

Rights of Alleged Victims in Penal Procedures in Argentina and Current Approach to Victims' Rights in Canon Law

María Inés Franck

Abstract

The statute of the victims of crimes constitutes one of the novel contributions to penal law in recent decades. Both in international treaties and in the legislation of the states, it has been opening the way with force, generating the transition towards a paradigm centred on people who have suffered violations of their rights. This article refers to the reception of this change in Argentine legislation and concludes with a brief reference to the state of the issue in canon law.

Keywords: statute of victims; victims' rights; victim-centred paradigm; canon law; penal law; child sexual abuse

1. Introduction: A Change of Logic

The final objective of the process is to arrive at the truth of the facts, as far as possible. Even so, the question of victims' rights has become a topical issue in all legal systems. And it is not that these rights are not enumerated in the laws and codes in a sufficiently comprehensive manner, but rather that we are faced with a change in the way crime is dealt with.

It is the system, or rather the way we look at it, that is changing. We come from a form of criminal logic in which the emphasis was almost exclusively on the prosecution of crime, the determination of responsibility and the punishment of offenders, a system in which there was little interest in who the victim was and what he or she needed. A system in which the focus was on the need to rigorously eradicate crime, and it was to that end that the law and law enforcement agencies were empowered.

In contrast, there now seems to be a shift towards putting the focus on those who suffer crime (the victims), so that it is they who sometimes seem to drive the criminal justice process according to their rights and needs.

In recent times, legal regimes – both international and national – have paid much less attention to victims than to perpetrators or to the state or legal order per se. This shift in focus, of course, goes hand in hand with

the consideration of the individual as the centre of the legal order and no longer so much the state and its rights. Indeed, 'just as the *ius puniendi* of the State embodied in criminal law has traditionally focused on the perpetrator without considering the victim, so too international law has focused exclusively on the perpetrator, be it the State or the individual, forgetting the victim'. The change of perspective now consisted in conceiving the criminal process as an instrument of guarantee, of safeguarding the system of values, of recognised fundamental rights and freedoms.

2. *Towards a Legal Status for Victims*

Over the last few decades, we have witnessed the emergence and development of a certain legal status for victims, which has been shaped by various international norms referring both to the victim in general and to different categories of victims depending on the crime they have suffered or on some particular situation affecting them.

The emphasis, therefore, seems to have shifted from determining the guilt of the perpetrator and the sanction to be applied to that criminal conduct, to the rights, feelings and expectations of those who have suffered the crime.

In 1985, the UN General Assembly issued a first document reflecting this change: the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'.¹

This Declaration defines victims of crime as 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, financial loss or substantial diminution of fundamental rights, through acts or omissions that are in violation of the criminal laws in force in the Member States'.² Paragraph 2 of that resolution adds that 'a person may be considered a victim [...] regardless of whether the offender is identified, arrested, prosecuted or sentenced and regardless of the family relationship between the offender and the victim'.³ In other words, the category of "victim" would apply even in the absence of an explicit criminal conviction or even a complaint. It is a category which, rather than being based on a legal status, is based on an existential narrative.

1 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985).

2 UNGA Res 40/34 (29 November 1985), paragraph 1.

3 Ibid. paragraph 2.

Furthermore, the term “victim” includes 'family members or dependants who have an immediate relationship with the direct victim and persons who have suffered harm in intervening to assist the victim in distress or to prevent victimisation'. Here the concept of 'indirect victim' appears, which is sometimes referred to as 'secondary victim', although the latter term also applies to the re-victimisation of the primary victim.

