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THE RIGHT TO ONE'S REPUTATION:
APPLICABLE LEGISLATION IN THE UNITED STATES OF AMERICA

by
Ms. Diane L. Barr, JD

A dissertation submitted to the Faculty
of Canon Law of Saint Paul University,
Ottawa, in partial fulfillment of the
requirements for the degree of Doctor of
Canon Law.

Ottawa, Ontario
Saint Paul University
Ottawa
1993



Diane L. Barr, Ottawa, Canada, 1993



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CURRICULUM VITAE

Diane Louise Barr was born in Pittsburgh, Pennsylvania on June 2, 1958. She is the oldest of three children. She was educated in the public school systems of the area and later in Idaho Falls, Idaho where she finished her high school diploma. She went on to obtain a Bachelor of Arts degree in History from the Boise State University in Boise, Idaho in 1980. In 1983 she was awarded her Juris Doctorate degree from the College of Law at the University of Idaho in Moscow, Idaho where she had been an associate editor of the Idaho Law Review and a member of the interscholastic moot court team. She was admitted to the practice of law at the state and federal bars in 1984. She is a member of the Idaho State Bar.

Since 1983 she has been an employee of the Diocese of Boise in the Office of Canonical Affairs. With the sponsorship of that diocese she completed her license in canon law at St. Paul University in Ottawa in December of 1987. She is currently the full-time director of that department and holds the canonical offices of promoter of justice and judge at first instance. She also serves as a member of the Committee on the Protection of Rights in the Church for the Canon Law Society of America. She married Daniel Joseph MacDonald in 1990.

INTRODUCTION

The recognition of fundamental rights for members of the Catholic Church is a relatively new legal institution. While the Church had historically protected the rights of individuals against outside forces, it had been somewhat reluctant to establish and recognize individual rights for its members.

At least this was the view up to the last century. Since then, the institution has begun to look within, as well as without, and it has tried to come to grips with the global reality that is the twentieth century Catholic Church. It has watched as democracy and participatory forms of government have replaced hereditary rulers and become the most widely accepted type of governmental structure. These forms of participatory government have often emphasized the basic premises of God-given individual rights, recognizing that what is truly good for the individual are usually good for the society as a whole.

The guiding principles for the revision of the Code of Canon Law were very specific in their emphasis on the rights of individuals and the means of vindicating these rights.¹ The Church's attempts to establish a "bill of rights" reflect an evolution in thought and practice. Even though this "bill of

¹ Communicaciones, 1(1969), pp. 82-83.

rights" did not emerge as a separate document, many of the proposed parts are found in Book Two of the present Code of Canon Law.²

One such right deals with the protection of the "good reputation" to be enjoyed by all who are members of the Church. While the concept of reputation within the Church is not new, the fact that it is put forward as a fundamental right of the faithful gives rise to a number of juridic questions. Where did this right come from? What does the canon establishing the right actually mean? Who may claim the right? If one's reputation is injured, how is it vindicated?

The theme noted above could, and perhaps should, be envisaged from the perspective of the natural law and moral law underlying the canons. Because of the practical nature of the work, however, I have intentionally limited my approach to the legal aspects of the topic. The first chapter here will briefly review the history of the right to reputation in Roman law and in canonical legislation. Protection of reputation has been a concern of the Church for centuries partially as a by-

² Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, Libreria editrice Vaticana, 1983, xxx, 317p. American version of English-language translation: Code of Canon Law, Latin English edition, translation prepared under the auspices of the Canon Law Society of America, Washington, D.C., Canon Law Society of America, 1983, xiii, 668p. All references to canons of the 1983 Code will be styled c. for canon and cc. for canons, followed by the canon number[s].

product of its own interest in protecting its reputation.³ Within the last century, it has provided penal sanctions against those who have injured a person's reputation in one way or another. The chapter will then review the development of Canon 220, through its promulgation in 1983, and examine each aspect of the canon in an attempt to formulate a set of definitions for the words and phrases of the law itself. To do so, similar words and phrases used elsewhere in the Code will be noted.

The three methods available under the law for vindication of a right will be studied in detail in the second chapter. Administrative recourse has a long tradition within the Church. It remains the most common method of vindication of rights in the Church today. Yet it is a process that has been criticized as being too distant and too slow, thereby lacking in justice as a result.

The judicial process is also available to those who wish to vindicate their rights in the Church and will be examined here. However the Church has less practical experience in applying its expertise to the adjudication of rights cases by means of the ordinary contentious process since the history of this form of trial has been almost exclusively focused on marriage nullity cases. The penal process, on the other hand, when applied, was used to impose penalties. While the

³ P. CIPROTTI, De iniuria ac diffamazione in iure poenali canonico, Roma, Apud Custodiam Librariam Pontificiam Instituti Utriusque Iuris, 1937, p. 23.

experience gained from the penal process can serve as a partial foundation for the vindication of an injury, the majority of its aspects do not transfer readily to a non-penal process.

Alternative dispute resolution, with its two components of arbitration and mediation (conciliation) will also be reviewed here with particular attention given to the processes part of the particular law of the United States. However, the document that established these processes has not been raised in twenty years.⁴ It will be compared to a more recent proposal on the same subject put forward by the Canon Law Society of America.⁵

The third chapter will present the basic aspects of the law of defamation as it is currently in force in the United States of America. Defamation is a tort with a long history of adjudication on a broad scale. It is a child of the common law of Great Britain, and thereby to some extent a grandchild of the Roman law. The evolution of the standards applied the adjudicating of this tort has been particularly affected by the development of mass communication, especially the press.

The final chapter of the work will be devoted to presenting practical recommendations gleaned from the review

⁴ NATIONAL CONFERENCE OF CATHOLIC BISHOPS (NCCB), On Due Process, Washington, D.C., USCC, 1972, 48p.

⁵ CANON LAW SOCIETY OF AMERICA, Protection of Rights of Persons in the Church - Revised Report of the Canon Law Society of America on the Subject of Due Process, Washington, D.C., Canon Law Society of America, 1991, 48p.

of the various areas of law and applying them to the procedures available in the present code. A series of working definitions will be proposed to assist those who may be faced with a procedure involving the right to reputation. Each process available under the present law will be evaluated with suggestions made for methods of vindicating the right to reputation.

CHAPTER ONE

THE RIGHT TO ONE'S REPUTATION

Canon 220 of the 1983 Code of Canon Law establishes the right of the faithful to their reputation. This canon is the first affirmative presentation of such a right by the Latin church. As part of the 1983 Code, it must be interpreted within the parameters of canon 17 which states that

ecclesiastical laws are to be understood in accord with the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse is to be taken to parallel passages, if such exist, to the purpose and the circumstances of the law, and the mind of the legislator.¹

This canon outlines four distinct ways to consider the meaning of a specific canon in the law:

1. the proper meanings of the words is to be considered in their text and context;
2. if the meaning remains doubtful and obscure, recourse is to be taken to parallel passages, if these exist;
3. the purpose and circumstances of the law are to be examined;

¹ C. 17 - "Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locus parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum."

