

# The Position of Alleged Victims in the Canonical Penal Process

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## Abstract

In light of his experience as a diocesan bishop and 20 years of being a judge in canonical penal trials, the author participated in a seminar organised by the Pontifical Commission for the Protection of Minors on "Rights of Alleged Victims in Canonical Penal Procedures". His main question is: With regard to the rights of victims in penal procedures, what can canon law learn from considerations, developments and provisions in different jurisdictions around the world, while recognising that the canonical system per se is not simply "another" jurisdiction? He attends to six points: 1. The necessity to avoid harm that could be inflicted because of the canonical penal procedures themselves; 2. The connection between abuse and the sacrament of confession (*solicitatio*); 3. The need to approach the victim with an attitude of "care for persons" (*Vos estis lux mundi*), which on a practical level implies accompaniment of the victim. The author advocates provisions to appoint a *procurator partis laesae*; 4. Reflection on how different rights of victims as found in the USA justice system can be found or received by and implemented in the current canonical provisions; 5. The necessity to attend to the way a victim is interrogated, and 6. A victim's healing process requires that he/she will be seen as a necessary person participating in the trial.

Keywords: *victims' rights; sexual abuse of minors; penal law; penal canonical proceedings; victims as witnesses*

## 1. Introduction

In December 2021, the Working Group "Safeguarding Guidelines and Norms" of the Pontifical Commission for the Protection of Minors organised a seminar entitled "The Rights of Alleged Victims in Penal Procedures". This was a follow-up to the seminar organised in 2019 in which the same working group had reflected on "Promoting and Protecting the Dignity of Persons in Allegations of Abuse of Minors and Vulnerable Adults: Balancing Confidentiality, Transparency and Accountability".<sup>1</sup> Both

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1 The proceedings are published in their original version, be that in English or Italian, in *Periodica* 109 [2020] 401–676. A translation of each contribution in English or Italian is available on <http://www.iuscangreg.it/seminario-tutela-minori>, access

seminars brought together the leaders and officials of different Roman Dicasteries, a few diocesan bishops, who as canon lawyers had great experience in handling allegations of sexual abuse of minors by members of the clergy, professors of canon law and judicial vicars who had been involved in penal procedures. I had the privilege to be invited to participate in both seminars because of my engagement in penal procedures as a canon lawyer and diocesan bishop in the USA.

Among the 2019 presentations was a contribution by the former promotor of justice and current Adjunct Secretary of the Dicastery for the Doctrine of Faith Archbishop Charles Scicluna on the role of victims in canonical penal procedures.<sup>2</sup>

The 2021 seminar focused on this topic while asking the question: What can the Church learn from considerations, developments and provisions in different jurisdictions around the world, while recognising that the canonical system per se is not simply “another” jurisdiction? This seminar was organised in such a way that a main speaker would present his or her thoughts and a respondent would react with some reflections. The organisers invited me to respond to the presentation by Professor Gianpaolo Montini, the former promotor of justice at the Apostolic Signatura and currently a professor at the faculty of Canon Law at Pontifical Gregorian University who specialises in the law on canonical procedures. The reflections offered in my current study will consequently take into consideration Montini’s contribution<sup>3</sup> and others that were presented during the seminar.

## 2. *Avoid causing damage to victims because of the penal procedures*

Under the heading “7 Points of discussion following the exposition”, in number 6, Montini points to the need for those who are responsible for conducting a canonical penal process to avoid causing damage to the dynamics of the healing process that has already begun before the penal

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10.10.2022. A Spanish translation was published as: Myriam Wijlens / Neville Owens (eds), *Confidencialidad, Transparencia y Accountability: La dignidad de las Personas en los procesos de denuncia de abuso sexual*. PPC Editorial 2021.

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

3 Gianpaolo Montini, The Rights of Alleged Victims in Canonical Penal Procedures. Current Penal Procedural Canon Law, in Charles J. Scicluna / Myriam Wijlens (eds), *Rights of Alleged Victims in Penal Proceedings. Provisions in Canon Law and the Criminal Law of Different Legal Systems*. *Nomos* 2023, 19–38.

process is initiated. Although this seems so obvious and important, I have seen it neglected and disrespected by some in canonical practice.

In more than 20 years of experience as a judge in penal cases, I have interviewed a number of victims who suffer from post-traumatic stress disorder or other mental health issues resulting from sexual abuse as minors. I heard unfounded criticism from advocates who concluded that disjointed narratives in which victims responded to questions with seemingly disconnected verbal responses, or with silence, or with loud weeping were nothing more than play-acting that was intended to win the sympathy of the judges.

