate for the accused or the judge, I obtained knowledge about and an awareness of the role and the needs of victims in canonical penal procedures.

My reflections are offered here in the light of the interventions at the seminar and also in the light of my personal experience. I want to highlight a few aspects that struck me particularly during the seminar.

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2. The Terminology of Victim

Mary Graw Leary, a professor of law at the Catholic University of America in Washington DC, a former federal prosecutor and recognised expert in the areas of criminal law and procedure as well as victimisation, presented her reflections in the study entitled "Crime Victim Rights Framework in the United States of America".[2] She considers the meaning of the term "victim", which, in the USA, is defined as "a person directly and proximately harmed as a result of the commission of an offence". She is of the view that this very precise definition does not really encompass the extent of the harm caused by a perpetrator of sexual abuse. She notes:

> "Jurisdictions should reject the temptation to conceptualize the victim as only the person directly harmed by the wrongful act. This is particularly true with child abuse as this is a crime that tears at the family framework, having a ripple effect on the immediate family of a victim as well as anyone in relation with her".[3]

The professor admits that it would be impossible to extend the meaning of the term that widely but that it is possible to extend it beyond the individual directly affected.

This is something that I can confirm from an actual case known to me: a victim of a serial offender asked to meet with the offender; he wanted to confront him with all the harm he had caused and the misery and suffering that followed; when he entered the room, accompanied by his wife and by the psychotherapist who facilitated the meeting, the man he saw was not the monster of his nightmares but a small, wizened, very elderly man; he said that he had come to speak of his anger at all he had suffered but that, when he saw him, he changed his mind: "now that I see you, I see that you are a pathetic old man and I am not going to get angry with you; in fact, I feel sorry for you"; no sooner had he finished speaking than his wife directed her gaze at the old man and said very clearly: "he might not be angry with you any longer, but I am – I am angry with you for all that I have had to suffer on account of what you did to him all those years ago; he might be prepared to take pity on you and forgive you, but I never will". Was the wife in this case also a victim? She most certainly was. Is it possible

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2 Mary Graw Leary, A Crime Victim Rights Framework in the USA, in Charles J. Scicluna / Myriam Wijlens (eds), Rights of Alleged Victims in Penal Proceedings. Provisions in Canon Law and the Criminal Law of Different Legal Systems, Nomos 2023, 119-150.

3 Ibid. 127, 128.

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that the wife could have rights within the canonical penal procedures? The answer to that question is negative because canon 1398 refers to actions by the perpetrator that are directed only to the person who is a minor. It does not include others. Nevertheless, even though not a victim in the strict legal sense, the wife in this case must be understood as having suffered as a result of the abuse perpetrated on her husband. While she may not have rights in a penal procedure, the Church has obligations to her from a pastoral point of view.

3. *Fundamental Rights*

Working within the framework of the more precise definition of "victim", Professor Graw Leary presents and comments on ten fundamental rights found in US legislation concerning victims and their participation in court proceedings:

1) The right to be reasonably protected from the accused.
2) The right to reasonable, accurate and timely notice of any public court proceeding or any parole proceeding involving the crime or any release or escape of the accused.
3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
5) The reasonable right to confer with the attorney for the government in the case.
6) The right to full and timely restitution as provided in law.
7) The right to proceedings free from unreasonable delay.
8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
10) The right to be informed of rights.

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These rights make a great deal of sense and put the victim at the heart of any proceedings in the state courts. Professor Graw Leary, in her conclusion, states:

> "A necessary component of that recognition and reconciliation is the awareness that there is a vital and essential role for victim-survivors in the canonical process that will benefit both the process as well as the victim-survivor herself. The basic rights afforded in the American federal criminal justice system to all victims of crime provide a minimal framework for that important first step".[4]

It is clear that she would like to see something akin to these incorporated into canon law.

It should be noted that many elements of these US procedural rights can and should be part of ecclesiastical proceedings, penal and administrative, without the need to modify the existing law: in particular, those which focus on the innate right of the victim to be treated with fairness and with respect for his or her dignity and privacy. Over the past two decades, a number of reports have been issued on behalf of the state concerning allegations of abuse and how they have been handled in dioceses and other institutions in Ireland. These include the reports into the dioceses of Ferns (2005), Dublin (2009) and Cloyne (2011), the Ryan report into residential institutions (2009) and the McAleese report into Magdalen Homes and Laundries (2013). A key complaint in each of these investigations was that those who had suffered abuse (sexual, physical, emotional and psychological) were not treated with respect when they came forward to make a complaint: they felt ignored, rejected, demeaned and treated as hostile.

Article 5 of the Apostolic Letter *Vos estis lux mundi*, hereafter VELM, already gives some indication of the obligation to treat victims with dignity and respect:

> "§ 1. The ecclesiastical Authorities shall commit themselves to ensuring that those who state that they have been harmed, together with their families, *are to be treated with dignity and respect,* and, in particular, are to be:
>
> a) *welcomed, listened to and supported,* including through provision of specific services;

4 Ibid. 148.

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> b) offered spiritual assistance;
> c) offered medical assistance, including therapeutic and psychological assistance, as required by the specific case.
>
> § 2. The good name and the privacy of the persons involved, as well as the confidentiality of their personal data, shall be protected".[5]

Of course, it is one thing to have such a duty indicated on paper, even in a letter from the Pope, it is quite another to make sure that it is observed in a real-life setting, and throughout the Church.

The majority of the ten rights identified by Professor Graw Leary are rooted firmly in elements of the system of criminal law that operates within the USA, e.g., parole proceedings, release or escape of the accused, and plea bargains. These, for many reasons, do not have exact parallels in the canonical system: ecclesiastical superiors do not have the authority to restrain, arrest or otherwise constrain members of the clergy and religious figures accused of the sexual abuse of minors. However, the real point at stake for the Church is to become aware of the moral obligation – which would have to be secured in a legally binding manner – to keep the victims informed at all stages of the proceedings, from the preliminary investigation right to the final decision and verdict. The confidential nature of the canonical proceedings should not prevent the proper and rightful sharing of important information with those whose lives have been affected by criminal behavior. A balance between confidentiality and transparency is to be found here. Confidentiality may not mean "secrecy" and transparency may not imply that everything is accessible to all in the public domain. Were the latter the case, the right to privacy of victims might also be affected. If victims cannot be sure that this right is respected, it would not be safe for them to come forward. Hence, discretion must be exercised in the matter of who should have access to information and when, and all this should be guided by the well-being of the victim.[6]

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5 Francis, Apostolic Letter in the form of Motu Proprio *Vos estis lux mundi*, available on https://www.vatican.va/content/francesco/es/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html, access 26.08.2022. Emphasis by the author.