4. the mind of the legislator must be considered.²

The first part of this chapter, then, will consist in examining the remote context of the law as well as its purposes and circumstances. To do so, we shall briefly review the historical development of the norm on the right to one's reputation, from the time of Roman law to its canonical promulgation in 1983. The second portion of the chapter will look more specifically at the canon itself in both its immediate context and in parallel passages in the Code; it will also highlight a number of practical limitations to its use.

I. TEXT OF THE LEGISLATION

A. Development of the Legislation Before 1917

Some form of governmental protection of the reputation of citizens has been found in societies over the centuries. For our purposes we will define reputation as the quality which enables a person to have a good name within the society.³ The importance of a good reputation within the community can be implied from the existence of specific

² See The Art of Interpretation, Washington, D.C., Canon Law Society of America, 1982, iii, 82p. See also L. ÖRSY, "The Interpreter and His Art", The Jurist, 40(1980), pp. 27-56.

³ Based on definitions from Webster's Third New International Dictionary of the English Language, unabridged, P. Babcock Grove, editor-in-chief and the Merriam - Webster editorial staff, Springfield, MA, G.C. Merriam, 1981, p. 1929.

penalties imposed for offenses against reputation. These penalties have been imposed under different headings throughout the centuries.

1. Roman law

The recognition of iniuria was one of the earliest ways an individual's dignity was protected. This term, used widely in the classical sense, could mean "simply unlawfulness or the absence of a right."⁴ In its specific sense, however, it could be translated as "insult or outrage",⁵ but this does not do full justice to the scope of the Roman concept

which embraced any contumelious disregard of another's rights or personality. It thus included not merely physical assaults and oral or written insults and abuse, but any affront to another's dignity or reputation and any disregard of another's public or private rights, provided always that the act was done wilfully and with contumelious intent.⁶

As Roman law evolved and went beyond the Twelve Tables period, more specific penalties for various actions were devised. Infamy⁷ and loss of existimatio⁸ were later

⁴ B. NICHOLAS, An Introduction of Roman Law (=NICHOLAS), Oxford, Clarendon Press, 1979, p. 215.

⁵ NICHOLAS, p. 216.

⁶ Ibid.

⁷ This term is defined as "evil reputation, the quality of being infamous (infamis). Infamia was not only connected with a diminution of the estimation of a person among his fellow citizens but produced also certain legal disabilities which differed according to the grounds for the infamy. In Justinian's law various groups of persons were added to those whose legal ability had been restricted already in earlier

evolutions of the penal laws and were applied to protect the reputation of an individual. Contumelia⁹ was one means whereby a person could commit a delict against another's reputation.

The amount and type of protection offered to persons would depend on where they stood among the groups of citizens of the society. This was determined by considering their liberty (i.e. slave, free or in bondage of some kind), their citizenship (i.e. Roman or otherwise), and position within the family unit (i.e. widowed, adopted, husband, wife, etc.).¹⁰

(primarily praetorian) law. The oldest measure to brand a person as dishonest was the nota censoria which was a moral punishment by the censors for misconduct in political or private life[...]. The praetorian edict deprived certain persons for moral reasons of the right of appearance in court as advocates or representatives of a party to the trial, or of being represented by another. In particular, persons condemned for crimes or private wrongdoings (delicta) were struck by this measure. Infamia as it appears as a developed institution in Justinian's law originated either in the exercise of a dishonest profession (personae turpes) or in a condemnatory judgment in trials resulting from contractual relations which required a particularly honest behavior and in which the violation thereof appeared as a flagrant break of confidence (as, e.g., partnership, deposit, mandatum, fiducia). A. BERGER, Encyclopedic Dictionary of Roman Law (=R.L. Dictionary), Transactions of the American Philosophical Society, 43, part 2, Philadelphia, PA, The American Philosophical Society, 1953, p. 500.

⁸ This term refers to the diminution of esteem which a person enjoyed in society. It affected the person's societal position at private law in exceptional cases: M. KASER, Roman Private Law (=KASER), rendered into English from the sixth edition by Rolf Dannenbring, second edition, Durban, Butterworths, 1975, p. 65.

⁹ "An insult...considered a kind of iniuria, but it is not particularly defined", R.L. Dictionary, p. 502.

¹⁰ KASER, p. 64.

Penalties imposed against someone who harmed another's reputation consisted not only in fines,¹¹ but also in damages.¹²

2. Early Church references to reputation

a. The Decretum of Gratian

We find in the Decretum of Gratian the earliest consolidated references to infamia¹³ and false accusation.¹⁴ The sections that refer to these¹⁵ are not focused solely on protecting reputation and truth; rather, they are part of other topics which touch peripherally on these subjects.¹⁶ There is no indication that Gratian intended to provide a definition for defamation, rather his purpose was simply to collect law already in existence at the time.¹⁷

He noted that slanderers might incur penalties, but

¹¹ This was the case under the Twelve Tables, NICHOLAS, pp. 216-217.

¹² This alternative remedy caused the Twelve Tables to fall into disuse. In the Praetorian period, this remedy was to be a "solace for injured feelings or affronted dignity", KASER, p. 217.

¹³ C. 6 q. 1.

¹⁴ C. 5 q. 6.

¹⁵ These are C. 5 and C. 6 generally.

¹⁶ R. HELMHOLZ, (ed.), Select Cases of Defamation to 1600 (= Select Cases), London, Seldon Society, 1985, pp. xvi-xvii.

¹⁷ Ibid.

little certainty can be gained from the texts about the standard to be applied to determine the presence of slander.¹⁸ The terminology was not used in a consistent manner that would allow for the creation of a legal standard nor was the creation of such a standard a goal of the collection.¹⁹

If one looks for the recognition of a legal remedy for defamation within the Decretum, the most complete reference is to be found in a canon attributed to Pope Hadrian I which states that "anyone who shall formulate a writing or slanderous words publicly against the reputation of another,

¹⁸ Select Cases, p. xvii. As noted by the same author, "some of the canons spoke as if only offences by the clergy were covered; (C.5 q.6. c. 3) others purported to deal with accusations and calumnies uttered by any person (C. 5 q. 6 c. 7). The range of penalties mentioned was wide and potentially confusing: form 'exclusion from the kingdom of God,' (C. 6 q. 1 c. 16: 'non habet partem in regno Dei') to punishment by whipping, (C. 5 q. 1 c. 1) to infliction of the lex talionis (C. 5 q. 6 c. 2: 'penam debet incurrere quam, si probasset, reus utique sustineret')", Ibid.