Sadly, I found it necessary to admonish advocates who attempted to discredit or berate a victim by accusing the injured party of putting on a show when he/she cried during the hearing. These advocates were unaware of the psychodynamics involved, and how victims recall the events of sexual abuse, or how the memory either haunts them or is triggered without warning.<sup>4</sup>

These experiences support Montini's suggestion that a *vademecum* for penal processes is needed for these cases. It would be helpful if it could be prepared by exceptionally qualified experts. While there are universal concepts that apply in these cases, a penal trial is not the place to indiscriminately adopt a "law section" that was formulated without reference to a specific case with a unique set of facts and circumstances. Most especially, it should offer insight into the mind of a child who has recently been sexually assaulted or an adult who was a victim many years ago, kept silent about the abuse and has now come forward. This manual should include practical guidance from experts in psychology, sociology, civil law and canon law.<sup>5</sup>

The Dicastery for the Doctrine of the Faith has published a *Vademecum*, which is intended as a resource for bishops, promoters of justice, advocates

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4 Dennis Sadowski, Clergy abuse survivors face a lifetime of recurrence of PTSD. *Catholic News Service* 2020, available on <https://www.ucanews.com/news/clergy-a-buse-survivors-face-a-lifetime-of-ptsd-recurrence/89608>, access 19.02.2023; Edwin T. Collins, Victims of clerical sex abuse suffer from PTSD: They deserve better treatment. *America Magazine* 2020.

5 A coordinated interdisciplinary approach is envisioned in: Congregation for the Doctrine of the Faith, Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics (May 3, 2011). It is also evident in the papers presented in a 2012 symposium in Rome. See Charles J. Scicluna / Hans Zollner / David J. Ayotte (eds), *Toward Healing and Renewal: The 2012 Symposium on the Sexual Abuse of Minors Held at the Pontifical Gregorian University*, English edition, Paulist Press 2012.

and others who participate in the adjudication of these cases.<sup>6</sup> This DDF *Vademecum* addresses only the procedures to be followed in prosecuting the perpetrator in a case involving grave delicts reserved to that dicastery. It presumes that those who are involved in these cases are well-versed in the jurisprudence concerning the nature of these offences and the standard canonical norms and procedures.

Canonists have access to volumes of commentaries and articles concerning the meaning of these delicts and the application of penalties. However, they also need to be aware of the nature of sexual abuse and the impact it has on victims. Judges and advocates should be aware of the psychology and the spirituality of victims. This would include a basic understanding of the trauma that may be caused by sexual abuse or assault. This trauma may impact victims spiritually.<sup>7</sup>

### 3. *Solicitation: Sexual Abuse and Sacramental Confession*

Another sensitive area concerns sexual abuse within the context of sacramental confession. In canon law, it is known by the term *solicitatio*. I have investigated, instructed or judged a number of cases involving this delict. It is extremely challenging for the victim who was solicited or sexually assaulted on the occasion of the sacrament of Penance to bring this forward for adjudication. Often, victims of sexual abuse by a cleric will seek assistance from their confessor because they are afraid or unsure of speaking with a psychological professional. Unfortunately, such an encounter between the victim and the confessor who is sought for counsel can become an opportunity for the confessor himself to initiate an offence against the sixth commandment with the victim.

Robert P. Deeley explains how the sacrament of Penance is used by some confessors to solicit information about the spiritual and emotional needs of penitents. This information is used to initiate a sexual relationship with the penitent. A typical scenario involves a penitent who is struggling with

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6 Dicastery for the Doctrine of the Faith, *Vademecum* on certain points of procedure in treating cases of sexual abuse of minors committed by clerics, Version 2.0, 5 June 2022, available on [https://www.vatican.va/roman\\_curia/congregations/cfaith/ddf/rc\\_ddf\\_doc\\_20220605\\_vademecum-casi-abuso-2.0\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html), access 10.10.2022.

7 Romeo Vitelli, How Can We Help Victims of Clergy Abuse? A new review explores what clergy abuse can mean for victims. *Psychology Today* 2019.

sexual sins or temptation and therefore seeks assistance in the sacrament of Penance.

The confession of such a matter or a mere question about it may tragically result in an unscrupulous confessor soliciting (i.e., inviting, suggesting or encouraging) the penitent to engage in similar sinful acts against the sixth commandment with the confessor. The solicitation may occur through words or gestures (e.g., kissing, embracing, etc.). It is not necessary for any indecent acts to occur during the celebration of the sacrament.<sup>8</sup>

Given the hideous nature of the solicitation and the secrecy that attends to the internal forum of the sacrament of Penance, it should be noted that this offence may cause harm to victims in three dimensions of their life. I have heard these reported during interviews with victims in penal cases:

- 1) *It impacts physically* when indecent contact occurs. A simple kiss on the cheek may cause as much harm as touching an inappropriate part of the body when it occurs as a false substitute for the rubric of the sacrament.
- 2) *It impacts psychologically/emotionally*, especially when a penitent who is a minor may be insecure about his/her own psycho-sexual identity or experience.
- 3) *It impacts spiritually*. I have heard victims testify that when the offence began within sacramental confession, it felt like the victim's soul had been kidnapped or killed. That experience deprived the victim of the graces of the sacrament prospectively. It frequently caused the victim to feel abandoned by God or to conclude that God is not real to them.