6 On this matter, see the proceedings of the seminar 'Promoting and Protecting the Dignity of Persons in Allegations of Abuse of Minors and Vulnerable Adults: Balancing Confidentiality, Transparency and Accountability' organised by the PCPM in 2019 and published in *Periodica* 109 [2020] 401–676; as well as online in an English/Italian translation: https://www.iuscangreg.it/seminario-tutela-minori, access 28.08.2022.

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4. *Rights Expressed in International Treaties*

The seminar organised by the PCPM opened with a presentation on the current canonical provisions by Monsignor Gianpaolo Montini (more below). Before subsequently attending to provisions in different jurisdictions around the world, Professor Fabián Salvioli, an Argentinian human rights lawyer and United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, presented some rights that can be distilled from international treaties.[7] He mentioned that, in his capacity as Special Rapporteur, victims of sexual abuse in the Catholic Church have contacted him.

Before we address this presentation, it is important to distinguish between the Holy See as a subject of international law and the Roman Catholic Church as a faith community. The seminar did not focus on the implications of international treaties that bind the Holy See, but instead focused on the canonical norms within the faith community. Nevertheless, in as far as these treaties articulate rights rooted, for example, in natural law or not against the anthropology of the teaching of the Church, they deserve careful study.

Basing his argumentation firmly on the foundation of international human rights law, Professor Salvioli states that victims have the right to justice, and he indicates some elements that guarantee this right:

- "active participation in the process at all moments and phases;
- a context that is not intimidating, with psychological and legal support provided by persons they choose and trust;
- protection from any form of revictimization of the persons affected – the focus must be on the actions of the perpetrator not on those of the victim;
- full access to the judicial and/or administrative proceedings".[8]

Of particular relevance are the contributions in this volume by Matteo Visioli, Confidenzialità e segreto pontificio, 447–491; Charles J. Scicluna, The Rights of Victims in Canonical Penal Processes, 493–503; John P. Beal, Accountability and Transparency According to Canon and International Law: A Human Rights Perspective, 505–526; and Damián Astigueta, La trasparenza e il diritto di difesa, 527–548.

7 Fabián Salvioli, The Rights of the Victims: International Standards and the Need of a Holistic Approach, in Scicluna / Wijlens (n 2), 39-51.

8 Ibid. 46, 47.

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The thoughts presented by Professor Salvioli are not far removed from those of Professor Graw Leary. Much of what he suggests can already be made real, bearing in mind the particular nature of the canonical judicial and administrative penal processes. The right to reparation and compensation is not to be contested. Canon law makes provision for this in canons 1729–1731 of the Code of Canon Law, hereafter CIC. In many countries, however, episcopal conferences or diocesan bishops have agreed to pay an "acknowledgement" of damages incurred because of abuse by a member of the clergy, but this provision is, so to speak, made outside the ecclesiastical courts. Such a provision might be helpful when, for example, the cleric accused of the delict has died. Moreover, in a number of countries, the question of the reparation of damages is settled according to decisions of the state's civil courts and is not under the jurisdiction of the ecclesiastical authority.

Given the adversarial nature of a criminal or penal procedure, legal challenges by the accused and his or her legal representatives can create an environment that a victim may find intolerably hostile. The fact that most cases coming before ecclesiastical authorities in Ireland in these years concern matters that happened over 40 years ago, the defence by the accused is often very vigorous and hostile. Another difficulty that limits full participation in a canonical penal process is created by the *General Data Protection Regulator,* hereafter GDPR, a piece of European Union legislation that came into force in May 2018. The GDPR restricts access to personal data. Under the legislation, apart from issues such as law enforcement, an individual's personal data can only be shared with another in limited circumstances. Among these is the situation where the individual freely consents to the sharing of information. In canonical penal procedures, this has become another bone of contention: the full access by a victim to judicial or administrative canonical proceedings by analogy with US legislation and international treaties cannot be granted without taking GDPR into consideration. The documentation of a particular case can often contain very delicate and deeply personal information about the person accused. The ecclesiastical authorities are not competent to allow access to this material without the individual's consent because, unlike the State law enforcement services, they are not exempt from the norm of the GDPR. This is an issue that is being strongly upheld by advocates acting on behalf of clerics and religious figures accused of sexual abuse of minors.

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5. Current Canonical Insights

The seminar began its deliberations by listening to Monsignor Gianpaolo Montini, a professor of canon law at the Gregorian University and a former senior official of the Apostolic Signatura. His task was to present the current canonical provisions with regard to the rights of the victims. From a strictly canonical standpoint, Monsignor Montini also echoes some of what Professor Graw Leary makes explicit. He argues very clearly and very forcibly that victims can already be parties in canonical penal proceedings, participating as an injured party in a claim for the reparation of damages under Canon 1729 § 1 CIC, in accordance with Canon 1596, which regulates the intervention of third parties in a case. If admitted by the judge, the victim becomes truly a party in the case. In a truly erudite presentation, Monsignor Montini then states:

> "Allowing the victim to intervene in the penal process entails, as a logical procedural consequence, that the victim benefits from all the rights of the "party" to a trial; it can be mentioned in this regard, for example, that the victim has the right to:
>
> – know the accusations and evidence disputed in the summons of the accused (cf. can. 540 SN);[9]
> – establish one or more defenders (lawyers) and a procurator (cf. can. 553, § 1 SN),[10] as well as request free legal aid;
> – propose exceptions and proofs (cf. can. 553, § 1 SN);[11]

9 "The object or matter of criminal trial is determined in the joinder of issue itself, with which the judge during the session of the court on the day assigned in the citation indicates the petition of the promoter of justice to the accused and to the injured parties, if they are present" (can. 540 SN).

10 "The injured party, who has been admitted to the exercise of a contentious action, has the right [...] to choose an advocate or procurator, as a true party in the case, but with due regard for canon 376, § 3" (can. 553, § 1 SN), i.e., in the case of late intervention, which therefore obviously takes place according to the Acts.

11 "The injured party, who has been admitted to the exercise of a contentious action, has the right to propose exceptions and proofs [...], as a true party in the case, but with due regard for canon 376, § 3" (can. 553, § 1 SN), i.e., in the case of late intervention, which therefore obviously takes place according to the status of the Acts. Cf. also can. 557 SN.

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- participate in the discussion of the case (cf. can. 569, § 1 SN);[12]
- request an exemption from legal expenses (cf. can. 576 SN).[13]

In a single word, the victim is "party" of the penal process to all effects, "as a true party in the case", as underlined in can. 553, § 1 SN".[14]

The document he refers to is *Sollicitudinem nostram*, an Apostolic letter by Pope Pius XII in 1950.[15] This contained sections of the Canon Law for the Eastern Churches in full communion with Rome. This remained in force until 1991 when the Code of Canons of the Eastern Churches, hereafter CCEO, came into force. Notwithstanding the fact that these canonical provisions are not to be found in current canon law and the fact that, at the time they were in force, they applied to the Eastern Churches in full communion with Rome, Monsignor Montini expresses the view that:

"Although the procedural rules of the aforementioned motu proprio *[Sollicitudinem Nostram]* are not formally in force today, they can still be considered binding due to the fact that they emerge as *logical deductions* from the setting of the current canons 1729–1731, canons that *fully* transpose, albeit in abbreviated form (as in the style of the current Code) the setting of the aforementioned motu proprio".[16]

This position appears to find support in canon 1477 § 1 CCEO: "The promoter of justice, the accused and the advocate for the accused, and the injured party mentioned in can. 1483, § 1 and that person's advocate take part in the discussion".