The Declaration we are commenting on assumes a number of rights for victims of crime, grouped in a number of categories:

- *Access to justice and fair treatment*: including the right to be treated with compassion and respect for their dignity; access to justice mechanisms and prompt redress for the harm they have suffered; the existence of judicial and administrative mechanisms that enable them to seek redress through formal or informal procedures that are prompt, fair, inexpensive and accessible; and to be informed of their right to seek redress through such mechanisms.
- *Adequacy of judicial and administrative procedures to their needs*: this includes the right to be informed about their role and purpose, the chronological progression and conduct of proceedings, as well as decisions relating to their cases, especially when serious crimes are being dealt with and when they have requested such information; that their views and concerns are presented and considered at the appropriate stages of proceedings whenever their interests are at stake; and to receive appropriate assistance throughout the judicial process; to take measures to minimise inconvenience to victims, to protect their privacy where necessary and to ensure their safety, as well as that of their families and witnesses on their behalf, from any acts of intimidation and retaliation; to avoid unnecessary delays in resolving cases and enforcing orders or decrees granting them compensation; the use, where appropriate, of informal dispute resolution mechanisms, including mediation, arbitration and customary or local justice practices, to facilitate conciliation and compensation for victims.
- *Compensation and reparation*: the right to fair compensation and reparation, where appropriate, for victims and their families or dependants; in cases where the perpetrators are public officials or other agents acting in an official or quasi-official capacity, to be compensated by the state, whose officials or agents were responsible for the damage caused; the creation, strengthening and expansion of national reparation funds.

- *Assistance*: i.e. to receive necessary material, medical, psychological and social assistance, through governmental, voluntary, community and local means; to be informed of the availability of health and social services and other relevant assistance, and to have easy access to them.

3. *The 2005 United Nations Documents*

In 2005, two key international documents appeared on this issue. The first concerns the rights of all kinds of victims of human rights violations. This is the ‘Basic Principles and Guidelines on the Right to Reparation and Redress for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’.⁴

This text explicitly adopts a “victim-centred approach”, and the following rights are made explicit:

- Be treated with humanity and respect for their dignity and human rights and have appropriate measures in place to ensure their safety, physical and psychological well-being, and privacy, as well as that of their families.
- Ensure that their domestic law, as far as possible, provides victims of violence or trauma with special consideration and attention, so that legal and administrative procedures for justice and reparation do not result in re-traumatisation.
- To have fair and effective access to justice.
- Achieve adequate, effective and prompt reparation of the damage suffered.
- Be able to access relevant information on violations and redress mechanisms.
- Have access to administrative and other bodies, mechanisms, arrangements and procedures used in domestic law.
- Receive information on all available remedies for serious violations of international human rights law and serious violations of international humanitarian law.
- To be able to use measures to minimise inconvenience to victims and their representatives, to protect their privacy from unlawful interference,

4 Basic Principles and Guidelines on the Right to Reparation and Redress for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005).

where appropriate, as well as from acts of intimidation and reprisal, and to protect their relatives and witnesses, before, during and after judicial, administrative or other proceedings.

- Have appropriate assistance for victims seeking access to justice.
- Have remedies for serious violations of international human rights law or serious violations of international humanitarian law.
- Ensure that the state establishes procedures for victim groups to make claims and obtain redress, where appropriate.
- Have access to all available and appropriate international procedures to which a person is entitled, without prejudice to any other domestic remedy.
- Obtain adequate, effective and prompt redress commensurate with the gravity of the violations and the harm suffered.
- To have domestic programmes of reparation and other assistance for victims when the party responsible for the harm suffered is unable or unwilling to meet its obligations.
- Receive full and effective reparation in the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees that crimes will not be repeated.
- Obtain reparation for all economically assessable damages resulting from serious violations of international human rights law or serious violations of international humanitarian law, such as physical or mental harm; loss of opportunities, including employment, education and social benefits; material damage and loss of income, including loss of earnings; moral damages; costs of legal or expert assistance, medication and medical services and psychological and social services.
- Access to rehabilitation, including medical and psychological care and legal and social services.
- Existence of effective measures to ensure that violations do not continue.
- Possibility of obtaining verification of facts and full and public disclosure of the truth, to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, their family members, witnesses or persons who intervened to assist the victim or prevent further violations.
- Obtain an official statement or court decision that restores the dignity, reputation and rights of the victim and those closely associated with the victim.
- Receive a public apology that includes an acknowledgement of the facts and acceptance of responsibility.