The confession itself is used by the confessor to identify a minor or an adult person who appears to be vulnerable. The information is used to take advantage of spiritually and psychologically vulnerable adults, which results in sins against the sixth commandment.<sup>9</sup> What is important is that the sexual abuse would not have occurred without the confessor using information gained from the confession itself. Moreover, if the penitent

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8 Robert P. Deeley, Some notes on graviora delicta and the delict of solicitation. *The Canon Law Society of Great Britain and Ireland Newsletter* 2006, 69–77. Bishop Deeley is a former official in the disciplinary section of the Congregation for the Doctrine of the Faith.

9 Norms Regarding Delicts Reserved to the Congregation for the Doctrine of the Faith, 11 October 2021, Art. 4, 4<sup>o</sup>, available on [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20211011\\_norme-delittiriservati-cfaith\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html), access 22.10.2022.

refuses the advances of the confessor and there are no sexual offences, the punishable crime has been committed insofar as the solicitation has already occurred.

Unfortunately, given the disparity of age/authority in the context of the sacrament of Penance, a minor may not have the ability to resist the advances of a confessor, and this may result in the further offence of sexual abuse of a minor.

An important study of the Church's lack of attention to this grave delict and the resulting negative consequences is found in a reading list on the Vatican website.<sup>10</sup> John Beal suggests that the 1962 instruction issued by the Congregation for the Doctrine of the Faith concerning this offence was a harbinger for the sexual abuse crisis of recent times. He observes that one of the most damaging elements of the Church's response was that of secrecy in its treatment of egregious offences involving minors. Beal adds that it was a topic that was no longer treated in seminary training.<sup>11</sup> It was barely mentioned when I began my graduate canon law studies in the late 1980s.

#### 4. *Accompanying the Victim from A Church Perspective*

The negative consequences of sexual abuse that have been reported by victims suggest additional questions for consideration in terms of the manner in which the diocese interacts with the victim. One of the main features of the narrative given by victims is that they feel no one listened and no one accompanied them. They had no one to turn to at the time of the offence. And when they are summoned by the Tribunal to be examined, they may once again experience being alone. The norm of canon 1481 § 2 indicates that in a penal case, the accused must always have an advocate either appointed by the accused or assigned by the judge. Unfortunately, the Code is silent about similar assistance for the victim.

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10 Abuse of Minors. The Church's Response, available on [https://www.vatican.va/resources/index\\_en.htm](https://www.vatican.va/resources/index_en.htm), access 07.11.22.

11 John P. Beal, The 1962 Instruction *Crimen sollicitationis*: Caught Red-Handed or Handed a Red Herring?. *Studia Canonica* 41 [2007] 199–236. Available on <https://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf>, access 28.10.2022. Beal is the Stephan Kuttner Distinguished Professor of Canon Law at the Catholic University of America.

In response to that circumstance, I support the proposal already made in the 2019 PCPM seminar by Archbishop Scicluna, who suggested having a specific role in canonical penal processes which would be a representative for the victim; a *procurator partis laesae*.<sup>12</sup> This curator would be given the right to represent the victim and share information with the victim concerning the penal process. It would be imperative for this assistance and canonical representation to commence as soon as possible after a punishable offence has been reported, or no later than the start of the preliminary investigation (c. 1717).

Carlo Gullo observes, “Guardians and curators have the duty to exercise their mandate with the diligence of a good parent”. Gullo’s description of this duty is appropriate insofar as guardians and curators are appointed to substitute for a lack of mental or psychological competence and to represent a minor deprived of someone who will look out for his/her interests. This is precisely the manner of care that would be appropriate for a victim during the entire penal process; someone, a guardian or curator, who is competent in the practice of canon law, and who does it with the care of a mother or father who looks after their children in time of need.<sup>13</sup>

This role, as envisioned here, is consistent with the one that is frequently identified in practice as a victim assistance coordinator. This person is not an advocate for the victim in a legal sense, but rather one who, because of education, training and experience, is able to interact with public or ecclesiastical social services, as well as the bishop’s office and tribunal. I would envision this person accompanying the victim to any meetings concerning the case, and even during the examination of the victim, who is the primary witness in the case. This role is consistent with a classic description of a curator as “one who takes care; one who overlooks the process; a guardian”.<sup>14</sup>

Even the simple tasks of scheduling appointments for interviews or requesting documents can be challenging for a victim. It may be necessary in some instances for the victim to want someone to accompany him/her to interviews, meetings at the tribunal, etc. The opportunity to choose someone for this role who is not employed by the diocese but understands

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12 Scicluna (n 2) 501.

13 Carlo Gullo, Canon 1479, in Ernest Caparros (ed), Exegetical Commentary on the Code of Canon Law (Midwest Theological Forum vol. IV/1[2004]), 968–970. Gullo is a former advocate at the Roman Rota, Roman Curia and the Holy See.