If the injured party and the advocate for that party can take part in the discussion of a case, surely the injured party can also avail of the rights highlighted by Monsignor Montini. There is no equivalent canon

12 "The promoter of justice, the accused and his advocate, the injured party and the party mentioned in can. 554 and their advocates await the discussion" (can. 569, § 1 SN). Cf. also can. 570 SN.

13 "Only private parties can be bound to pay something under the title of judicial expenses, unless they are exempted (from the burden) according to the norm of canons 441–443" (can. 576 SN).

14 Gianpaolo Montini, The Rights of Alleged Victims in Canonical Penal Procedures. Current Penal Procedural Canon Law, in Scicluna / Wijlens (n 2), 27 FN 20.

15 Pius XII, Apostolic Letter in the form of Motu Proprio *Sollicitudinem Nostram. De iudiciis pro Ecclesia orientali,* available on https://www.vatican.va/content/pius-xii/la/motu_proprio/documents/hf_p-xii_motu-proprio_19500106_sollicitudinem-nostram.html, access 28.08.2022.

16 Montini (n 14), 27 FN 17.

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in CIC 1983. But it can be argued on the basis of the recourse to parallel places found in canon 17 CIC that the victim in a penal case who has been constituted as a lawfully intervening third party has rights within the canonical penal process.

A more concrete reflection on his analysis of the situation leads quickly to the conclusion that, in practice, things may not be quite as easy as they might seem. For example, in those parts of the world that follow the common law tradition, no canonical process can take place until the state authorities have concluded their own investigations. To proceed canonically before the state has concluded may well be construed as an effort to subvert the course of justice. In accordance with standard procedure in Ireland, for example, all information about alleged sexual abuse of minors must be reported to the statutory authorities, i.e., to the police (An Garda Síochána) and to the child and family agency (Tusla). While they are investigating the matter, in almost all cases, a civil case for damages is initiated by the victims before the state's civil courts.

By the time any canonical procedure can begin, the ecclesiastical authorities generally can have contact with victims only through their legal representative. The idea of a victim taking part in a subsequent canonical procedure would be unthinkable for most: their experience before the state courts often leaves them exhausted; moreover, not infrequently, they feel they have been let down by the Church already and they are not prepared to assist in any investigation or process. In any case, within the current civil structure in Ireland, if damages have been settled by the state courts, it is not possible for victims to seek them again in canonical trials. The temporal goods of the various Church bodies (dioceses and religious institutes) are administered strictly under the supervision of the Charity Regulator. Payment of damages after a purely internal, canonical procedure would not be looked upon favourably and could well result in sanctions by the Regulator. Nonetheless, advocates representing victims ought to suggest that they present the contentious action for damages mentioned in canon 1729 § 1 so that they can be constituted as parties in the procedure.

In practice, most canonical processes are not judicial in nature but administrative. Monsignor Montini points out that: "There are no explicit procedural prescriptions on the participation of the victim in administrative criminal proceedings".[17] Nevertheless, basing himself on the jurisprudence of the Apostolic Signatura, on the opinion of learned authors and

17 Ibid. 30.

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on some indications of the opinion of the senior officials of the Dicastery of the Faith, he is of the view that, even in administrative penal processes, victims can be permitted to intervene in ways not dissimilar from those outlined for the judicial penal process.

6. *Looking Ahead*

In the light of these and other contributions, how can victims be involved in canonical penal processes in a realistic and meaningful way? To begin to answer that question, might I suggest that, when a canonical penal proceeding – judicial or administrative – has been established:

- those charged with the conduct of the proceedings should reach out, personally or through a person with the appropriate skills, to the victims, to those against whom a delict is said to have been committed;
- they should explain what the proceeding is and how it will unfold;
- they should explain precisely what rights the victim has in the procedure; at present, this is the right to file a complaint, to be heard, to give a statement and to recount the facts of what happened; this gives the victim the status of a witness in a case, but it does not prevent the ecclesiastical authorities from keeping the victim informed;
- they should indicate to the victim someone who is an expert in canonical penal matters who can give information as and when it is necessary; in particular, this expert – who may also act as an advocate – ought to bring to the attention of the victim the possibility of presenting a contentious action for damages in order to become a party in the case;
- they should explain what is happening at every stage of the procedure: at the preliminary investigation, at the joinder of the issue (concordatio dubii), during the instruction, at the phase of deliberation, during a possible appeal and during the implementation of the decision;
- they should seek to have the victim "present" for the final consideration of the judge/judges, not in person, but by means of a victim-impact statement, so that those making the decision might be fully informed of the effects of the crime on the victim; this would give an expression to the damage caused by the violation of the dignity of the victim (cf. canon 1398).

As yet, none of these is the object of an explicit right on the part of a victim according to canon law. However, bearing in mind the need for

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confidentiality and the particular nature of canonical proceedings, they are not forbidden: all penal proceedings touch on the common good and this must include the good of the victims. Moreover, as Monsignor Montini has shown, a careful analysis of canonical texts can provide proper justification for behaving in this way.

I have already noted that, in recent decades, the Catholic Church's approach to the sexual abuse of children by clerics and religious figures has undergone a fundamental shift: whereas previously the offence was considered to be a personal failing on the part of the perpetrator, according to the revised Book VI of the Code of Canon Law, it is now to be considered – first and foremost – as an offence against human life, dignity and liberty. The victim, according to the letter of the law, now stands at the centre of the delict. It is time to adopt this perspective for canonical penal procedures as well.

In the light of the contributions made during this conference, it is clear that the Church has a lot to learn from the approach taken in other jurisdictions.

Biography

Aidan McGrath OFM is the Minister Provincial of the Franciscan Province of Ireland. He received his doctorate in canon law in 1985. From 1984–2009, he was successively judge, vice-officialis and judicial vicar of the Dublin Regional Marriage Tribunal and the Dublin Metropolitan Tribunal. From 2009–2017, he was Secretary General of the Order of Friars Minor. He is a canonical consultor to many bishops and religious institutes. He has written several articles on canonical matters. He has over thirty years' experience of penal proceedings in the Church, working as an advocate for the accused, as a preliminary investigator, as a presiding judge and a judge delegate.