- Apply judicial or administrative sanctions against those responsible for violations.
- The commemoration and honouring of victims.
- Inclusion of an accurate account of violations in the teaching of international human rights law and international humanitarian law, as well as in teaching materials at all levels.

The second of the documents that appeared in 2005 relates specifically to child victims of crime. These are the 'Guidelines of the United Nations Economic and Social Council on Justice in Matters Involving Children Victims and Witnesses of Crime'.⁵ Here the emphasis is on the following rights:

- To be treated with dignity and understanding throughout the justice process, taking into account their personal situation, their immediate needs and personal wishes and feelings, their age, gender, physical disabilities and level of maturity with full respect for their physical, mental and moral integrity.
- To receive interference in their private lives limited to the minimum necessary.
- Ensuring that interviews, examinations and other investigations are carried out by trained professionals who act with tact, respect and rigour to avoid further suffering.
- Ensuring that interactions with the child are conducted in a manner sensitive to the child, in an environment appropriate to the child's needs and special abilities, age, intellectual maturity and evolving capacities, and in a language the child speaks and understands.
- Ensure protection against any kind of discrimination during the process.
- To have access to special services and protection where necessary.
- Participate in the proceedings and be treated as a capable witness whose testimony is not considered invalid or unreliable on the basis of age alone.
- As far as possible and appropriate, to be duly and promptly informed, from the first contact with the judicial process and throughout the process, inter alia, of the availability of medical, psychological, social and other relevant services; of the relevant services, as well as the means to access them, together with legal or other advice or representation,

5 Guidelines of the United Nations Economic and Social Council on Justice in Matters Involving Children Victims and Witnesses of Crime, ECOSOC Res 2005/20.

compensation and emergency financial support, where appropriate; the procedures applicable in the criminal justice process for adults and children, including the role of child victims and witnesses of crime, the importance, timing and manner of giving evidence and the manner in which 'cross-examination' will be conducted during the investigation and trial; the support mechanisms available to the child when making a complaint and participating in the investigation and court process; the specific dates and locations of hearings and other important events; the availability of protective measures; the mechanisms in place to review decisions affecting them; their rights; the progress and substance of the case affecting them; the opportunities available for them to seek redress from the offender or the state through the judicial process, alternative civil proceedings or other processes.

- Be able to be heard and freely express their opinions and concerns.
- To obtain effective assistance from professionals, including assistance and support services such as financial, legal, counselling, health, social and educational, physical and psychological recovery, and other services necessary for the reintegration of the child.
- Not being re-victimised through excessive interventions.
- Receive assistance from support staff from the initial report and on an ongoing basis until such services are no longer needed.
- Having their special needs addressed by specialists in child victims and witnesses.
- Having support staff, including specialists and appropriate family members, accompany them while they testify.
- Ensure that their privacy is protected, as well as all information relating to their participation in the judicial process.
- Be protected from excessive public exposure.
- Be protected from suffering during the course of justice.
- Not to be questioned by the alleged offender and to have private rooms in court.
- To be interrogated in a manner suitable for them.
- Ensure appropriate measures to safeguard their safety before, during and after the judicial process.
- Receive, where possible, redress for their full compensation, reintegration and recovery.
- To offer special preventive measures and strategies for child victims and witnesses of crimes, who are particularly vulnerable to repeated victimisation or outrage.

4. *Victims' Rights in Argentine Law*

The recognition of international standards for victims' rights in Argentina was reflected in 2017 in the so-called 'Bill of rights and guarantees of victims of felonies people'.⁶

That law considers that a victim is not only the person offended directly by the felony but also its spouse, partner, father, mother, sibling or guardian if the crime results in the death of the person offended or if they had been affected physically or psychically in a way that prevents them from practising their rights.