14 See “curator” in Cassell’s Latin-English Dictionary, Funk & Wagnalls 1955. 147.

how to exercise this function is an important and necessary role. One author recommends that “a diocese must have in place a clear praxis regarding the exchange of information between canonical personnel and those involved in pastoral care. Such a policy should be based on the distinction between secrecy and confidentiality”.<sup>15</sup>

In the seminar presentation, “Rights of Alleged Victims in Penal Procedures in Spain”, Professor Jorge Cardona underscores the points of accompaniment indicated by Pope Francis in article 5 of the Apostolic Letter *Vos estis lux mundi*:

“The ecclesiastical authorities should commit themselves to those who claim to have been affected, together with their families, so that they may be treated with dignity and respect, and should offer them in particular, the following: a) reception, listening, and follow-up, including through specific services; b) spiritual care; c) medical, therapeutic and psychological assistance, as the case may be”.<sup>16</sup>

The observation that *care* for the victim is simultaneously situated within the family, within the spiritual care of the Church and within the necessary medical and psychological assistance indicates a holistic approach in which victims should be accompanied by multiple persons in a cooperative and complimentary way.<sup>17</sup>

##### 5. *Victims’ Rights in the Criminal Justice System of the USA and their Application in Canon Law*

Professor Mary Graw Leary has identified a lacuna in the Church’s approach to the victims of sexual abuse of minors committed by members of the clergy. As an expert in American criminal justice, Graw Leary argues that the Church hierarchy would benefit from affording victims of clergy

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15 Amy Strickland, To Protect and Serve: The Relationship Between the Victim Assistance Coordinator and Canonical Personnel, *CLSA Proceedings* 71 [2009] 238.

16 Francis, Apostolic Letter in the form of Motu Proprio ‘*Vos estis lux mundi*’, May 10, 2019, Art. 5, available on [https://www.vatican.va/content/francesco/es/motu\\_proprio/documents/papa-francesco-motu-proprio-20190507\\_vos-estis-lux-mundi.html](https://www.vatican.va/content/francesco/es/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html), access 22.10.2022.

17 Jorge Cardona, Rights of Alleged Victims in Penal Procedures in Spain, in Scicluna / Wijlens (n 3), 195. Dr. Cardona is a professor of international law at the University of Valencia, Spain.



abuse substantive and procedural rights in the canonical system. Graw Leary noted that just 50 years ago, the American criminal justice system lacked a procedural system that provided a victim-centred approach in cases of sexual abuse of minors. It should be noted that this approach corresponds to the desire expressed by Pope Francis for the Church “to convert from a system of secrecy and clericalism to one more protective of victim-survivors and marked by transparency and accountability”.<sup>18</sup>

From the perspective of US federal law, Graw Leary discusses ten rights that “victim-survivors” in the Church should receive on their own and that they should not need to request or fight to receive or exercise them. These proposed rights are indicated in italics. I have offered some brief observations in support of these rights.

1. *The right to be reasonably protected from the accused.* This can be safeguarded according to the norm of c. 1722 by the removal of the accused minister from ministry once the alleged offence has been reported and by announcing when these measures occurred. The bishop may impose residence in a certain place or otherwise restrict the activities of the accused. The accused should be precluded from having any contact with the victim.
2. *The right to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime or any release or escape or movement of the accused.* This is intended to protect the victim from any real or potential contact with the accused. According to the norm of c. 1723 §§ 1–2, the legal representative of the accused would be notified by the judge. Similar communication could be directed to the procurator advocate for the victim.
3. *The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.* Underlying this right is the tension that exists between a victim’s dual status as both a victim and witness. Canonical proceedings are not public; however, allowing the participation of the victim in the fullest extent possible recognises the value of the victim-survivor and his/her inherent dignity.

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18 Francis, Letter of his Holiness Pope Francis to the People of God, August 20, 2018, available on [https://www.vatican.va/content/Francesco/en/letters/2018/documents/papa-francesco\\_20180820\\_lettera-popolo-didio.html](https://www.vatican.va/content/Francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html), access 29.10.2022.