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Quo vadis? Canonical Reflections on the Rights of Alleged Victims in Canonical Procedures

Charles J. Scicluna

Abstract

The Working Group "Safeguarding Guidelines and Norms" of the Pontifical Commission for the Protection of Minors convened a seminar on the "Rights of Alleged Victims in Canonical Penal Procedures". The purpose of the seminar was to learn how international treatises understand rights of victims in penal procedures, how these are implemented in different judicial systems around the globe and what the Church can learn from them in light of its current canonical norms for penal procedures. In this study, the author summarises and reflects on the different contributions. In light of the principle *salus animarum suprema lex*, the author calls for *hermeneutics of care* to govern canonical provisions that attend to the rights of victims in canonical procedures.

Keywords: *sexual abuse in the Catholic Church; procedural rights of victims; penal canon law; duty to care, penal procedures*

1. Introduction

In December 2021 the Working Group "Safeguarding Guidelines and Norms" of the Pontifical Commission for the Protection of Minors (PCPM) organised a seminar entitled "Rights of Alleged Victims in Canonical Penal Procedures". The topic had arisen from the 2019 seminar organised by the same working group of the PCPM which was entitled "Promoting and Protecting the Dignity of Persons in Allegations of Abuse of Minors and Vulnerable Adults: Balancing Confidentiality, Transparency and Accountability".[1] During this latter seminar, I reflected on the rights of victims in different canonical penal procedures and made some suggestions

1 English version: Promoting and Protecting the Dignity of Persons in Allegations of Abuse of Minors and Vulnerable Adults: Balancing Confidentiality, Transparency and Accountability, *Periodica* 109 (2020) 401–676. All contributions are translated into English or Italian and these can be accessed at: https://www.iuscangreg.it/seminario-tutela-minori, access 08.08.2022.

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as to how this could unfold in the different phases of different procedures.[2] My reflections then and now take into consideration reports that victims shared with me personally as well as findings from reports commissioned by independent institutions or Church authorities. The narratives that were shared reveal that victims not only suffered from sexual abuse as minors by clerics, but that they also incurred new wounds that were inflicted upon them because of the way Church authorities responded to their allegations. They thus experienced what is generally known as "secondary victimisation". Hence, there is a need to evaluate the existing canonical provisions and their implementation in order to avoid such "secondary victimisation".

The purpose of the 2021 seminar of the PCPM was to identify the rights of victims as expressed in different canonical penal procedures and to reflect on them in light of internationally developed standards as well as the way different jurisdictions around the world attend to the role and rights of victims in their respective judicial penal provisions. It is hoped that a dialogue among experts on the topic will assist the Roman Catholic Church in its own reflections on how to best attend to the rights of victims in its own different penal procedures.

This contribution offers a canonical reflection after having listened to the different experts. I really must begin by expressing my gratitude to these outstanding experts for generously sharing their knowledge of the rights of victims in penal matters, be it from the perspective of international treatises and / or the way they unfold in different jurisdictions around the world. I would also like to thank all the people who responded to the presentations and all others who engaged in a true dialogue between these experts and professors of canon law, staff members of different dicasteries of the Roman Curia, as well as a number of diocesan bishops and (former) major superiors of religious institutes who have expertise in this domain. I am grateful for the questions that were raised and the answers we were privileged to hear.

The seminar was opened by a true expert in canonical penal procedures, Prof. Msgr. Gianpaolo Montini, who presented the status quo in canon law. Now that I have heard the presentations of the experts from other

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Spanish translation: Myriam Wijlens / Neville Owen (eds), Confidencialidad, transparencia y accountability. La dignidad de las personas en los procesos de denuncia de abuso sexual (PPC-Editorial 2022).

2 Charles J. Scicluna, Rights of Victims in Canonical Penal Processes in Periodica 109 (2020) 493–503.

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jurisdictions and in light of my own experience, the question arises: *Quo vadis*? Where can we go from here? In answering that question, I feel it is important to appreciate the fact that the legislation of the Vatican City State since 2019 has updated the institutions of the Holy See in line with international obligations, as the Law CCXCVII states.[3] I offer my reflections in this specific context.

2. *The Framework: Accompaniment because of a Duty to Care*

My contribution starts from what needs to govern all further reflections: the response by the Church to allegations of abuse needs to occur within a framework of accompaniment of the victim, because those in leadership especially have a duty to care. This point was made by Professor Jorge Cardona, a professor of Public International Law at the University of Valencia (Spain) and a former member of the Committee on the Rights of the Child, which monitors the implementation of the Convention on the Rights of the Child by its state parties. Cardona underscores the need to attend in all procedural matters to "the best interests of the child", but adds that this "should not entail a reduction in the rights of the accused [who has a right] to a fair trial [...]. Obtaining the truth while respecting the innocence and the rules of a fair trial is not at odds with respect for the best interests of the child".[4] Considering this, Cardona argues in favour of the general accompaniment of victims that is then to unfold in the different legal provisions and in their application. He invites the Church to attend to this because, as he points out, the rationale of canon law is the *salus animarum*, the spiritual well-being of our communities: *salus animarum suprema lex*.[5] Indeed, whatever we try to do to promote and protect the rights of victims and survivors, but also perpetrators, must be read and experienced within this framework; it is the *leitmotiv* of the great duty to care, which is at the basis of the right to be protected. Victims have a right

3 Francis, Law No. CCXCVII 'On the Protection of Minors and Vulnerable Persons' March 26, 2019, available on https://www.vatican.va/resources/resources_protezionem inori-legge297_20190326_en.html, access 06.08.2022.

4 Jorge Cardona, Rights of Alleged Victims in Penal Procedures in Spain, in Charles J. Scicluna / Myriam Wijlens (eds), Rights of Alleged Victims in Penal Proceedings. Provisions in Canon Law and the Criminal Law of Different Legal Systems, Nomos 2023, 160.

5 Cf. can. 1752 of the Code of Canon Law 1983.

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to be protected, and the community has a duty to care; this is an expression and unfolding of the *salus animarum.*

International documents, like the EU Directive,[6] hereafter Directive 2012/29/EU, consider the interest of the child to be a paramount principle which is to be the basis for our considerations. Canon law and civil law now converge on defining "minor" in law as a person under 18 years of age.[7] This is an added advantage because now we can start talking on the same level, which is an important development that we should not underestimate. We have the same concept of a minor, which adds value to our reflections.

3. The Scope of the Canonical Penal Procedures

In his remarkable study, Monsignor Montini adopted a very specific perspective on the penal procedures, starting from the moment when the procedure formally starts, up to the definitive sentence. Yet, we must recognise that most of the civil legislation, international conventions, EU directives, laws of Vatican City State, even the Code of Canon Law, hereafter CIC, do consider the preliminary investigation and the right and duty to denounce or disclose as an integral part of the system of penal justice.

In a very eloquent way, Monsignor Montini presented the argument that if you talk about processes, you must go from the *citatio* up to the *sententia definitiva*.[8] However, looking at the comparative legislation as reviewed during the 2021 seminar, one can recognise that the relevant structure of book VII on the Penal Process in the CIC itself starts from the *notitia criminis,* then attends to the preliminary investigation, provides for important norms concerning the deliberation, decision and discretion to choose what

6 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ 2 315/17.