¹⁹ "Whereas some seemed to require a judicial accusation, others used vague terminology like 'contumelious matters' (C. 5. q. 1. c. 1: 'verba contumeliosa') or 'words of baseness' (Dist. 46 c. 6: 'verbis turpibus') or simply 'falsehoods' (C. 5 q. 1 c. 1.) in referring to words which would render the speaker subject to canonical discipline." Ibid.

if he does not prove the writing, shall be whipped."²⁰ The entire tone of the reference is very strong.

b. "Auctoritate de patris"

The Constitution "Auctoritate de patris"²¹ of the Council of Oxford (1222), was the basis of defamation law in Britain. This Council had been convoked to promulgate the decrees of the Fourth Lateran Council.²² The supplementary constitution that dealt with defamation had no immediate connection with the Lateran decrees. It stated:

We excommunicate all those who, for the sake of hatred, profit, or favor, or for whatever cause, maliciously impute a crime to any person who is not of ill fame among good and serious men, by means of which at least purgation is awarded to him or he is harmed in some other manner.²³

²⁰ Translation from Select Cases, p. xvii. Taken from C. 5 q.1 c. 1: "Qui in alterius famam publice scripturam aut verba contumeliosa confinxerit, et repertus scripta non probaverit flagelletur." This reference apparently goes back to the ninth century. See Decretum Magistri Gratiani, ed. Lipsiensis, post Aemilii Ludouici Righteri curas ad librorum manu scriptorum et ed. romane fidem recognouit et adnotatione critica Aemilius Friedberg, Bernard Tauchnitz, Lipsiae, 1879, pp. 543-544 for the notes indicating that this text originated at that time.

²¹ This is how this document was referred to in legal practice in England after its promulgation. Select Cases, p. xiv.

²² Ibid.

²³ R. HELMHOLZ, "Canonical Defamation in Medieval England" (=HELMHOLZ), American Journal of Legal History, 15(1971), p. 256. From the latin on the same page: "Excommunicamus omnes illos qui gratia odii, lucri, vel favoris, vel alia quacunque de causa malitiose crimen imponunt alicui, cum infamatus non sit apud bonos et graves, ut sic

This portion of the Constitution formed part of a broader set of general excommunications "meant to prevent abuses of judicial procedure and to help maintain the peace of the realm."²⁴ The influence of this Constitution on the English legal system will be discussed in Chapter III.

c. Decretals of Gregory IX

The Decretals of Gregory IX did not specifically mention defamation or injury to reputation. In its general treatment of wrongs to others, noting instances where one must make amends,²⁵ verbal injuries were mentioned.²⁶ There was no title "Defamation" in the work as its purpose was not to provide a complete treatment of defamation law.²⁷

d. Thomas Aquinas

There are also two references in the works of Thomas Aquinas to injuries inflicted on another by "reviling" that

saltem ei purgatio indicatur vel alio modo gravetur."

²⁴ Select Cases, p. xiv.

²⁵ X 5.36.9 which states: "Si culpa tua datum est damnam vel iniuria irrogata, seu aliis irrogantibus opem forte tulisti,...iure super his satisfacere te oportet, nec ignorancia te excusat, si scire debuisti, ex facto tuo iniuriam verisimiliter posse contingere vel iacturam."

²⁶ X. 5.36.9: "Et illud scias quod iniuria fit aut re aut verbis. Re, quotiens manus infertur; verbis, quotiens convicium dicitur."

²⁷ Select Cases, p. xviii.

person²⁸ or by "backbiting".²⁹ These texts in the Summa Theologica have been used in a variety of works on the evolution of the canonical crimes of iniuria and diffamatio.

Reflecting Thomas' opinion, the first question asks:

Reviling denotes the dishonoring of a person, and this happens in two ways: for since honor results from excellence, one person dishonors another, first, by depriving him of the excellence for which he is honored. This is done by sins of deed, whereof we have spoken above. Secondly, when a man publishes something against another's honor, thus bringing it to the knowledge of the latter and of other men. This is reviling properly called, and is done by some kind of signs.³⁰

An objection proposed to a second question, with its ten themes, is more direct in its reference to reputation:

It would seem that backbiting is not as defined by some, the blackening of another's good name by words uttered in secret. For secretly and openly are circumstances that do not constitute the species of a sin, because it is accidental to a sin that it be known by many or by few...Further, the notion of a good name implies something known to the public. If, therefore, a person's good name is blackened by backbiting, this cannot be done by secret words, but by words uttered openly. Further to detract is to subtract, or to diminish something already existing. But sometimes a man's good name is blackened even without subtracting from the truth: for instance, when one reveals the crimes which a man has in truth committed. Therefore not every blackening of a good name is backbiting.³¹

²⁸ T. AQUINAS, Summa Theologica (=AQUINAS), translated by the Fathers of the English Dominican Province, New York, Benzinger Brothers, Inc., 1947, IIa - IIae, q. 72, a. 1-4, pp. 1500-1503.

²⁹ AQUINAS, IIa - IIae, q. 73, a. 1-4, pp. 1503-1504.

³⁰ AQUINAS, IIa - IIae, q. 72, a. 1, p. 1500.

³¹ AQUINAS, IIa - IIae, q. 72, a. 1-4, p. 1503.

e. Other references to injury of reputation

The treatment of injury to reputation appears among the writings of later canonists,³² although it is not in the same direct legal form as the references made above.³³ Hostiensis does mention injury to reputation as an iniuria.³⁴ The remedies of canonical purgation³⁵ and infamia were also used to protect reputation in different ways.

The canonical concepts of infamy of law and infamy of fact touched reputation in an indirect and limited way. These

³² Ibid. See P. CIPROTTI, De iniuria ac diffamatione in iure poenali canonico (=CIPROTTI), Roma, Apud Custodiam Librariam Pont. Instituti Utriusque Iuris, 1937, pp. 19-22. G. DI MATTIA, "La diffamazione in persona disonorata nel diritto canonico" (=DI MATTIA), Ephemerides iuris canonici, 17(1961), pp. 68-91 for two general outlines of the historical evolution of delicts that affect reputation (i.e. contumelia, detractio and calumnia). All appear to be linked to the original Roman law concepts mentioned earlier.

³³ See DI MATTIA, pp. 85-91 for specific references to some of the commentators who have dealt with injury to reputation in canon law.

³⁴ Summa Aurea, V, tit. De iniuriis et damno dato, no. 6; "Et quicumque causa minuendae opinionis alicuius aliquid fecerit vel dixerit; iniuriarum tenere."

³⁵ Canonical purgation is defined as an action "made by the party's taking his own oath that he [or she] was innocent of the charge, which was supported by the oath of twelve compurgators, who swore they believed he spoke the truth. To this succeeded the mode of purgation by the single oath of the party himself, called the 'oath ex officio,' of which the modern defendant's oath in chancery is a modification", H. Black, Black's Law Dictionary, fifth edition, St. Paul, Minn., West Publishing Col., 1979, p. 1111, col. 2.

notions developed together³⁶ with the early Church recognizing infamy of fact by the fifth century.³⁷ Infamous persons were mentioned in the Councils of Carthage (A.D. 419 and in 421), and those so identified were reminded of the restrictions placed upon them.³⁸ Infamy of fact was also mentioned in the spurious Isidorian Collection and also in the Decretum of Gratian.³⁹ Later the Decretal collections of Gregory IX and Bonafice VIII included references to the causes and effects of infamia iuris.⁴⁰

³⁶ F. RODIMER, The Canonical Effects of Infamy of Fact (=RODIMER), Washington, D.C., Catholic University of America, 1954, p. 16. See also G. MAY, "Die Bedeutung der pseudoisidorischen Sammlung für die Infamie im kanonischen Recht", Österreichisches Archiv für Kirchenrecht, 12(1961), pp. 87-113; and "Die Belegung kirchlicher Vergehen mit Infamie durch den Staat im römischen und westgotischen Reiche", Österreichisches Archiv für Kirchenrecht, 15(1964), pp. 177-188.

