The Rights of Alleged Victims in Canonical Penal Procedures

Current Penal Procedural Canon Law

Gianpaolo Montini

Abstract

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

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

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

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

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

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

1 Tertullianus, Apologeticum, I, 2.

1. Limitations Concerning the Subject of the Article

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

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

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

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

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

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

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

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

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

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

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

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

2. *Some Premises*

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

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

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

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

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

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

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

3. Penal Action

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

This means – for our interest – that the victim:

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

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

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

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

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

4. *The Victim in the Penal Process*

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

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

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

A. Introduction of the Case for Damages Suffered

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

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

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

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

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

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

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

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

B. Intervention by the Victim in the Penal Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

This is a rather delicate point.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Particular Issues

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

A. Damage Reparation in Canon Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

8. *Points of Discussion Following the Exposition*

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

---

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

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

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

Biography

Msgr. Prof. Dr. Gianpaolo Montini Extraordinary Professor of Procedural Law in the Faculty of Canon Law at the Pontifical Gregorian University (Rome).

References

Baura, Eduardo (2020): Il risarcimento del danno causato da un'autorità ecclesiastica, in *Ius Ecclesiae* 2020, No. 3, pp.630 – 672.

Francis (2019): Lettera Apostolica motu proprio *Vos estis lux mundi*, www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html.

Code of Cannon Law (1983): www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html.

Montini, Gianpaolo (2004): Exegetical Commentary on the Code of Canon Law, vol. 5, Wilson & Lafleur, 2036–2048.

Montini, Gianpaolo (1991): Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica, in La giustizia amministrativa nella Chiesa, Libreria Editrice Vaticana, 179–200.

Montini, Gianpaolo (2021): La responsabilità dell'Autorità ecclesiastica secondo la giurisprudenza della Segnatura Apostolica' in Ius Ecclesiae 2021, No. 3, 537–567.

Pallath, Paul (ed) (2021): Code of Eastern Canon Law: English translation of the four apostolic letters issued Motu Proprio by Pope Pius XII, Oriental Institute of Religious Studies India.

Pérez-Madrid, Francisca (2018): La vigilancia de la recta administración de justicia por el Tribunal de la Signatura Apostólica. Comentario a algunos decretos recientes en materia disciplinar, in *Ius Canonicum* 2018, No. 1, 321–354.

Poland, John David (2021): Guidelines produced in response to the CDF's Circular Letter of 3 May 2011 complementary to art. 6 §§ 1–2 of the 2010 "Normae de gravioribus delictis". A Canonical Analysis in Light of the Work of the CDF, Editrice Pontificia Università Gregoriana.

Scicluna, Charles J. (2020): The Rights of Victims in Canonical Penal Processes, in *Periodica de re canonica* 2020, No. 3–4, 493–495.

Zambon, Adolfo (2013): Sul risarcimento del danno. Some reflections starting from two "coram McKay", in *Ius Ecclesiae* 2013, No. 1, 107–119.