7 Cf. Congregation for the Doctrine of the Faith, A brief introduction to the modifications made in the *Normae de gravioribus delictis*, reserved to the Congregation for the Doctrine of the Faith, n. 14; May 21, 2010, available on https://www.vatican.va/resources/resources_rel-modifiche_en.html, access 02.08.2022; Francis, Rescript of the Holy Father to introduce some amendments to the *Normae de gravioribus delictis,* December 17, 2019, art.1, available on https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217a.html, access 02.08.2022.

8 Gianpaolo Montini, The Rights of Alleged Victims in Canonical Penal Procedures. Current Penal Procedural Canon Law, in Scicluna / Wijlens (n 4) 20.

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to do with the information gathered, and finally there is a process, whether administrative or judicial, that leads to a definitive decision.

Hence, any future reflection should not only look at the process as a technical parenthesis but consider it in a wide perspective, because the duty to care cannot be expressed within the parameters of a "process" only in the technical meaning of the term. We must have a system that looks at disclosure, investigation and process as well as aftercare or support.[9]

We cannot simply look at the CIC either. It is necessary to appreciate the fact that with the motu proprio *Vos estis lux mundi*,[10] hereafter VELM, there is a binding universal law. Part one of VELM provides a universal law concerning the protection of minors and vulnerable adults, and it introduces the important legal obligation to offer protection services for victims of crime and the duty to report. Under the heading "care for victims", VELM determines in art. 5 § 1 that victims:

"together with their families, are treated with dignity and respect, and, in particular, are to be:

a) welcomed, listened to and supported, including through provision of specific services;
b) offered spiritual assistance;
c) offered medical assistance, including therapeutic and psychological assistance, as required by the specific case".

This is an important development that must be taken into consideration.

Another point that one needs to make is that whenever references are made to the exercise of discretion by the authority in canon law, such decisions have consequences for the community, for the victims, their families, and for the perpetrators. An example of the exercise of this discretion concerns the moment when the Ordinary has to decide whether it is expedient to have a penal process, or once a penal process has been decided on, to choose what kind of process is best: administrative or judicial. This discretion must be exercised *ex iusta causa*; it cannot be taken lightly, but

9 See in this regard also the contribution by Mark Bartchak, The Position of Alleged Victims in the Canonical Penal Process, in Scicluna / Wijlens (n 4) 287-308, who as a judge in canonical penal processes and a diocesan bishop underscores the need to attend to victims in a much wider sense than the mere process itself.

10 Francis, Apostolic Letter in the form of Motu Proprio *Vos estis lux mundi,* May 10, 2019, available on https://www.vatican.va/content/francesco/es/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html, access 06.08.2022.

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it must instead be a reasonable decision. It would seem justified for all concerned that the decision should entail a consultation with experts. As I have mentioned on another occasion: "Expert advice brings light and comfort and helps us bishops arrive at decisions that are based on scientific and professional competence. Tackling cases as they arise in a synodal or collegial setting will give the necessary energy to bishops to reach out in a pastoral way to the victims, the accused priests, the community of the faithful and indeed to society at large".[11]

So far the canonical system does not have a process or remedy for victims, or even the perpetrator, to challenge a decision taken at the preliminary stage, whereas we saw during the seminar, how many jurisdictions, and even the Directive 2012/29/EU itself, offer these remedies for preliminary decisions. This is something that should be considered. Does one have a remedy if the bishop decides not to conduct a penal process in a particular case? Considering that bishops and major superiors can themselves be called to account for the decisions they take in these matters,[12] the provision is of relevance not only for victims, but for those who exercise leadership as well.

The CIC talks about the aggrieved party before the formal beginning of the process in canon 1718. When there is the opportunity for reconciliation and with the consent of the parties, the person investigating can facilitate this and can also award *ex bono et aequo* damages. Hence, the CIC recognizes that the parties are already protagonists or players before the beginning of the penal process. We need to take cognisance of this.

We owe victims everything that we can do to facilitate the search for truth because this will be the basis for healing. I think that whatever help and role we can give victims of abuse in the canonical penal proceedings is important, because this is part of our mission: our mission is a mission to heal.

11 Charles J. Scicluna, Taking Responsibility for processing Cases of Sexual Abuse and for Prevention of Abuse, Lecture given at the Meeting 'Protection of Minors in the Church' of the Holy Father with the Presidents of Episcopal Conferences, Rome February 22, 2019, available on https://www.vatican.va/resources/resources_mons-scicluna-protezioneminori_20190221_en.html, access 24.12.22.

12 Francis, Apostolic Letter issued Motu Proprio *As a loving Mother*, 4 June 2016, available on https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html, access 24.12.22.

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There has been a very important emphasis on the "public" nature of penal procedures. This is an action promoted by the authorities in the name of the public good. However, during this 2021 seminar we have learned of civil law systems that have also brought in the parties as "co-actors" in the penal procedures. The provisions in Germany[13] and Poland,[14] which will be expanded upon in further detail below, are very interesting, and we should reflect on them and try to understand them on a deeper level.

It is worth considering that even in the context of the public nature of penal processes – and they are public because they promote the common good of the Church – the common good of the Church includes the good of the victims and the accused. I recall a comment that in certain communities in Africa the individual is put on a secondary level and there is a more pronounced emphasis on the community and the role of the community. These emphases are not incompatible, because the common good includes the good of the individuals who are wounded. Pope Francis has been quite vocal in giving the magisterium a grounding and the theology of the care of the victim. I am referring to his 2018 "Letter to the People of God",[15] which deals with the theology of our responses to abuse, seeing it in light of the Gospel"s teaching that when one member suffers, we all suffer. The wound inflicted on one of us is a wound inflicted on the body of the Church.

Furthermore, I would also include the good of the accused, because we tend to concentrate on the victim, but the good of the accused, what we define as the *emendatio rei,* the conversion of the accused, is part of the common good. It is a blessing to the Church if a person who is guilty of an egregious crime returns to the fold. That would be an extraordinary response to the danger of recidivism and an extraordinary way to prevent further crime.

13 Frauke Rostalski, The Rights of (Minor) Victims of Sexual Violence in German Criminal Procedure, in Scicluna / Wijlens (n 4) 243-260.

14 Malgorzata Skórzewska-Amberg, Polish Criminal Procedure in Respect of Sexual Offences Against Minors, in Scicluna / Wijlens (n 4) 261-285.

15 Francis, Letter of His Holiness Pope Francis to the People of God, August 20, 2018, available on https://www.vatican.va/content/francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html, access 06.08.2022.