³⁷ V. TARTARCZUK, Infamy of Law (=TARTARCZUK), Washington, D.C., Catholic University of America, 1954, p. 13.

³⁸ Ibid.

³⁹ Ibid. See also G. MAY, "Die Infamie im Decretum Gratiani", Archiv für katholisches Kirchenrecht, 129(1960), pp. 389-408.

⁴⁰ Ibid.

There is even some suggestion that infamy of fact⁴¹ was one of the specific types of infamy written about by the decretalists and glossators.⁴² Those who were found infamous by reason of infamy of fact were restricted in the exercise of their rights in a variety of ways.⁴³

While canon law has generally kept to its Roman law roots in the area of protection of reputation, no single systematic approach with standards and remedies was developed to address injury to reputation in a specific way. That is not to say that various kinds of injury, i.e. slander or infamous conduct, could not be vindicated, but the legislation was not

⁴¹ "The term "infamia facti" was applied to what resulted from a false accusation. This was made even more obvious by a gloss which made mention of another canon, presenting it as the foremost example of infamia facti. The canon to which reference was made, a portion of an epistle of St. Gregory, points out that God permits detractions and reproofs against the good in order to effect a proper balance to the excessive praise which may jeopardize Christian humility", RODIMER, pp. 20-21.

⁴² RODIMER, pp. 17-18.

⁴³ A) they could not bring an action in court; b) they could not serve as lawyers; c) they could not be promoted to honors; d) they could not receive orders; e) they could not testify; f) they were at times liable to suspension, and deprivation of office or benefice, RODIMER, pp. 24-25.

Infamy of fact, as applied later in canon 2294 of the 1917 Code, was focussed on the unblemished reputation of clerics in their admission to orders and in their appointment to an office. See Sacrae Romae Rotae Decisiones seu sententiae (=SRR Dec), coram LEGA, 8 March 1913, no. 17, 5(1912), pp. 196-210 and also SRR Dec. coram LEGA, 12 December 1910, no. 33, 2(1910), pp. 347-358 for pre-code decisions on this topic.

explicitly geared toward any kind of limitation or standard. References to such conduct remained general in nature and were limited to noting possible remedies. This was in keeping with the general approach of lawmakers of the time.

B. The 1917 Code of Canon Law

Canon 2355 of the 1917⁴⁴ Code is the canon most closely related to canon 220 of the 1983 Code.⁴⁵ This canon stated:

A person who inflicts injury upon another, not by bodily attack, but by words or writings or in any other manner, or who damages his good reputation, may not only be forced in accordance with canons 1618 and 1938 to make due satisfaction and repair the damage done but may in addition be punished with appropriate penalties and penances. If the offender be a cleric, and the gravity of the offense demands it, he may be punished even with suspension or removal from office and benefice.⁴⁶

⁴⁴ Codex iuris canonici auctoritate Benedicti PP. XV promulgatus (=1917 Code), Libreria editrice Vaticana, 1917, 916 p.

⁴⁵ Codex iuris canonici auctoritate Ioannis Pauli PP. promulgatus (=1983 Code), fontium annotatione et indice analytico-alphabetico auctus, Typis polyglottis Vaticanis, 1989, p. 59. See P. CIPROTTI, "De iniuria ac diffamatione in iure poenali canonico", Apollinaris, 10(1937), pp. 53-75, 233-268, 431-456.

⁴⁶ "Si quis non re, sed verbis vel scriptis vel alia quavi ratione iniuriam cuiquam irrogaverit vel eius bonam famam laeserit, non solum potest ad normam cann. 1618, 1938 cogi ad debitam satisfactionem praestandam damnaeque reparanda, sed praeterea congruis poenis ac poenitentiis puniri, non exclusa, si de clericis agatur et casus ferat, suspensione aut remotione ab officio et beneficio." In the 1983 Code this canon is more closely related to c. 1390, §2 and §3. Translation from S. WOYWOD, A Practical Commentary of the Code of Canon Law (=WOYWOD), vol. 2, third edition, New York, Joseph F. Wagner, Inc., 1929, p. 502. For commentary and partial English translations of the 1917 canons see J. ABBO

This canon points out the consequences of verbal injury to another's reputation.⁴⁷ Commentaries indicate that such wrongs were considered "private matters" between individuals rather than the type that would require the intervention of the promoter of justice.⁴⁸

At the time of the canon's promulgation, reputation had been protected when a person was found guilty of iniuriam or its subdivisions: contumelia,⁴⁹ diffamatio,⁵⁰ and libellus famosus.⁵¹

and J. HANNAN, The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church (=ABBO and HANNAN), 2 vols., St. Louis, MO, B. Herder Book Co., 1952; T. BOUSCAREN and A. ELLIS, Canon Law: A Text and Commentary (=BOUSCAREN and ELLIS), Milwaukee, WI, fourth revised edition, 1966, vii, 942p.

⁴⁷ WOYWOD, p. 502; BOUSCAREN and ELLIS, p. 866.

⁴⁸ WOYWOD, p. 327. According to Woywod, it was not necessary to follow the norms for criminal trials in such cases.

⁴⁹ Defined as "an insult. It is considered a kind of iniuria, but it is not precisely defined", R.L. Dictionary, p. 415.

⁵⁰ Relates to injury to reputation and as elements of a canonical crime requires the good reputation of the passive subject, the subject's absence, the attribution of an evil crime or a defect, the divulgation or making public, and evil intent or malice (dolus) on the part of the active subject, CIPROTTI, p. 33.

⁵¹ Defined as "a pasquil, a lampoon. According to the Lex Cornelia de iniuriis punishment was inflicted on the person who wrote, composed or edited such a lampoon, even if the publication was made under another name or anonymously. [It] was also a letter addressed to the emperor or an official containing malicious accusations against another person. If the letter was anonymous, it had to be burnt, without any investigation against the person defamed", R.L. Dictionary,

1. Application of the canon

All authors agree that everyone has the right to a good reputation grounded in truth.⁵² This good reputation is lost when one becomes notorious under the law.⁵³ This applies to individuals only and not to moral or juridic persons.⁵⁴

a. Penal Law

The protection of reputation as the goal of the criminal penal process has two dimensions. First, the individual has an interest in protection of reputation because of his or her

p. 562. See CIPROTTI, p. 16 for an extremely detailed discussion regarding the differences between the canonical concepts of iniuria, contumelia, detraction, defamation, and libellus famosus that indicates that the processes to be carried out to apply any of these penalties was a quite specialized. It depended on factors such as whether the person injured was present or not, whether the statement made was true but unknown rather than false, whether the damage was done to reputation or honor, the number of witnesses present, or whether malice along with the other general requirements for imposition of a penalty were actually present.