4. *The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. The civil law does not indicate the method for being heard, but it is historically understood to allow a crime victim to address the court in person.* Should the victim be present at the time of the hearing, the exercise of this right suggests the need to provide additional safeguards for the well-being of the victim, as explicitly indicated in *Vos estis*, Art. 5.<sup>19</sup>
5. *The reasonable right to confer with the attorney for the Government in the case.* The corresponding ecclesiastical attorney is the promoter of justice. In a penal trial, the promoter of justice should act on behalf of the public good, which includes the good of the victim. The intervention of the promoter of justice is required in penal cases (c. 1430). The promoter of justice can appeal whenever the promoter considers that the repair of the scandal or the restoration of justice has not been provided for sufficiently in the decision of the judges (c. 1727 § 2). This norm would apply, for example, if the victim is not satisfied with the decision of the tribunal. This may occur if the victim is convinced that the punishment imposed by the judges is insufficient. If the victim is convinced that an appeal should be made concerning the punishment, the victim could confer with the promoter of justice in order to urge the reconsideration of a stronger penalty.
6. *The right to full and timely restitution as provided in law.* Insofar as many of the child sex abuse cases adjudicated in the Church have not been prosecuted in United States civil courts, the burden rests with ecclesiastical officials to enforce the prescribed restitution to the victim. This is explicitly indicated in canons 1729–1730, which recognise the twofold goal of restitution. It provides at least some relief to the victim, but it also has a punitive purpose. This would likely be seen in cases where the Church failed to act when it first received notice of child sexual abuse by a cleric.
7. *The right to proceedings free from unreasonable delay.* US law provides defendants with the right to a speedy trial. At the same time, it is noted that delays can result in further harm to the victim. It may also negatively impact the successful prosecution of the offence if the delay results in the loss of available witnesses or other evidence. *The Norms Regarding Delicts Reserved to the Congregation for the Doctrine of the*

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19 Francis, '*Vos estis lux mundi*' (n 16).

*Faith*<sup>20</sup> (revised 11 October 2021) provide for derogation from the time limits. This is used as an exception in individual cases and not as a general rule.

8. *The right to be treated with fairness and with respect for the victim's dignity and privacy.* It is known that in the past the criminal justice system has lacked recognition of the inherent dignity of crime victims and the need for fairness, dignity and privacy to be respected. The most challenging of these values is the respect for privacy insofar as the emphasis is on a public trial in which little is kept from being disseminated to the public. Protection of one's privacy and one's good reputation are fundamental rights in the Church (c. 220).
9. *The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.* As noted by Graw Leary, this right was added to the list of federal crime victim rights in 2015. It might occur in the canonical penal system that the injured party brings an action for damages. In canon law, the question of damages may be introduced prior to a penal process (c. 1718 § 4). However, judgement concerning this action is usually deferred until the penal trial is concluded in order to avoid delays (c.1730).
10. *The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990.* The 1983 Code of Canon Law, in canons 1717–1731 concerning the penal process, refers to victims (i.e., the injured party or *partis laesa*) only twice: in canon 1729 § 2 and canon 1731. Both canons deal with the procedural limits on the victim introducing an action to repair damages. According to the Dicastery for the Doctrine of the Faith, *Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics* (revised June 5, 2022), n 164, “the competent ecclesiastical authority (Ordinary or Hierarch) should inform the alleged victim and the accused, should they request it, in suitable ways about individual phases of the proceeding.” Even though this instructs the diocesan bishop to inform the victim about the ca-

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20 Francis, Norms regarding delicts reserved to the Congregation for the Doctrine of the Faith, available on [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20211011\\_norme-delittiriservati-cfaith\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html), access 09.11.2022.

nonical penal process, it is indicated that the victim has the burden of requesting that information.<sup>21</sup>

## 6. Examination of the Victim in the Penal Process

An important aspect of the penal process is the interview or examination of the victim, who is the primary witness (and most often the only eyewitness) in cases of sexual abuse of minors. It is reported that experts in criminology and psychology tend to agree that victims want and need to be heard, especially by those who are responsible for the Church's response.<sup>22</sup> At the same time, some experts in criminal investigations have discerned that one of the more significant problems is that sexual assault cases are not even investigated primarily because victims are not believed.<sup>23</sup>

Archbishop Scicluna has frequently observed that respect for canonical procedural laws is a necessary expression of pastoral care in cases of the sexual abuse of minors.<sup>24</sup> This principle applies especially to the moment in the penal process when witnesses (including the victim) are examined by the judge, a judge's delegate or an auditor.

In my own experience as presiding judge in these cases, most victims want to be heard by the presiding judge, if not the full panel of judges. There is a sense that if they are to have justice, they should be heard by whomever is going to render a decision in the case. This desire of the victim to be heard is consistent with the norm of canon 1561, which determines that if the promoter of justice or the advocates present at the examination have any questions for the witness (including the victim), they are not to propose them to the witness. They are to propose questions to the judge (or

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21 Mary Graw Leary, *A Crime Victim Rights Framework in the USA*, in Scicluna / Wijlens (n 3), 130-145.

22 Catherine Sheehan, *Sexual abuse victims want to be heard by church hierarchy*, Jesuit says, *National Catholic Reporter*, 5 September 2018, available on <https://www.ncronline.org/news/sexual-abuse-victims-want-be-heard-church-hierarchy-jesuit-says>, access 19.02.2023. The Jesuit is Rev. Hans Zollner SJ, Director of the Institute of Anthropology, Interdisciplinary Studies on Human Dignity and Care (IADC) at the Gregorian University, Rome.

