

Rights of Alleged Victims in Criminal Proceedings in Italy, with Reference to Canon Law

Livia Pomodoro

Abstract

This paper addresses the issue of sexual and psychological abuse of minors and vulnerable persons, comparing the Italian penal system with canon law. In recent years, the Church, like the state, has chosen to act in the fight against sexual abuse and violence against minors and vulnerable persons. Most Italian dioceses (including the Ambrosian) have set up a special service headed by a diocesan delegate, who coordinates the various activities: training and raising awareness on the one hand, listening and collecting reports on the other. At the Curia of the Archdiocese of Milan, the Commission for the Protection of the Rights of Minors was also set up to develop a network between Italian and canon law.

Keywords: protection of sexual abuse of minors and vulnerable persons; Italian and canonical order diocesan delegate; commission for the protection of the rights of minors at the curia; cooperation between church and state

1. Introduction

Sexual and psychological exploitation and abuse of vulnerable individuals (minors, but not only) are among the most severely punished crimes in terms of the estimation of penalties. They also imply severe social disapproval because they find nourishment and manifest themselves within a family or parental relationship, or within a relationship of strong role inequality, where the deep bond between the victim and the perpetrator tends to hide or not recognise the violence and, consequently, protect the perpetrator.¹

The phenomenon can occur in all those contexts where there is a close relationship between the adult and the victim: in recovery communities, in sports centres, in schools and in church-related centres such as seminaries

1 Servizio analisi criminale della direzione centrale polizia criminale, *Decimo Dossier indifesa di Terre des Hommes* (2021), available on https://terredeshommes.it/indifesa/pdf/Dossier_indifesa_tdh_2021.pdf, access 09.09.2022.

or oratories. It is therefore important that, for the effective suppression of this type of crime, measures are taken to help victims find a listening ear and protection. Fundamental in this sense is the role of education, knowledge and training, which must extend to all those involved on a daily basis in helping vulnerable individuals to grow up in appropriate contexts and in catching and interpreting signs of distress.

Minors and vulnerable persons cannot be left alone on the difficult path of denouncing violence but rather must, from the very beginning, find adequate support and assistance programs to rebuild their psychophysical integrity and sexual identity, which are sometimes severely compromised and harmed by the violence they have suffered.

The Lanzarote Convention was ratified in Italy in 2012, constituting the first international instrument that comprehensively regulates the repression of the various forms of sexual exploitation and abuse committed against persons under the age of 18.

The framework outlined by the Convention is aimed at making national and international legislation more effective. In the realisation of these principles, Italy has provided, with the ratification law no. 172/2012, rules for the adaptation of domestic legislation, both substantive and procedural, in order to transpose the contents of the Convention. For example, our legal system has long provided for significant instruments to protect and safeguard vulnerable individuals.

2. Differences Between the Italian Legal System and the Canonical System

A. The Victim

One of the most obvious differences between the canonical and the Italian legal systems is the role of the victim assumed within the trial, as well as the relative precautions to be taken towards the minor or vulnerable person during his or her hearing and throughout the proceedings.

In a canonical penal trial, the alleged victims are not “parties” to the trial, but witnesses: the actor in a penal trial – given its public nature, i.e. its protection of the public good and not exclusively of a private good – is the Promoter of Justice. In the Italian legal system, as a result of the trial incapacity of the minor or the fragile subject, the action is exercised by the persons entitled – pursuant to Article 90, para. 2 of the Italian Code of

Criminal Procedure – to represent him/her, i.e. the parent, the curator or the guardian, who may act in a subsidiary manner.

On this point, therefore, it is important to highlight what the protected legal interest is and why it is important that, in addition to the public interest, the legal interest of the minor or of those who lack the use of reason is also protected.

In cases of violence against children under the age of 14, the protected legal interest is found in the sexual intangibility of the victim, in view of the legal presumption of the subject's incapacity to give valid consent to the performance of any kind of sexual act. In cases of sexual violence against children over the age of 14, the protected legal interest is diverse, and it is related to the child's freedom of self-determination, especially sexual freedom and the free expression of one's will, as well as the child's balanced, healthy and free psycho-sexual development.

Pursuant to Article 90(2) of the Italian Code of Criminal Procedure: 'The offended person who is a minor, interdicted by reason of insanity or incapacitated exercises the faculties and rights attributed to them by means of the persons indicated in articles 120 and 121 of the Criminal Code'. In the case of minors as well as for legal persons and de facto bodies, the Code makes a dissociation between the ownership of the right to sue and its exercise, identifying two hypotheses, provided that the ownership of the right lies with the offended person tout court.

The first hypothesis is that of the person under the age of 14 or of those who lack the use of reason. In this case, 'the right to sue is exercised by the parent or guardian' (art. 120, p.2, Criminal Code).