⁵² See CIPROTTI, p. 15. It should be noted that Ciprotti, when speaking of the delicts of calumny, contumelia, or iniuria, gives specific references to decisions of the Roman Rota relating to these crimes. Direct reference to these sentences has been omitted here since this is not the direct object of our study. See also DI MATTIA, pp. 100-104.

⁵³ See CIPROTTI, p. 55.

⁵⁴ See CIPROTTI, p. 41. The reason given for this conclusion is that canon 2355 applies only to physical persons.

concern for honor⁵⁵ and then others have an interest in it when an individual's reputation is injured.⁵⁶ The roles of the one damaged and the one causing the damages are very different within the penal process. The one causing the damage must have done so with malice, rather than negligence, under conditions that would not entail any mitigation of the damage done.⁵⁷ Malice (or guile) would be considered in the traditional context of penal law.

i. Malice and truth

While malice is required for responsibility for a crime, good faith may diminish a penalty to be imposed on the guilty person.⁵⁸

Use of the truth as a complete defense to the charge of injury to reputation is not permitted since no one has the right to make private injuring facts public, unless certain circumstances are present.⁵⁹ While the truth of the defamatory

⁵⁵ See CIPROTTI, p. 15. He defines "honor" subjectively as a sense of one's own dignity acquired relative to moral virtues or merits, or objectively as one's physical and social virtues and merits.

⁵⁶ See CIPROTTI, p. 1. Contrary to honor which is in ourselves, reputation is in other people as it concerns the honest or mores of someone.

⁵⁷ See CIPROTTI, pp. 67-84.

⁵⁸ See CIPROTTI, p. 93.

⁵⁹ These circumstances included the obligation to come forward when one knows something against a person who seeks ordination in the Church or against one who is about to enter

statement may be considered by the Court under certain circumstances,⁶⁰ no one has a right to make public those things that are to remain private.⁶¹ The 1917 Code does not explicitly allow truth as a defense.⁶²

ii. Compensation

Compensation was seen as part of the penalty for injury to reputation. The judge had to consider a balance between the parties in awarding any type of compensation.⁶³ They were to present their own views on this matter prior to a final decision. It could be noted that there was no requirement that compensation had to be requested before it was awarded by the Court.⁶⁴

the sacrament of matrimony. CIPROTTI, p. 87.

⁶⁰ Ciprotti notes that some civil codes recognize three situations where the exception of truth is permitted: 1. where the injured party in litigation concedes to the accused the permission to prove the truth of the accusation; 2. if the defamation was done to a public official relative to his function in office; and 3. if there is a judicial trial against the defamed person relative to the object of the defamation. CIPROTTI, p. 87.

⁶¹ The reason given is that it is not good for the public good or public policy to denounce the vices of another in public except in the judicial forum. See CIPROTTI, p. 86.

⁶² CIPROTTI, p. 88.

⁶³ Compensation is determined according to the mutual injury, such as the defamatory comment and the right to reply. Both of these are weighed and set against each other before compensation is awarded. See CIPROTTI, pp. 93-98.

⁶⁴ CIPROTTI, p. 95.

iii. Privilege

Cardinals could not be brought to court for injury of another's reputation under the 1917 Code.⁶⁵ Statements made within the course of a trial could not be considered defamatory since they were confidential and thus not made public in the sense that the canon presupposed.⁶⁶ One could not be considered to have defamed another in the sense of canon 2355 if the utterance was made in a judicial forum.⁶⁷

b. Action for damages

An action for damages was available as an adjunct to the penal process. A variety of concepts in penal law were applied in an action for damages: truth, damages, monetary damages, remuneration, restitution, and culpability.⁶⁸ Damages could be offset by some kind of restitution or remuneration (depending on the type of damage done).⁶⁹

⁶⁵ CIPROTTI, p. 37.

⁶⁶ CIPROTTI, pp. 88-89; Ciprotti also believed that persons could not be accused of defamation when using their own rights, even if the defamation was done with evil intent.

⁶⁷ CIPROTTI, pp. 43-44.

⁶⁸ Ibid.

⁶⁹ Ibid.

2. Difficulties with the approach of the 1917 Code

A number of criticisms arose concerning the approach of the 1917 Code to issues of defamation. First, the right to reputation appeared to be linked to the right of individual privacy rather than to some societal interest.⁷⁰ Such a view coupled the right with the person considered as an individual rather than with the interest of ecclesial society.⁷¹ Thus deceased persons would have no right to vindication of their good name since their reputation was linked to their personhood.⁷²

Likewise, there were concerns about a person's ability to achieve redress of a wrong when all elements of the injury have not been sufficiently proved.⁷³ This approach ignored the damage done to the victim.⁷⁴ There were also difficulties with the concepts of "injury" and "damage" applied under the

⁷⁰ DI MATTIA, pp. 108-109.

⁷¹ DI MATTIA, pp. 104-108.

⁷² DI MATTIA, pp. 109-111.

⁷³ See DI MATTIA, pp. 312-313. This section of the author's article is particularly concerned with the case where there is no objective crime since there was no damage or harm sustained because of unfit means of communication or other difficulty. The author notes that while the defamatory communication may not yet have imposed harm, it could do so in the future.

⁷⁴ DI MATTIA, pp. 313-315.

1917 Code since they were not juridically relevant to the concept of defamation,⁷⁵ as was the case in other societies.

Finally, the limitations against invoking truth as a defense were viewed as outdated when compared to civil statutes⁷⁶ and the demands of justice.

C. Vatican II

The Second Vatican Council was concerned with rights in many ways. While not speaking of a specific ecclesial right to a good reputation, it did recognize such a human right in the Pastoral Constitution Gaudium et spes.⁷⁷ Prior to this document, Pope Pius XII had noted his commitment to the concept⁷⁸ and Pope John XXIII had stated that such a guarantee was to be considered one of humankind's most basic rights.⁷⁹

⁷⁵ DI MATTIA, pp. 332-335.

⁷⁶ DI MATTIA, pp. 304-305.

⁷⁷ SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, Gaudium et spes (=GS), December 7, 1965, no. 26, Acta Apostolicae Sedis (=AAS), 58(1966), p. 1046 (English translation in W.M. Abbott (ed.) The Documents of Vatican II [=ABBOTT], 1966, New York, NY, Guild Press, 1966, p. 225).

⁷⁸ PIUS XII, Address, December 6, 1953, "[....] Il diritto all'esistenza, il diritto al rispetto e al buon nome [...]," AAS, 45(1953), p. 795.

⁷⁹ JOHN XXIII, Encyclical, Pacem in Terris, April 20, 1963, AAS, 55(1963), p. 260. "Homo praeterea iure naturae postulat, ut in debito habeatur honore, ut bona estimatione afficiatur, ut libere possit verum inquirere, et morali ordine communique omnium utilitate servatis, opinionem suam declarare, vulgare, et artem qualemcumque colere; ut denique ex veritate de publicis eventibus certior fiat."