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4. *Rights of Victims – a procurator partis laesae*

In the 2019 seminar organised by the PCPM,[16] while speaking about the rights of victims, I suggested the introduction of a *procurator partis laesae* as a representative of the victim. Now having listened to many interesting experiences from different jurisdictions in the current seminar, I feel that such a proposal does not come from Mars, because civil jurisdictions have adopted a similar model. While it is necessary to respect the specific nature of the canonical system, it is equally true that the canonical system has always been open to development. The impact of canon law is universal and could be a beneficial influence in so many cultures.

Frauke Rostalski, Professor of Criminal Law, Criminal Proceedings, Legal Philosophy and Legal Comparison at the University of Cologne, made a noteworthy contribution from the perspective of the German system. She remarks that since "[a] criminal offense is an individual's violation of a legal prohibition or obligation", the legal system might see the offence as a mere violation of the law, but "[a]bove all, it is a violation of a victim's legal position". She explains that through criminal law, the conflict is taken out of the private realm into the public sphere, which, however, could:

"lead us to losing sight of the individual victim that suffered at the hands of the defendant. The criminal offence is an attack on the rights of the society to which the victim belongs: the criminal offence is grounded in the specific violation of the victim's legally protected right, which in turn gives rise to the reaction of the state in the shape of punishment. Thus, the victim should be accorded an appropriate role in the criminal process – as a person who has a special interest in the resolution of the conflict".[17]

Rostalski explains that German criminal law offers decisive instruments to help the victims pursue their legitimate interests: the "private accessory prosecution" and the "assertion of rights in adhesion proceedings". These measures might risk further emotional damage for the victim, but, writes Rostalski, such tension is to be considered in the creation of victim rights. The victim should have an opportunity to participate in the trial, while their psychological constitution is also to be considered. In contrast, the adhesion proceedings, as explained by Rostalski, do not give the victim an active role in the trial; instead, the injured party is "able to claim damages

16 See Fn. 1 above.
17 Rostalski (n 13) 244.

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in civil law in the context of a criminal trial".[18] This provision is in place so as to avoid conflicting decisions in criminal and civil law.

Through a private accessory prosecutor, victims have their own procedural standing and become independent participants in the proceedings: "The injured party is given the opportunity to present his/her specific situation and emphasise the suffering he/she endured, to strengthen his/her claim for redress".[19] Through this instrument the victim also has the right to defend themselves against a termination decision by the prosecutor. The prosecutor might do so, but "if the injured party put forward the request for criminal prosecution and it is later terminated, he/she must be informed about the decision of the prosecution […] and he/she may appeal this decision".[20] Rostalski explains that during the criminal proceedings the private accessory prosecutor has the right to demand and receive information as well as view relevant records, be informed about the trial and the termination of the proceedings, where and when the main proceedings are held, as well as what charges are brought against the defendant. "However, he/she does not have the right to receive a copy of the decisions".[21] Hence, the injured party would only obtain the result of the proceedings in a comprehensive manner. Furthermore, they have a right to receive information that concerns their own safety in relation to the defendant. This would include, for example, instructions not to get in touch with the victim. Through the private accessory prosecutor, the injured party has the right to review records. Other rights are, for example, the right to be present at the main proceedings, reject judges and experts, and question the defendant, witnesses and experts themselves. There are a number of other relevant rights, for which I refer to Rostalski's article.

Similarly, the victim has the chance to take an active role during the trial in Polish criminal procedure. Professor Malgorzata Skórzewska-Amberg, Chair of Theory, Philosophy and History of Law at the School of Law at the Kozminski University in Warsaw, explains that even if the parties in the proceedings are the prosecutor and the defendant, the victim may appear as a party as an "auxiliary prosecutor". Professor Skórzewska-Amberg describes this instrument as "an institution of the Polish criminal procedure which has been introduced in order to enable the aggrieved party to

18 Ibid. 247.
19 Ibid. 246.
20 Ibid. 249.
21 Ibid.

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actively participate in the trial and exercise the victim's rights as a party – alongside or instead of the public prosecutor".[22] She explains that through an auxiliary prosecutor the victim is entitled to submit evidentiary motions and pose questions to those interrogated, attend the main hearing and attend the court sittings prior to the main hearing, in respect of conditional discharge or dismissal on the grounds of the defendant's incapacity, along with the application of protective measures or conviction and sentencing without a main hearing.[23]

Professor Mary Graw Leary, a former federal prosecutor and professor of law from the Catholic University of America in Washington DC with expertise in the intersection between criminal law, criminal procedure, technology and contemporary victimisation, presented a comprehensive examination of ten minimum rights that the federal statutes of the USA recognise for victims of sexual abuse. These rights, which can serve as orientation in our study, include the right to:

- be reasonably protected from the accused;
- obtain a reasonable, accurate and timely notice of any public court proceeding or any parole proceeding involving the crime or of any release of or escape by the accused;
- not be excluded from any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
- be reasonably heard at any public proceeding in the district court involving release, plea, sentencing or any parole proceeding;
- confer with the attorney for the government in the case;
- full and timely restitution as provided in law;
- proceedings free from unreasonable delay;
- be treated with fairness and with respect for the victim's dignity and privacy.[24]

22 Skórzewska-Amberg (n. 14) 272.
23 Ibid. 274.
24 Mary Graw Leary, A Crime Victim Rights Framework in the USA, in Scicluna / Wijlens (n 4) 130-145.

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The canon lawyers with experience in conducting penal procedures Bishop Marc Bartchak[25] and Aidan McGrath OFM[26] have already offered some useful insights on how these rights are already foreseen in canonical norms or can be unfolded within them. Their thoughts should be taken into consideration by a possible task force, as I will suggest below. Furthermore, it is important to remember that the first *Vademecum* issued by the Congregation for the Doctrine of the Faith already determines: "In cases where it proves necessary to hear minors or persons equivalent to them, the civil norms of the country should be followed, as well as methods suited to their age or condition, permitting, for example, that the minor be accompanied by a trusted adult and avoiding any direct contact with the person accused".[27]

The reflections make one realise that information and dialogue with those concerned is essential and can be an important aspect in the healing process. If this is not done properly, that process is impeded. As VELM says, we have a duty to care, to support, to accompany. Pope Francis keeps telling us that the style of the gospel is *tenerezza, compassione, vicinanza*. We should be able to apply these notions and translate them into action and thus show compassion, tenderness and closeness to the victims.

In this regard, another point mentioned in the study presented by Professor Rostalski about the German provisions is of relevance. She refers to the possibility of professional psychosocial procedural accompaniment, *psychosoziale Prozessbegleitung.* She states that this is an additional means of support for victims of sexual violence, including minors, during the criminal proceedings: "the person providing this assistance should be allowed to be present with the injured person during his/her examination and the main hearing".[28]

25 Bartchak, (n. 9).

26 Aidan McGrath, With Dignity and Respect: How Victims May Participate in Canonical Proceedings – Reflections on a Conference by a Practicing Canon Lawyer in Penal Matters, in Charles Scicluna / Myriam Wijlens (n 4) 312.