The law aims especially to recognise and guarantee the right to be advised, assisted, represented, protected, fairly treated and repaired. It also endeavours to search for the truth, access to justice and celerity during procedures. Its other objective is to establish and coordinate measures and actions to promote, get respected, protect, and allow the effective practice of victims' rights and to implement mechanisms for all the authorities to fulfil their duty of preventing, investigating and penalising crimes and achieving reparation of violated rights.

With regard to victims' rights, Argentine law lays down three main principles in dealing with felonies:

- a) Rapid intervention: the measures of help, attention, assistance and protection that the victim's situation requires will be adopted as quickly as possible, and in the case of pressing needs, they will be immediately satisfied.
- b) Differential approach: the measures of help, attention, assistance and protection of the victim will be adopted according to the degree of vulnerability that they present.
- c) No revictimisation: the victim will not be treated as responsible for the crime suffered, and the inconvenience caused by the criminal process will be limited to that which is strictly essential.

The law names several victims' rights, whose list is not exhaustive: to receive the report of the crime that affects them immediately; to receive dignified and respectful treatment and that the inconvenience derived from the procedure is minimal; to have their privacy respected to the extent that it does not obstruct the investigation; to request protection for their

6 Ley de Derechos y Garantías de las Personas Víctimas de Delitos, N°. 27, 372 (2017) Argentina.

safety; to be assisted in a specialised way in order to promote their mental, physical and social recovery; to be informed about their rights when they make the complaint or in their first intervention in the procedure; to intervene as a plaintiff or civil actor in criminal proceedings, in accordance with the provisions of the constitutional guarantee of due process and local procedural laws; to examine documents and proceedings, and to be verbally informed about the status of the process and the situation of the accused; to provide information and evidence during the investigation; to be heard before each decision that implies the termination or suspension of the criminal action, and those that provide measures of coercion or the freedom of the accused during the process, whenever expressly requested; to be notified of the resolutions that may affect their right to be heard; to promptly adopt the coercion or precautionary measures that may be appropriate in preventing the crime from continuing to be committed or reaching subsequent consequences; to be granted the suffrage of the expenses demanded by the exercise of their rights when, due to their personal circumstances, they are financially unable to solve them.

When the victim presents situations of vulnerability, the authorities must provide specialised care. A situation of special vulnerability will be presumed if the victim is a minor or over 70 years of age or is a person with a disability; also, if there is a relationship of economic, emotional, labour or subordination dependency between the victim and the alleged perpetrator of the crime.

The authority receiving the complaint shall advise the victim about their rights and the means they have to enforce them; inform them of the names of the judge and the prosecutor who will intervene in the case and the location of their offices, and inform them of the location of the nearest victim assistance centre and transfer them there in the shortest possible time, if the victim requests it and does not have their own means of locomotion.

The authority must attend to the suffrage of the expenses of transfer, temporary accommodation and emergency food support that may be necessary when, due to their personal circumstances, the victim is financially unable to do so.

The authorities will adopt all measures that prevent an unjustified increase in the inconvenience caused during the process, concentrating the interventions of the victim in the fewest possible acts, avoiding recurring calls and unnecessary contact with the accused. To this end, the victim may give a statement at their home or in an office specially adapted for this purpose. Also, in the act in which the victim participates, the accompaniment

of a professional may be arranged. The victim may also give testimony at the trial or hearing without the presence of the accused or the public.

During the execution of the sentence, the victim has the right to be informed and to express their opinion and everything they deem appropriate. All provisions will be interpreted and executed in the way that best guarantees the rights recognised to the victim.

A Centre for Assistance to Victims of Crimes was created by the law. The centre is aimed at comprehensively assisting victims of crimes.

As regards the term of the statute of limitations, our Criminal Code states that the prescription is suspended while the victim is a minor and until they have reached the age of majority, make the complaint or ratify the complaint made by their legal representatives during their minority.⁷

In Argentina, sexual abuse against children or people declared incapable is considered a felony of public action, which means that the prosecutor will proceed ex officio (Penal Code, art. 72).