These two declarations were the first occasions when the right to a "good name" was presented as a positive right in the Church rather than simply as a cause for a penalty when it was not respected. The recognition of the right to a good reputation, along with the other rights mentioned, was part of the human rights tradition dating back to the end of the nineteenth century and continuing into the twentieth.⁸⁰ The Council Fathers added their voices to these previous statements when they ratified Gaudium et spes, by proclaiming:

Therefore, there must be made available to all men everything necessary for leading a life truly human, such as food, clothing, and shelter; the right to choose a state of life freely and to found a family, the right to education, to employment, to a good reputation, to respect, to appropriate information, to activity in accord with the upright norm of one's own conscience, to protection of privacy and to rightful freedom in matters religious too. (Emphasis added).⁸¹

⁸⁰ See D. HOLLENBACH, Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition, New York, Paulist Press, 1979, pp. 41-107; P. BOLTÉ, Les droits de l'homme et la papauté contemporaine: synthèse et textes, Montréal, Fides, 1975, pp. 15-83.

⁸¹ "Oportet ergo ut ea omnia homine pervia reddantur, quibus ad vitam vere humanam gerendam indiget, ut sunt victus, vestitus, habitatio, ius ad statum vitae libere eligendum et ad familiam condendam, ad educationem, ad laborem, ad bonam famam, ad reverentiam, ad congruam informationem, ad agendum iuxta rectam suae conscientiae norma, ad vitae privatae protectionem atque ad iustam libertatem etiam in re religiosa", Gaudium et spes (=GS), AAS, 58(1965), p. 1046. Cf. ABBOTT, p. 225 (emphasis added).

There had been no specific debate among the fathers on the inclusion of the right to a good reputation prior to the passage of this section.⁸²

Gaudium et spes was addressed by the Council fathers to the whole world.⁸³ Its emphasis on the rights of the human person were unique in some ways and limiting in others.⁸⁴

Y. Congar stated in regard to GS 26, 2:

These lines list a certain number of rights that the Church judges to be of particular importance,

⁸² NATIONAL CATHOLIC WELFARE CONFERENCE, Council Daybook: Vatican II, F. Anderson (ed.), Washington, National Catholic Welfare Conference, 1965-1966, pp. 179-211; X. RYNNE, The Third Session: Debates and Decrees of Vatican Council II, September 14 to November 21, 1964, New York, Farrar, Straus & Giroux, 1964, pp. 115-201. H. VORGRIMLER, (ed.) Commentary on the Documents of Vatican II, 3 vols., Freiburg, Herder and Herder, 1967-1969; see also G. SCHNER, (ed.), The Church Renewed: The Documents of Vatican II Reconsidered, Lanham, MD, University Press of America, Inc., 1986, x-153p.

There is some suggestion that the action of the Council fathers was influenced strongly by the passage of the United Nations Declaration of Human Rights. For a copy of the document see I. BROWNLIE, (ed.), Basic Documents on Human Rights, second edition, Oxford, Clarendon Press, 1981, pp. 21-27.

⁸³ Y. CONGAR, "Propositions en vue de la révision demandée du Schéma XVII", in J. Perarnau, La formació de "Gaudium et Spes" 1962-novembre 1963, Barcelona, Facultat de teologia de Barcelona, 1975, p. 104.

⁸⁴ For a more in-depth treatment of the entire pastoral constitution, see any of the following works: Y. CONGAR and M. PEUCHMAURD, (eds.), L'Église dans le monde de ce temps: constitution pastorale "Gaudium et spes", 3 vols., Paris, Éditions du Cerf, 1967; P. RIGA, The Church Made Relevant: A Commentary on the Pastoral Constitution of Vatican II, Notre Dame, Fides, 1967, 337p; J. PERARNAU, La formació de "Gaudium et spes" 1962-novembre 1963, Barcelona, Facultat de teologia de Barcelona, 1975, xiii, 128p; U. PENELLO, Schematismo sistematico dei documenti del Concilio Vaticano II, Vicenza, Edizioni ESCA, 1972, 655p.

and whose respect flows from the eminent dignity of the <<human person>>. The Council avoided speaking of <<natural>> rights, because of the ambiguity of the term, and since many of the requirements cited were not considered <<natural>> only a half-century ago. We can also note that this movement is situated in an evolutionary context and that as the understanding of human dignity, the human species, and the Church gradually <<increases>>, new requirements are discovered.

This listing is by no means exhaustive; a few points of present day interest were selected. We could note in addition to the discrete allusion to freedom in religious matters, <<the right to education, to work, to reputation, to respect, to proper information>> this latter right is in correlation to <<the right to privacy>>. (Emphasis added. Form of punctuation from the original.)⁸⁵

Although the commentators applauded this passage, there were also criticisms against this "catalogue of rights"⁸⁶

⁸⁵ "Ces lignes énumèrent un certain nombre de droits que l'Église juge d'une particulière importance, et dont le respect découle de <<l'éminente dignité de la personne humaine>>. On évite de parler de droits <<naturels>>, à cause de l'ambiguïté actuelle du terme, et parce que plusieurs des exigences citées n'étaient pas du tout considérées comme <<naturelles>> il y a seulement un demi-siècle. On observera aussi que cette évolution se situe dans un contexte évolutif et qu'on laisse entendre qu'au fur et à mesure que <<grandit>> la conscience de la dignité humaine, le genre humain et l'Église découvrent sans cesse de nouvelles exigences.

"L'énumération n'est aucunement exhaustive; on a choisi quelques points d'un intérêt plus actuel. Signalons au passage, outre l'allusion discrète à la liberté en matière religieuse, <<le droit à l'éducation, au travail, à la réputation, au respect, à une information convenable>>, ce dernier droit ayant pour corrélatif le <<droit à la sauvegarde de la vie privée>>," Y. CONGAR and M. PEUCHMAURD, L'Église dans le monde de ce temps; constitution pastorale "Gaudium et spes", Paris, Éditions du Cerf, 1967, vol. 2, pp. 269-270.

⁸⁶ D. CAMPION, World: Vatican II's Pastoral Constitution on the Church in the Modern World, Part I: the Church and Man's Calling - Text and Commentary, P. Foote, (ed.) Chicago, Catholic Action Federations, 1967, p. 53.

because it was seen as lacking in safeguards.⁸⁷ How these rights would translate into actual practice in the Church would remain an open question until the 1983 Code was promulgated.

D. Drafts of the New Legislation

1. The Lex Ecclesiae Fundamentalis (LEF)

On January 25, 1959, at the same time as Pope John XXIII announced the convocation of the Second Vatican Council, he also stated that the 1917 Code of Canon Law would be revised as well.⁸⁸

Actual formal preparation of this revision did not begin until March 28, 1963 when Pope Paul VI appointed the Commission for the Revision of the Code of Canon Law.⁸⁹ The eventual charge of the committee included preparation of a Constitution that would serve as a fundamental law for both the Latin and the Oriental Churches.⁹⁰ The document was to be a primary source of law for the Church as a whole and was to draw on scriptural sources, tradition, previous legislation,

⁸⁷ Ibid.

⁸⁸ AAS, 51(1959), pp. 65-69.

⁸⁹ AAS, 55(1963), p. 363.