23 Joanne Archambault / Kimberly Lonsway, *Start by Believing: Participation of Criminal Justice Officials*, Colville, WA, 2002, available on [https://evawintl.org/wp-content/uploads/2016-09\\_TB-SBB-CJS-Response.pdf](https://evawintl.org/wp-content/uploads/2016-09_TB-SBB-CJS-Response.pdf), access 28.10.2022.

24 Charles J. Scicluna, *The Quest for Truth in Sexual Abuse Cases: A Moral and Legal Duty*, in Scicluna / Zollner / Ayotte (n 5), 47-57.

the one who takes the place of the judge) who is to ask the questions, unless a particular law provides otherwise.

Canon 1564 provides useful instructions concerning the formulation of questions that are to be posed to the victim:

1. The questions should be brief. This is especially applicable when asking about basic information such as time, place, location, etc. The questions must be appropriate to the mental capacity of the witness. This would include asking questions using vocabulary that the victim will understand and avoiding canonical terminology, which becomes even more obscure or confusing if the Latin expression is used.
2. The questions should not be crafty or deceptive. They may not to be leading questions. A leading question would prompt a witness to answer on the basis of what was heard in the question, rather than on the basis of what he or she knows. This sort of question may hinder the discovery of the truth. Leading questions may cause a judge to give the impression of being biased. This may impact the witness' response.
3. The questions must be relevant to the case. Going far afield to other topics may be problematic (confusing or distracting) when the questions do not apply to the alleged offence or are directed to a witness who would have no way of knowing the answer.
4. The questions should not give any form of offence or be off-putting to the victim. The judge's responsibility is to discover the truth as indicated by the facts and circumstances of the case. The judge needs to be prepared for the examination by studying the facts that caused the case to be brought to trial. Should the witness give a response that contains previously unknown information or refers to some other fact or circumstance of the case, the judge must be prepared to have the witness clarify the basis for that information.<sup>25</sup>

This fourth observation is made in view of a more or less typical situation of the victim. The victim may describe some details concerning the facts and circumstances in response to questions about some other matter. It is for the judge to discern the significance of repetitive information. This is in contrast to testimony where the responses of the victim (or other witnesses) are inconsistent and thus point to other inferences or conclusions (canons 1572–1573).

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25 Feliciano Gil de las Heras, in Caparros (n 13), 1291–1294.

A former dean of the Tribunal of the Spanish Rota offered these practical observations concerning the interviewing of witnesses, including the victim:

“In any case, the judge must know how to ask questions. He must not ask questions in such a way that an affirmative or negative reply or any other answer is suggested. He must not abuse his powers by preventing a witness from saying what he or she knows or wants to say. While a judge must avoid crafty and deceptive questions, at the same time he must not be indifferent to any concocted or suspicious stories told by a witness”.<sup>26</sup>

Cardona adds that currently in Spain, there are centres where interdisciplinary teams made up of healthcare professionals, psychologists, social workers and legal professionals interact with alleged child victims of sexual abuse in one place (*casas del niño*) in a child-friendly manner. Pre-constituted evidence is also taken at that time.<sup>27</sup> This “team” approach is becoming commonplace in the USA, especially in cases where the victim is still a minor. However, because of the legal doctrine of the separation of Church and State, it is not certain that a representative from the diocese would be part of the interdisciplinary team. There is a greater likelihood of only limited sharing of information.

I am also in agreement with the position that, in order to protect the common good, it is necessary to research all possible legal means to achieve this protection. This includes the entire panel of judges being present at any hearing of witnesses and the accused. There is no substitute for seeing victims and listening to their responses in person. Certain nuances are perceived in tone of voice, the expression of the face, attitude, silences, pauses and other emotional reactions of the person being interrogated.<sup>28</sup> The same would apply in assessing the veracity of the accused.

All the norms cited above are provided for in the Code of Canon Law. They apply especially to situations in which an alleged delict causing potential harm to victims has occurred and requires a response. In these circumstances and according to the norm of canon 1752, “canonical equity is to be observed, and the salvation of souls, which must always be the supreme law of the Church, is to be kept before one’s eyes”.

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26 Ibid. c. 1564, 1292.

27 Cardona (n 17), 179.

28 See Book VII, Article 4, of the 1983 Code under the heading of *Trustworthiness of Witnesses*. In particular, the norm of c. 1572, 3<sup>o</sup> addresses the evaluation of testimony of witnesses in terms of reliability, consistently firm or inconsistent, uncertainty or vacillation.