27 Congregation for the Doctrine of the Faith, Congregation for the Doctrine of the Faith, *Vademecum* on certain points of procedure in treating cases of sexual abuse of minors committed by clerics, Version 1.0, 16 July 2020 n. 51, available on https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html, access 15.08.2022. Indeed, after the seminar, version 2.0 was published on 5 June 2022, available on https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html, access 15.08.2022.

28 Rostalski (n 13), 253.

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This is an interesting provision for accompanying a victim throughout the process. Regretfully, those who work in the Dicastery for the Doctrine of the Faith have heard reports of cases in which people had been left in the dark as to what the outcome was of the case in which they were a victim. I remember a person who wrote letters to the Holy See complaining that nothing happened after he had reported a case of abuse. Hence, we checked and discovered that the accused priest had been dismissed from the clerical state. The Church had complied with its duty, but no one had informed the person most affected, namely the victim. The obligation to contribute to healing, to express care had not been fulfilled.

5. *Specified Training for Professionals in Canonical Penal Procedures*

I noticed that so many of the civil jurisdictions that have been reviewed insist on the training of personnel to be able to address the special status of a minor or of a person abused as a minor.

Professor Salvioli from Argentina, the former President of the UN Human Rights Committee (2015–2016) and UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, explains in his insightful contribution that one of the recommendations for good practice to effectively ensure the rights of victims of abuse is to “train investigators, prosecutors and judges to carry out their functions according to human rights standards, eliminating the prejudices and stereotypes that place the responsibility for the abuse on the behaviour of the victims”.[29] Professor Cardona explains that Spanish law also requires that all those involved in the different proceedings related to violence against children and adolescents must have specialised, initial and continuous training. He refers to General Comment No. 13 of the Committee on the Rights of the Child, which recommends:

> [T]hat investigations [have] to be carried out “by qualified professionals who have received role-specific and comprehensive training [for this purpose], and must require a child rights-based and child-sensitive approach”, taking “extreme care […] to avoid subjecting the child to further

29 Fabián Salvioli, The Rights of the Victims: International Standards and the Need of a Holistic Approach, in Scicluna / Wijlens (n 4) 48.

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harm through the process of the investigation".[30] This specialization is reiterated when it calls for "juvenile or family specialized courts [...] for child victims of violence", or "the establishment of specialized units within the police, the judiciary and the prosecutor's office".[31]

Cardona explains that the training does not only apply to police, but also to attorneys, lawyers defending child victims, and those working in the judicial and prosecution domain. The training relates to material and procedural aspects. Spanish law foresees that professionals specialised in the different areas of action, including forensic sciences and legal medicine, work together, thus reinforcing the multidisciplinary nature of assistance provided to victims. In canon law, besides having to have at least a licentiate in canon law, additional specialised training for those working in the area of penal law could be envisioned. Such training could include learning methods of interrogating, evaluating proof and forensic reports, understanding trauma caused by sexual abuse and its impact on giving testimony, etc.

During our dialogues, we have indeed seen that even if an adult is talking about their experience, at that moment it is the child talking through that adult. Those involved in these cases need to be aware of this and the challenges that arise from it. Victims are often still living in their trauma because they are almost frozen in that traumatic experience. Their language is almost fixed in that time and space. Therefore, the people who encounter victims need training to be able to be empathic and caring in the job of supporting victims. It is also of relevance that those who are procurators, auditors, advocates, promotors of justice or judges in canonical procedures understand the proof presented.

Through his personal experience as a judge in canonical procedures, Bishop Mark Bartchak has already shared some very helpful reflections on how to conduct a canonical investigation, how to interact with and interrogate victims as well as how to judge their testimony.[32] It would be good to develop this area more deeply and also see, for example, how faculties of canon law can offer specialised courses possibly in cooperation

30 UN Committee on the Rights of the Child (CRC), 'General comment No. 13 (2011): The right of the child to freedom from all forms of violence', 18 April 2011, CRC/C/GC/13, available on https://www.refworld.org/docid/4e6da4922.html, access 15.08.2022.

31 Cardona (n 4) 164.

32 Bartchak (n 9) 298.

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with forensic institutions. Training should be multidisciplinary: canonical, psychological and spiritual.

6. A Dialogue between the Different Judicial Systems

One of the things that came to the fore in the 2021 PCPM seminar is that there are different families of law and that within the same family of law such as common law, civil law and Germanic law, the legal provisions in different places are at different points of the graph. Canon law on the other hand has the benefit – because it is truly catholic, truly universal – of being able to influence culture around the world.

The dialogue between canon law and civil law in this area has been beneficial, as can be seen with regard to the development of the motu proprio *Sacramentorum sanctiatis tutela* after its initial publication in 2001; recently, the third version was issued.[33] In 2010 canonical legislation introduced the question of sexual exploitation through images, formerly called pornography. This was the result of a developing phenomenon that had to be recognised and addressed. The recent 2021 revision of the motu proprio included further developments that not only accept what VELM had already determined concerning sexual abuse of minors, but also states which delicts are the preserve of the Dicastery for the Doctrine of the Faith and which ones are not.

7. Quo vadis? A "task force" and an Instruction

Quo vadis – where do we go from here? I suggest that this is not the moment to decide anything; above all, there is no mandate to do so. However, I would suggest that, under the auspices of the PCPM, "a task force" would

33 John Paul II, Apostolic Letter in the form of Motu Proprio '*Sacramentorum Sanctitatis Tutela*', AAS 93 [2001], available on https://www.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_20020110_sacramentorum-sanctitatis-tutela.html, access 09.08.2022; Benedict XVI, *Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis* AAS 102 [2010], available on https://www.vatican.va/resources/resources_norme_en.html, access 09.08.2022; Francis, Norms on delicts reserved to the Congregation for the Doctrine of the Faith, L'Osservatore Romano 161 [2021], available on https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html, access 09.08.2022.

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take care of the elements I have suggested. Of course, different Roman dicasteries need to be involved because of their specialised knowledge and wisdom, be it in the case at hand or also in drafting legal documents.

First, we need time and energy to digest the extraordinary amount of input and information we have had the privilege to receive through the papers, the dialogues and the responses of those who participated in the seminar. There is a world of information that needs to be digested. A task force would discuss the elements of convergence and differentiation, and it would be integrated by people familiar with the limits and the values of the canon law system.

One of the limits that we usually ignore is the fact that canon law is a system based on the voluntary submission of the individual member of the people of God, whereas a state jurisdiction has the power of physical coercion and obliges because of citizenship or residence. Canon law is based on the obsequious notion of faith. As the apostolic constitution *Pascite gregem Dei*,[34] by which Pope Francis promulgated the new norms contained in Book VI of the CIC, says the submission to canonical penal law is an expression of an act of faith, but it is also a disciplinary and voluntary submission. There are people who have walked away from the Church to avoid or evade the consequences of penal processes. Another limitation concerns the technical possibilities that the Church has: it simply cannot order the accused to make available devices such as computers and phones on which relevant proof might be found, nor does it have the technical possibility to conduct such an investigation. Hence, cooperation with civil authorities in these areas is necessary.