⁹⁰ AAS, 57(1965), 985-989. T. GREEN, "The Revision of Canon Law - Theological Implications" (=GREEN, Theological Studies I), Theological Studies, 40(1979), p. 603; H. HEIMERL, "Outline of a Constitution for the Church" (=HEIMERL), Concilium, 8(1967), p. 31.

and the documents of the Second Vatican Council.⁹¹ It was to be presented in constitutional form.⁹²

The right to a good reputation first appeared as canon 23 of the Lex Ecclesiae fundamentalis (LEF) schema circulated by the Commission in 1970. This canon stated: "The Christian faithful have the right that the good reputation they enjoy be respected by all; therefore no one may unlawfully damage it."⁹³

Specific criticism of this arrangement included the question of whether the right to a good reputation was a

⁹¹ W. ONCLIN, "De Lege Ecclesiae Fundamentali", Communicationes, 3(1971), p. 50; F. CAMPO, "Antecedentes de la Ley fundamental de la Iglesia", Estudio Agustiniiano, 8(1973), p. 451. See also CONVENTUS CANONISTARUM HISPANO-CERMANUS (=Conventus), Salamanticae, Consejo superior de investigaciones cientificas instituto San Raimundo de Peñafort, 1972, 195p; HEIMERL, pp. 31-35; W. LADUE, "A General Analysis of the Proposed Schema on the Lex Fundamentalis" (=LADUE), Canon Law Society of America (=CLSA), Proceedings of the Thirty-second Annual Convention, 1970, pp. 29-46; J. MANSFIELD, "A Bill of Rights for the Church" (=MANSFIELD), in J. Coriden (ed.), The Case for Freedom (=CORIDEN), Washington, Corpus Books, 1969, pp. 129-163.

⁹² LADUE, p. 342; HEIMERL, pp. 31-32.

⁹³ "Christifidelibus ius est ut bona fama qua gaudent ab omnibus in honore habeatur; quapropter nemini licet illegitime eadem laedere." Conventus, p. 21. Canon 21 of the same schema, together with one of the three canons that follow, also mentions the right to a good reputation as one of a series of rights: "Enumerantur deine [sic] alia tria iura quae, ratione naturae et loci quo inseruntur, videntur gaudere characterem magis generali. Quae, etsi ad fideles referantur, indubie sunt communia omnibus hominibus, praesertim duo priora iura. Talia sunt:

- ius libere eligendi statum vitae (can. 22);
 - ius ad bonam famam (can. 23);
 - ius ad institutionem christianam (can. 24)";
- Conventus, p. 112.

"natural right" or one specific to the faith.⁹⁴ Some were concerned that the phrase "no one may illegitimately harm the (good reputation) of another"⁹⁵ would put moral theology on the same plane as precepts of divine and natural law.⁹⁶ There were also questions as to why this right was included in the schema.⁹⁷

In 1976, the right to a good reputation was presented in the LEF as canon 22. The wording was basically the same as in the earlier schema: "No one may unlawfully harm the good reputation which a person enjoys."⁹⁸

⁹⁴ Conventus, p. 112.

⁹⁵ "Nemini licet illegitime eandem (bonam famam) laedere."

⁹⁶ Conventus, p. 115.

⁹⁷ Ibid.

⁹⁸ "Nemini licet bonam famam qua quis gaudet illegitime laedere." Lex Ecclesiae Fundamentalis, in Ecclesiae Catholicae universae lex canonica fundamentalis, Romae, 1976, p. 7. See GREEN, *Theological Reflections I*, p. 604.

Criticisms of both schemata were numerous.⁹⁹ One writer who advocated the creation of a bill of rights for the Church noted:

To be effective, [it] must be supported by constitutional provisions that establish structures, processes and institutions capable of assuring freedom [...]. Questions arise, of course, about the extent to which the present structure of the Church, with its intermingling of legislative, executive, and judicial functions, is a requirement of her divine constitution or is alterable in favor of institutional forms and processes more favorable to freedom.¹⁰⁰

Some writers were concerned with the limitations of rights in favor of the common good, since they saw this as almost eliminating any possible exercise of the recognized rights.¹⁰¹

While the right to a good reputation was listed in both the 1970 and 1976 drafts of the LEF, it did not receive any particular attention. Indeed, questions regarding the timeliness and necessity of the issuance of a Church constitution along with the question of its form became far

⁹⁹ GREEN, *Theological Studies* I, pp. 601-605; HEIMERL, p. 34; P. HEBBLETHWAITE, "Lex Ecclesiae Fundamentalism" (=HEBBLETHWAITE), *The Month*, Second Series 4, no. 4, 1971, pp. 99-103; H. RIKHOF, "The Ecclesiologies of Lumen gentium, the Lex Ecclesiae Fundamentalism and the Draft Code", *Concilium*, 147(7/1981), pp. 54-63; M. MAZZIOTTI, "Riflessioni di un costituzionalista sulla 'Lex Ecclesiae fundamentalism'", *Ephemerides iuris canonici*, 38(1982), pp. 50-61; LADUE, pp. 35-46; *Conventus*, pp. 92-116; G. ALBERIGO, *Legge e Vangelo: discussione su una legge fondamentale per la Chiesa*, Brescia, Paideia Editrice, 1972, p. 712; J. GUTIÉRREZ, "Situación presente y perspectivas futuras de la Ley fundamental de la Iglesia", *Ephemerides iuris canonici*, 27(1971), pp. 282-295.

¹⁰⁰ MANSFIELD, p. 135.

¹⁰¹ HEIMERL, p. 34. HEBBLETHWAITE, pp. 101-102.

more important.¹⁰² Although hope was high in some circles for the promulgation of such a unifying document, the Pope chose not to issue it.¹⁰³

2. The Drafts of Book II

Work on the drafting of the schemata of the new code began around the same time as did the work on the LEF. The committee first established ten guiding principles for the revision of the Code before assigning its work to various study groups.¹⁰⁴

The sixth and seventh principles of revision are most important for our purpose. These principles established the importance of defining the rights of individual persons and providing a manner to safeguard these rights once established.¹⁰⁵ These principles reflect one of the major

¹⁰² Ibid.

¹⁰³ C. CORRAL, "La recepción de la proyectada 'Ley fundamental de la Iglesia' en el nuevo Código de derecho canónico" (=CORRAL), Estudios Eclesiásticos, 58(1983), pp. 138-139; T. GREEN, "The Revised Code of Canon Law" (=GREEN, Theological Studies II), Theological Studies, 47(1986), p. 622. For a text of the canons to be added to the 1983 Code see Communicationes, 15(1984), pp. 91-99.

¹⁰⁴ Communicationes, 1(1969), pp. 75-100.