5. *The Efforts of Canon Law*

Canon law, it is fair to say, is making an effort to explicitly incorporate some victims' rights into its formulations. It is not that they did not have them, but rather that, regardless of whether they were applied correctly or not, the paradigm followed in the canonical criminal process was focused, like in so many other legal systems, on the objective prosecution of the crime. The focus was on the law and on those responsible for its application and the consequent restitution to the rest of the social body of a resolved and repaired situation. It is assumed that the interest of those charged with prosecution in criminal proceedings coincides with that of the persons offended: the pursuit of justice. It is not the person offended who bears the burden of prosecution, but there is someone who bears it for them and is supposed to look after this common interest.

In this sense, the issue of victims' rights was not put first, but somehow sublimated into the task of the accusing officer. The victim's request for greater protagonism in the process is subsequent to the drafting of the Code of Canon Law.

The *Motu Proprio Vos estis lux mundi* (2019), the *Instruction on the Confidentiality of Cases* (2019) and the *Vademecum on Certain Procedural*

7 Ley de Respeto a los Tiempos de las Víctimas de Abusos Sexuales, N°. 27, 206 (2015) Argentina.

Issues in Cases of Sexual Abuse of Minors Committed by Clerics (2020) added certain provisions regarding victims' rights to the existing canonical norms. Nevertheless, everything would seem to indicate that canon law, like many other judicial systems, is still following the old paradigm and trying to include some provisions on victims' rights without fully assuming that we are facing a rather radical change of perspective.

The fact that the paradigm has not changed does not necessarily mean that victims in canon law are in the background. It could also indicate that the modern approach to victims' rights has not yet been fully embraced.

The question seems to revolve around whether a more radical change in this direction is needed. Does canon law necessarily have to accommodate the contemporary paradigm? Can victims' rights be addressed only in one way, or is there any possibility that legislation will opt for another way of understanding it?

Certainly, as a Church today we are in a difficult position on this issue: the choice would seem to be either to bow to this paradigm, or to accept the accusation that we are not doing anything for the victims.

Today, it seems that it is difficult to get out of this dilemma and propose something thoughtful and based on the desire to protect victims. And here another question arises: does the enumeration of a long catalogue of victims' rights necessarily mean that we have fulfilled our duties towards them, or is there something more fundamental that needs to change in order to allow progress in fraternal accompaniment and just reparation?

I believe that these are very interesting debates necessary to be able to respond to the expectations and claims of many people and organisations in relation to the Catholic Church, while remaining faithful to the vocation of protecting the most vulnerable.

Biography

Lic. María Inés Franck Degree in Political Science and International Relations — Lawyer — Specialist in Social Doctrine of the Church — Degree in Canon Law, Pontifical Catholic University of Argentina — Diploma in Protection of Minors from the UPM and PUG — Academic Secretary of the Faculty of Canon Law of the Pontifical Catholic University of Argentina — Coordinator of the Commission for the Protection of Minors of the Archdiocese of Paraná — Member and Secretary of the Pastoral Council for the Protection of Minors of the Argentine Episcopal Conference.

References

- Committee of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2014): Concluding observations on the initial report of the Holy See.
- Committee on the Convention on the Rights of the Child (2014): Concluding observations on the initial report of the Holy See.
- Congregation for the Doctrine of the Faith (2020): Vademecum on some procedural issues in cases of clerical sexual abuse of minors.
- Francis (2019): Apostolic Letter in the form of a Motu Proprio *Vos estis lux mundi*.
- Francis (2019): Rescript promulgating the *Instruction on the Confidentiality of Cases*.
- Scicluna, Charles (2020): The rights of victims in canonical criminal trials, in *Periodica* 109 (2020) 495–505.
- United Nations Economic and Social Council (2005): Guidelines on justice in matters involving child victims and witnesses of crime (Resolution 2005/20).
- United Nations General Assembly (2005): Basic Principles and Guidelines on the Right to Reparation and Redress for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Resolution 60/147).
- United Nations General Assembly (1985): Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34).