Following the discussion on the elements of convergence and differentiation, the task force would be able to extrapolate a set of principles for policy. We have been blessed with so much information about principles of best practices in international treatises, on the United Nations level and regional conventions like the Directive 2012/29/EU. There are principles that converge; they usually concern the right to information, the right to participation and the right to support and award damages. This task force would also be able to propose ways and means by which the Church can promote the empowerment of victims in the process of the search for truth.

34 Francis, Apostolic Constitution *Pascite gregem Dei* on the Reform of Book VI of the Code of Canon Law, available on https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2021/06/01/210601b.html, access 26.08.2022.

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This obviously leads to two important aspects which are not technically procedural, but which are present in so many jurisdictions: information and training. Most of the documents shared in the current seminar concentrate on information, such as the right of the victims to be informed about their rights, about the process, and about its development or progress. There is also a need to attend to the (ongoing) training of those persons who engage as players and stakeholders in a canonical process, as mentioned above.

The task force could look into the possibility of issuing an instruction. I am thinking of an instruction, because unlike a revision of the whole procedural law in book VII of the Code of Canon Law, which might well take a long time, an instruction could answer to the needs much more quickly, and considering the principle *Lex semper reformanda est,* subsequent changes that might be needed due to new insights could be more easily accounted for. Furthermore, an instruction or guidelines would have the advantage of going beyond attending to procedures in the strict sense. After all, the care for the victim starts, as mentioned above, before the formal beginning of a process and goes beyond it. The Code of Canon Law in its procedural law could not cover the care of victims like VELM does in part I. An instruction would be able to have this holistic approach. It is necessary to give the care of victims the right context, which is wider than what happens from the formal beginning of a canonical process to the very end, because the care of victims is broader.

The idea of an instruction, however, brings me to one of the things that I learned from the extraordinary input by Monsignor Montini: we need more information about the status of canon law. Most canon lawyers who participated in the seminar would agree that we all learned something because the sources that Monsignor Montini mentioned are not available to us mortals. We cannot go on with a system where specialised information is not shared institutionally. I was intrigued by some things he mentioned, especially about the rights of the *pars laesa* within the process. In his study, he quotes a law that was in force between 1950 and 1991;[35] it is not in force

35 Pius XII, Apostolic Letter in the form of Motu Proprio *Sollicitudinem Nostram. De iudiciis pro Ecclesia orientali,* available on https://www.vatican.va/content/pius-xii/la/motu_proprio/documents/hf_p-xii_motu-proprio_19500106_sollicitudinem-nostram.html, access 28.08.2022; Gianpaolo Montini, The Rights of Alleged Victims in Canonical Penal Procedures. Current Penal Procedural Law, in Scicluna / Wijlens (n 4) 27 FN 17/18.

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anymore. But how are we going to apply a law that is not in force anymore and nobody knows about?

There should be a system that allows us to be informed, even about the jurisprudence of the tribunals of the Holy See,[36] especially the Apostolic Signatura, where I worked for seven years as a substitute promotor of justice. Hardly anybody knows about the work of the Signatura, because the Signatura itself has always refused to publish its jurisprudence except for some rare things and in very rare instances. This means that experts like Monsignor Montini need to help this task force to glean these principles.

We also need proposals from a task force which give extra impetus to the system because the Church would benefit from instruction. Monsignor Montini mentioned the experience with the instruction *Dignitas connubii,* which concerns the procedure in marriage nullity cases.[37] I was secretary on the team that worked on it from 1996 to 2000. It was an extraordinary experience, and I remember that most of it was based on the instruction *Provida Mater,*[38] which was issued in 1936, an instruction that went into great detail. It was useful even after the promulgation of the 1983 CIC. If you have a great law, like the motu proprio *Sollecitudinem nostram* promulgated for the Eastern Churches in 1950,[39] which is not *ius vigens* now, it can help with the development of a new instruction.

However, since we are talking about delicts that are the preserve of the Dicastery for the Doctrine of the Faith, I would suggest that its own input is essential. The *Vademecum,*[40] published by this Dicastery, offers extraordinary, albeit not perfect, input. It could also be a basis for further progress, because the Dicastery for the Doctrine of the Faith did a good service of including many aspects of its jurisprudence, especially on the formal

36 The call for the publication of jurisprudence was already mentioned in a number of studies presented in the 2019 seminar organised by the PCPM (see n 1 above). See e.g., John Beal, Accountability and Transparency According to Canon and International Law: A human Rights Perspective, in Periodica 109 (2020) 505–526; and Neville J. Owen, The Ideal of Accessible Justice: In praise of Jurisprudence, in Periodica 109 (2020) 633–658; as well as Neville J. Owen / Myriam Wijlens, Outlook after the Seminar, in Periodica 109 (2020) 659–666.

37 Montini (n 35) 37.

38 S. Congregation de Disciplina Sacramentorum, Instructio *Provida Mater Ecclesia*, AAS 28 (1936) 313–372; English translation in T. Lincoln Bouscaren (ed), The Canon Law Digest, vol. 2, Milwaukee, Bruce, 1943, 473–530.

39 Pius XII (n 35) 5–120.

40 Congregation for the Doctrine of the Faith, *Vademecum* (n 27).

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procedural level, but it did not envisage the question of awarding damages. However, it is something that could be remedied in an instruction.

It is important that we realise that our system is a special system; it needs to bear witness to the wisdom behind the minimum standards on the rights, support and protection of victims of crimes that are now a threshold and a standard in the international community. We need to be wise in accepting the fact that the Roman Catholic Church, which used to be an authority and interpreter of *ius gentium* during the first and second millenniums, now needs to understand that in the third millennium it has to continue this dialogue with the international community, and that its own system needs to be up to scratch and be an example of best practices of a faith community that has the important role of care, because after all the *salus animarum* doesn't expect anything else from us.

This is my take: a task force and an instruction. Therefore, I would like to conclude my reflections by saying that they are open-ended; this is the beginning of a process. It is an extraordinary beginning, because it is in dialogue with the world and we need to be challenged by the international community and local jurisdictions, because we need to be of service to our communities, and we owe it to people in our flock who are wounded and crying out for healing and justice.

Biography

Archbishop Charles J. Scicluna has been the Archbishop of Malta since 2015. He holds doctorates in Civil and in Canon Law. After serving as Deputy Promotor of Justice at the Apostolic Signatura (1995–2002), he was appointed in 2002 as promotor of justice at the Congregation for the Doctrine of the Faith with special responsibility for the *delicta graviora*, in particular the abuse of minors. In 2015 Pope Francis appointed him president of the College for Recourses in Cases of Reserved Delicts at the same Dicastery.

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