The law presumes that a person under the age of 14 does not possess the necessary maturity to determine his or her own case. Such a young person may be afraid to report the alleged perpetrators of a crime against him or her because he or she most often has relations with them.²

The second hypothesis concerns those over 14 years old and those who lack the use of reason. They 'may exercise the right to sue, and the parent or guardian or curator may also exercise it on their behalf, notwithstanding any contrary will, expressed or implied, of the minor or the incapacitated person' (Art. 120, paragraph 3, Criminal Code).

2 Eleonora Luzi and others, Il minore vittima di abusi sessuali e le garanzie del giusto processo penale, *International Journal of Developmental and Educational Psychology* (2018) 1(1), available on <https://www.redalyc.org/journal/3498/349855553014/html/>, access 10.08.2022.

B. Damages

On damages, Article 10 of the Code of Juvenile Criminal Procedure expressly states the inadmissibility of civil action in criminal proceedings. With regard to the damage caused by the injury to the child's health in civil proceedings – in addition to the pecuniary component, relating to the medical expenses incurred for psychotherapy treatment – one must deal with the quantification of the non-pecuniary damage resulting from the disability, both permanent and temporary, ascertained for the victim.

C. Extended Notion of Victim

The harm suffered by the parents is noted as an offence that may cause damage not only to the primary victims, but also to the secondary victims, who are entitled to compensation for the harm as they have a situation resulting from a certain relationship with the victim. The compensation for the damage in question is made by taking into account the moral suffering of the parents, while damage of a dynamic-relational character must be proven. The parameters taken into consideration, for the purposes of the compensation, are the repetition of the crime, the circumstances of time and the place in which it was committed and the personal relationship existing with the offender.

D. The Sequence of the Processes

In the relationship between the canonical process and the civil process, moreover, one of the problems that is noted is that, many times, the canonical process is held before there is a civil investigation. Often in the canonical setting, testimony is taken, as, in some cases, is the confession of the accused, which could be of interest to the civil authority. There are certain situations in which the civil authority may have access to these documents, e.g. an enforceable judicial order or the seizure of the ecclesiastical archives. This evidence given in canonical proceedings could be used in civil proceedings.

E. The Principle *ne bis in idem*

Another element to be highlighted concerns the Latin proverb *ne bis in idem*, which expresses a civic principle guaranteeing that no legal action can be taken twice for the same cause against a defendant previously and definitively judged.

In the Italian legal system, the prohibition of double jeopardy for the same action is enshrined in Article 649 of the Italian Code of Criminal Procedure, which states that:

a defendant who has been acquitted or sentenced by a final judgement or criminal decree cannot be prosecuted again for the same offense, not even if the conduct is considered differently in terms of the legal definition, degree or circumstances, except as provided for in Articles 69(2) and 345(2) of the criminal code, provided for in Articles 69 paragraph 2 and 345. If, notwithstanding this, criminal proceedings are again commenced, the judge at any stage and level of the proceedings shall pronounce a judgement of acquittal or of non-prosecution, stating the cause in the operative part.

This is a principle that already existed in Roman Law and is recognised in European legal systems, in some of which it has constitutional status. The principle of *ne bis in idem* does not fall within the sphere of inviolable human rights and does not have the nature of a principle of international law capable of taking precedence over that of territoriality. It can, if anything, be applied in the presence of conventions ratified and implemented between states and is binding only to the contracting parties and within the limits of the agreement reached.³

In general, the Italian state, like most modern states, is inspired by the principle of territoriality and the general mandatory nature of criminal law. This is done with the clear justification of ensuring a justice system that takes into account the different social and political evaluations of human behaviour, especially in the criminal field, where the importance attributed to certain crimes is also different in the popular conscience.

The *ne bis in idem* principle cannot be considered applicable as a result of agreements between the Holy See and Italy or Conventions to

3 Elena Scozzarella, La questione del ‘ne bis in idem’ nella giurisprudenza della CEDU e nella giurisprudenza nazionale di merito, di legittimità e della Corte Costituzionale, *Diritto Penale Contemporaneo* 2019 <https://archiviodpc.dirittopenaleuomo.org/upload/9936-scozzarella2019a-2.pdf>, access 10.08.2022.

which both have acceded. The Holy See remained outside the *Convention implementing the Schengen Agreement*, having signed only the *European Monetary Convention*.

On this point, the conclusion reached by the Court of Cassation (Section Three, 17 September 2021) is that *ne bis in idem* is not applicable in this case, with the consequence that a subject can be judged and punished both by the Holy See and by the Italian jurisdiction for the same fact, but under certain conditions.⁴

3. State and Church in the Fight Against Abuse: First Results

The Church, like the state, has chosen to act in the fight against child sexual abuse and violence against children. Its canonical legal system includes a recently reformed section of the canonical penal law aimed at defining criminal behaviour.

Moreover, at the express wish of the Pope and – in Italy – in accordance with the indications of the Italian Episcopal Conference, from 2019–2020 most Italian dioceses (including the Ambrosian diocese) set up a special Diocesan Service for the Protection of Minors and Vulnerable Adults, headed by a Diocesan delegate, who coordinates the various activities: training, prevention and raising awareness on the one hand; listening and collecting reports on the other.