This equitable and pastoral approach in response to victims is given further expression in the USCCB *Charter for the Protection of Children and Young People* (revised 2018). The Charter outlines “a series of practical and pastoral steps” for providing safe environments for children and young people and for preventing sexual abuse of minors by members of the clergy into the future. The content of the following articles is intentionally victim-centred:

- Article 1. Dioceses/eparchies are to reach out to victims/survivors and their families and demonstrate a sincere commitment to their spiritual and emotional well-being. The first obligation of the Church with regard to the victims is for healing and reconciliation. Each diocese/eparchy is to continue its outreach to every person who has been the victim of sexual abuse as a minor by anyone in church service, whether the abuse was recent or occurred many years in the past. This outreach may include provision of counselling, spiritual assistance, support groups, and other social services agreed upon by the victim and the diocese/eparchy. Through pastoral outreach to victims and their families, the diocesan/eparchial bishop or his representative is to offer to meet with them, to listen with patience and compassion to their experiences and concerns, and to share the profound sense of solidarity and concern.
- Article 2. Dioceses/eparchies are to have policies and procedures in place to respond promptly to any allegation where there is reason to believe the sexual abuse of a minor has occurred. Dioceses/eparchies are to have a competent person or persons to coordinate assistance for the immediate pastoral care of persons who report having been sexually abused as minors by clergy or other church personnel. The procedures for those making a complaint are to be readily available in print form and other media in the principal languages in which the liturgy is celebrated in the diocese/eparchy and be the subject of public announcements at least annually.
- Article 4. Dioceses/eparchies are to report an allegation of sexual abuse of a person who is a minor to the public authorities with due regard for the seal of the Sacrament of Penance. Diocesan/eparchial authorities are to comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and cooperate

in their investigation in accord with the law of the jurisdiction in question.<sup>29</sup>

These Articles coincide with the victim-centred recommendations proposed by Archbishop Scicluna, who has considerable experience in conducting interviews with victims. In the seminar mentioned before, organised by the Pontifical Commission for the Protection of Minors in 2019, Scicluna made the following intervention, which I strongly support:

“I now conclude with some suggestions *de iure condendo*. My first suggestion is that we have a specific role in canonical penal processes, which would be a representative for the victim. I would call this a *procurator partis laesae*, the procurator for the person aggrieved. A direct reference to the representatives of people aggrieved can already be found under Art. 17 § 3 of *Vos Estis Lux Mundi* because this law specifically refers to the person who has alleged an offence or his/her representative. My suggestion is that there is a role which is created on a stable level by the law and that would give the right of representing the victim and also sharing information with the victim within the context of the canonical penal process. The norms of *CIC* can. 1481–1490 that deal with procurators in general would also apply to the procurator of the aggrieved party”.<sup>30</sup>

## 7. *The Victim as a Necessary Person in the Process*

I have one final observation concerning the victim as “not a necessary party of the penal process”, as Prof. Montini indicated in the opening to his presentation.<sup>31</sup> He correctly stated that the role of the victim in the canonical penal process is limited to two categories, i.e., as a witness to a crime and as the injured party. The interests of the victim are the responsibility of the promoter of justice in a role similar to a district attorney or prosecutor in the civil courts.

I wish to propose that the victim should always be understood and treated as a “necessary person” in the penal process. One of the most

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29 United States Conference of Catholic Bishops, Charter for the Protection of Children and Young People, revised June 2018, available on <https://www.usccb.org/offices/child-and-youth-protection/charter-protection-children-and-young-people>, access 16.10.2022.

30 Scicluna (n 2), 501.

31 Montini, (n 3), 22.



obvious yet profound ways for a victim to experience that recognition is in his/her examination as a witness, who is a real person and not simply an element of the process. As mentioned previously, according to the norm of canon 1561, the examination of a witness is conducted by the judge, or by his delegate or an auditor, with a notary present in either case.

In cases of an offence against the sixth commandment with a minor, the victim is an eyewitness. It is a rare occurrence that there are other eyewitnesses to the same offence. It is likely that at least some persons have observed other interactions between the victim and the alleged offender. And at an unspecified time, the victim may have shared some information about his/her interaction with the accused.

The information obtained in the investigation may indicate that there is no evidence of a punishable offence, or it may result in the bishop handing the matter to the promoter of justice for prosecution under canon law.

If the bishop does not have access to the findings of the investigation made by the state, it is even more important to conduct a preliminary investigation according to Church law.<sup>32</sup> Those who assist the bishop in conducting the investigation and assessing the findings of the investigation must have adequate knowledge of the norms of civil and canon law that apply in these cases. This will form the basis of confirming whether there is “knowledge which at least seems true of a delict”, which is the predicate for initiating the preliminary investigation (c. 1717 § 1) and any subsequent response.

It often occurs that the victim makes the first report of an offence to the Church. The first response from the Church will be a report made to a civil authority (the police or prosecuting attorney), who will conduct a criminal investigation on behalf of the state. In the investigations where I am the diocesan bishop, a department of the county government provides a victim assistance person for the victim. Once the investigation has been conducted, the prosecution completed and the decision made by the state court, the Church is free to complete its own investigation and conduct a penal process.

It may happen that the victim assistance person will continue in that capacity during the Church’s proceedings. This is significant for two reasons.

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32 It should be noted that if the canonical investigation interferes with the state investigation, the diocese may come under scrutiny for obstruction of justice according to state laws. At the same time, it should be noted that there is no guarantee that the state will share the findings of its criminal investigation with the promoter of justice or the diocesan bishop.

