Rights of Alleged Victims in Penal Procedures in Spain

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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

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).

> 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

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

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.

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.

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.

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)

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.

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.

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

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.

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.

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".

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.

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.

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.

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.

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).

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.

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]

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".

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.

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.

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

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

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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.

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.

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.

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.

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.

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.

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.

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.

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.

"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.

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".

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.

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

> 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.

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.

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

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

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.

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.

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.

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.

– 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).

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.

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:

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.

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.

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

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

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.

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

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

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