In the Archdiocese of Milan, in particular, by the Archbishop's Decree of 18 November 2021, a specific Listening Service has been given to the delegate, with the task of 'the first reception and listening to those who declare themselves victims of abuse in the ecclesial context, either past or present, as well as to people who are aware of a situation of alleged abuse in the ecclesial context' against minors and vulnerable people.

The Listening Service was set up with the intention of offering the most humane, attentive and welcoming listening to those who have been victims

4 In the relevant case, the defendant had been brought to trial for engaging in sexual acts against a minor of 16 years of age entrusted to him for reasons of religious upbringing (art. 609 quater no. 2 of the Penal Code) after having been tried for the same actions, in the canonical jurisdiction, at the conclusion of an "administrative penal trial," he was sentenced, by the delegate of the Archbishop of Pescara-Penne, by penal decree, to the perpetual expiatory penalty of exercising priestly ministry in perpetuity with minors of age, as well as to the temporary penalties of suspension from priestly ministry for a term of three years and from the obligation to reside, for a period of five years for a life of prayer and penance, to be spent in a community.

of abuse, sexual misconduct or inappropriate behaviour in the ecclesial sphere.

At the Curia in Milan the Commission for the Protection of the Rights of Minors was also set up with the aim of creating a network between the Italian and canonical legal system. In fact, the intention is to highlight an initial form of best practice that can be a guide for other realities, both national and international, through an in-depth knowledge of the phenomenon of protection systems that are more and more suited to the needs of individuals and victims. We consider this to be an appropriate framework to allow the two legal systems to function better with absolute autonomy.

Also, within the Diocesan Service for the Protection of Minors, the Diocesan Commission for the Protection of Minors was set up in 2019, with a specific task: to identify, formulate and disseminate – in all the different diocesan ecclesial contexts – the Guidelines for the prevention of and training on the subject of abuse and sexually inappropriate behaviour towards minors (and vulnerable adults).

The Guidelines adopted by the Archdiocese of Milan then served as a kind of best practice for other Italian dioceses.

Since its establishment in 2019, the network of diocesan contact persons and related services for the protection of minors and vulnerable persons in all 226 Italian dioceses has been strengthened. It will now be supported with training courses aimed at people working in pastoral ministry (priests, religious men and women, catechists, educators, religious teachers...) and those called to deal with the legal aspects. This action is intended to promote, even more widely, a culture of respect and dignity for minors and vulnerable persons.

A first national report will also be produced on prevention and training activities and on cases of abuse reported to diocesan and interdiocesan services in the last two years (2020–2021). The data will be collected and analysed by an academic research centre. The reports will be annually and will be a valuable tool to improve, in terms of quality and effectiveness, the training action of the services and the reception and listening in the centres. They will also be a sign of transparency since they will be made public.

Thanks to a recently opened new area of collaboration with the Dicastery for the Doctrine of the Faith, it will then be possible to know and analyse, in a quantitative and qualitative manner, the data held at the Congregation while guaranteeing due confidentiality. These data refer to alleged or

ascertained crimes committed by clerics in Italy in the period 2000–2021. The analysis will be conducted in collaboration with independent research institutes, which will guarantee high-level scientific and moral profiles, and will provide deeper and more objective knowledge of the phenomenon. This will make it possible to improve prevention and counteracting measures, to accompany victims and survivors with more awareness and to refine the criteria for further research.

In this context, on 5 June 2022 the Dicastery for the Doctrine of the Faith published the second *Vademecum* online to help deal with cases of child abuse committed by priests from a canonical point of view. The text, which does not have the force of law but responds to a need for knowledge of the practice, provides guidelines for dealing with the phenomenon, from the *notitia criminis* to the prior investigation and penal procedure. The revision compared to the version of 16 July 2020 took into account contributions from academic centres and studies in the sector, as well as constant comparison with ecclesial realities.

Biography

Prof. Dr Livia Pomodoro is a former president of the Court for Minors and the Court of Milan. She is the diocesan delegate for the protection of minors in the Archdiocese of Milan. She directs the Spazio Teatro No'hma Teresa Pomodoro, is President of the Brera Academy and holder of the UNESCO Chair 'Food System for Sustainable Development and Social Inclusion'.

References

- Luzi, Eleonora and others (2018): Il minore vittima di abusi sessuali e le garanzie del giusto processo penale, *International Journal of Developmental and Educational Psychology* 1(1), <https://www.redalyc.org/journal/3498/349855553014/html/>.
- Scozzarella, Elena (2019): La questione del ne bis in idem nella giurisprudenza della CEDU e nella giurisprudenza nazionale di merito, di legittimità e della Corte Costituzionale, *Diritto Penale Contemporaneo*, <https://archiviodpc.dirittopenaleuomo.org/upload/9936-scozzarella2019a-2.pdf>.
- Servizio analisi criminale della direzione centrale polizia criminale, *Decimo Dossier indifesa di Terre des Hommes* (2021): https://terredeshommes.it/indifesa/pdf/Dossier_indifesa_tdh_2021.pdf.