First, the state has the financial resources to provide qualified persons to provide this service even when the Church does not have corresponding resources. Thus, the state's victim assistance person is available at no expense to assist the victim.

The second reason is the realisation that the victim assistance person may be able to serve as a bridge between the civil and ecclesiastical forums. I have frequently heard victims refer to the canonical process as "my case", without reference to the role of the prosecuting attorney for the criminal prosecution of a punishable offence in the civil court, or the corresponding role of the promoter of justice for criminal prosecution in an ecclesiastical tribunal.

For the Church in the United States of America, these concerns are addressed in a particular law established in 2006. According to the USCCB, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, n. 3: "Each diocese/eparchy will designate a competent person to coordinate assistance for the immediate pastoral care of persons who claim to have been sexually abused when they were minors by priests or deacons".<sup>33</sup>

This norm corresponds to the recommendation made by Archbishop Scicluna that a "representative for the victim" be provided in the canonical penal proceedings. As mentioned, he has suggested a "*procurator partis laesae*, the procurator for the person aggrieved, as an appropriate title for this function".<sup>34</sup> However, the specific responsibilities of this procurator need to be delineated according to the needs of the victim in each case.

Such a designation is consistent with what has been established in Art. 5 "Care for Persons" of *Vos estis lux mundi*, as mentioned before:

"According to § 1, the ecclesiastical authorities shall commit themselves to ensuring that those who state they have been harmed, together with their families, are to be treated with dignity and respect, and in particular are to be:

- a. welcomed, listened to and supported through provision of specific services;
- b. offered spiritual assistance;

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33 USCCB, *Essential Norms for Diocesan/ Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, 5 May 2006, available on [https://www.camdendiocese.org/wp-content/uploads/2013/07/B\\_Essential\\_Norms.pdf](https://www.camdendiocese.org/wp-content/uploads/2013/07/B_Essential_Norms.pdf), access 07.11.2022.

34 Scicluna (n 2).

c. offered medical assistance, including therapeutic and psychological assistance, as required by the specific case”.

According to § 2, “the good name and privacy of the persons involved, as well as the confidentiality of their personal data, shall be protected”.<sup>35</sup>

It should be noted that these provisions found in *Vos estis lux mundi* were approved on May 7, 2019 “*ad experimentum* for three years”.<sup>36</sup> It remains to be seen how these provisions might be extended in a permanent fashion, even if some modifications are necessary. *Vos estis lux mundi* applies to Cardinals, Bishops and Papal Legates; clerics who are or have been leaders of Personal Ordinariates or Personal Prelatures; and those who have been supreme moderators of Institutes of Consecrated Life, Societies of Apostolic Life or autonomous monasteries.<sup>37</sup> However, the pastoral response to victims outlined in *Vos estis lux mundi* Art. 5 is universally applicable in all cases involving offences committed by members of the clergy and religious figures.

Hopefully, the shared wisdom, jurisprudence and recommendations expressed in the seminar on the “Rights of Alleged Victims in Penal Procedures” will be of assistance in assessing the effectiveness of *Vos estis lux mundi*. Until then, everyone dealing with these cases should remain mindful of the most commonly expressed needs of victims: 1) to feel safe; 2) to express their emotions; 3) to know what comes next after their victimisation. These three needs as expressed by victims underscore the continued need for victim assistance. They go beyond the limited scope of penal procedural law. It is hoped as well that the norms, procedures and recommendations expressed in this seminar may be brought together in a cohesive manner which will apply *mutatis mutandis* to the various circumstances that have been addressed in separate policies, letters and decrees cited in this report and discussed during the seminar. This is the stated desire of Pope Francis:

“The crimes of sexual abuse offend our Lord, cause physical, psychological and spiritual damage to the victims and harm the community of the faithful. In order that these phenomena, in all their forms, never happen again, a continuous and profound conversion of hearts is needed, attested by concrete and effective actions that involve everyone in the

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35 Francis, ‘*Vos estis lux mundi*’ (n 16).

36 Ibid. Art. 19.

37 Ibid. Art. 6.

Church, so that personal sanctity and moral commitment can contribute to promoting the full credibility of the Gospel message and the effectiveness of the Church's mission [...]. Even if so much has already been accomplished, we must continue to learn from the bitter lessons of the past, looking with hope to the future".<sup>38</sup>

### Biography

*Bishop Mark Leonard Bartchak* was ordained and installed as the eighth Bishop of Altoona-Johnstown (Pennsylvania) on April 19, 2011. He attended The Catholic University of America School of Canon Law in Washington, DC, from which he received a Licentiate in Canon Law and in 1992 a Doctorate in Canon Law. That same year he was appointed Judicial Vicar and Director of the Office of Conciliation & Arbitration of the Diocese of Erie. He is a member of the USCCB Committee on Canonical Affairs & Church Governance. Pope Francis named him a member of the Supreme Tribunal of the Apostolic Signatura on June 21, 2021.

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