¹⁰⁵ The sixth principle states in part: [...] "Vera tamen usus huius potestatis in Ecclesia arbitrarius esse non potest, idque iure naturali prohibente atque iure divino positivo et ipso iure ecclesiastico. Unicuique christifidelium iura agnoscenda ac tuenda sunt, et quae in lege naturali vel divina positiva continentur, et quae ex illis congruenter derivantur ob insitam sociale conditionem quam in Ecclesia acquirunt et possident." Communicationes, 1(1969), p. 82.

concerns of the 1967 Synod as it strongly emphasized the protection of human rights as well as ecclesial rights, and wanted to ensure these rights against any injustice that might occur in the arbitrary exercise of administrative discretion.¹⁰⁶

The committee used study groups to draft the various portions of the Code. The first draft of the schema on rights for Book II, "The People of God", was issued in 1977.¹⁰⁷ Canon 32 of that schema stated: "The faithful have a right that the good reputation which is enjoyed by all should be honorably upheld; for this reason no one is permitted to unlawfully damage it."¹⁰⁸ This schema was distributed with a request for

The seventh principle states in part: [...] "Proclamari idcirco oportet in iure canonico principium tutelae iuridicae aequo modo applicari superioribus et subditis, ita ut quaelibet arbitrarietatis suspicio in administratione ecclesiastica penitus evanescat.

"Haec finalitas obtineri solummodo potest mediantibus recursibus sapienter a iure dispositis ut ius suum quod quis ab inferiore instantia laesum reputet, in superiore restaurari efficaciter possit." Communicationes, 1(1969), p. 83.

¹⁰⁶ GREEN, Theological Studies I, pp. 605, 630-633, 639; LADUE, pp. 39-40; F. MORRISEY, "The Revision of the Code of Canon Law" (=MORRISEY), Studia Canonica, 12(1978), p. 188. J. KOMONCHAK, "The Status of the Faithful in the Revised Code of Canon Law" (=KOMONCHAK), Concilium, 146(6/1981), pp. 37-38; T. GREEN, "Revision of the Code: The First Decade", The Jurist, 36(1976), pp. 400-402.

¹⁰⁷ CODEX RECOGNITUS (SCHEMA) Liber II. De Populo Dei (=1977 Schema), Rome, Vatican Polyglot Press, p. 30.

¹⁰⁸ "Fidelibus ius est ut bona fama qua gaudent ab omnibus in honore habeatur; quapropter nemini licet illegitime eandem laedere", 1977 Schema, p. 30.

comments before the committee moved on to the next phase of its work.¹⁰⁹

Criticisms of the schema itself and of the section on rights and obligations were numerous.¹¹⁰ The most vigorous ones centered on the fact that the rights were so weighted down with qualifications that they were of little use to the faithful.¹¹¹ Other criticisms included a concern that the

¹⁰⁹ T. GREEN, "Critical Reflections on the Schema on the People of God" (=Green, People of God), Studia Canonica, 14(1980), p. 235.

¹¹⁰ GREEN, People of God, pp. 235-322; T. BERTONE, "Sistemática del libro II - i 'Christifideles': doveri e diritti fondamentali", Apollinaris, 56(1983), pp. 432-442; T. GREEN, "The Use of Vatican II Texts in the Draft De Populo Dei", Concilium, 147(7/1981), pp. 45-53; D. LE TOURNEAU, "Réflexions sur la partie 'de Christifidelibus' du Code", L'Année canonique, 28(1984), pp. 173-189. A. LONGHITANO, "Il libro II: il popolo di Dio", La Scuola cattolica, 112(1983), pp. 174-193. T. GREEN, "Persons and Structures in the Church: Reflections on Selected Issues in Book II", The Jurist, 45(1985), pp. 24-94.

¹¹¹ GREEN, in People of God, states: "[...] (a) The schema overemphasizes the obligations and minimizes the rights of believers, which flow from baptism and other sacraments. It occasionally reverses the order of its sources and speaks of 'obligations and rights' rather than of 'rights and obligations'. (b) The schema overly conditions the articulation of rights so that their limitations seem essential to the rights themselves and not to their exercise. The schema seems to lack confidence that such rights will be exercised responsibly while reflecting an unwarranted fear of abuses. This issue surfaced nearly a decade ago during the critique of the Lex, and seems equally operative in the schema. It would be sufficient to articulate a norm calling for responsible exercise of Christian rights in light of the rights of others and exigencies of the common good. The alternative formulations of the norms attempt to express basic Christian rights in as unqualified a fashion as possible. (c) The sacramental grounding of fundamental ecclesial rights and obligations is hardly as clear as it might be and hardly as faithful to the conciliar sources as desirable [...]", pp.

rights, once established, would have little protection from the exercise of arbitrary discretion.¹¹² Nothing seems to have been specifically mentioned about the right to a good reputation.

The canons addressing the rights and duties of the faithful underwent a revision by the coetus from October 10-15, 1979.¹¹³ Yet they were eventually removed from the text of the 1980 draft schema of Book II, presumably on the grounds that this material would be included in the LEF.¹¹⁴

In 1980 the final draft text of the LEF was submitted to the special committee of cardinals and bishops who in March 1981 voted 13-5 in favor of its submission to the Pope for promulgation.¹¹⁵ The Pope decided, however, not to promulgate this text for reasons that are unclear. After it became known that the LEF was not going to be issued, a number of sections of the proposed law had to be transferred to the schema on Book II.¹¹⁶ The canons on the fundamental rights and

281-285.

¹¹² Ibid.; LADUE, pp. 39-40; KOMONCHAK, pp. 37-38; MORRISEY, p. 188.

¹¹³ Communicationes, 12(1980), pp. 48-92.

¹¹⁴ KOMONCHAK, p.37.

¹¹⁵ GREEN, Theological Studies II, p. 622.

¹¹⁶ Communicationes, 15(1984), pp. 91-99; See KOMONCHAK, p. 37; GREEN, Theological Studies II, p. 622; GREEN, Theological Studies I, 601-602, 619; J. ALESANDRO, "Law and Renewal: A Canon Lawyer's Analysis of the New Code" (=ALESANDRO), Proceedings of the Forty-Fourth Annual

obligations of believers were part of these additions.¹¹⁷

The canon proclaiming a person's right to a good reputation that emerged in the 1982 schema of Book II was exactly the same as the one found in the final version of the LEF.¹¹⁸ The only later change in the document promulgated by the Pope involved coupling the right to reputation with the right to privacy.¹¹⁹

Concerns about the vindication of rights continued to be heard, especially since the section of the Code mandating the establishment of administrative tribunals was not included in the promulgated text.¹²⁰

Convention of the Canon Law Society of America, 44(1982), p. 36; See also CORRAL, pp. 137-161.

¹¹⁷ Ibid.

¹¹⁸ CODEX RECOGNITUS (SCHEMA NOVISSIMUM), 1982, Roma, Typis polyglottis vaticanis, p. 36.

¹¹⁹ C. 220.

¹²⁰ See CORIDEN, p. 31; ALESANDRO, p. 33; KOMONCHAK, p. 42; MORRISEY, p. 188; GREEN, Theological Studies II, pp. 628, 632-633.

II. CONTEXT AND PARAMETERS OF THE LEGISLATION

Having studied the evolution of the text of the legislation, this portion of our study will now focus on establishing a practical working definition of the right to a good reputation within the context of the present Code of canon law.

To define the right implies examining its context and a variety of other indicators as required by the Code to understand as clearly as possible what is already established and what is not.

Canon 220 states: "No one is permitted to damage unlawfully the good reputation which another person enjoys nor to violate the right of another person to protect his or her own privacy." (CLSA version). Or: "No one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy." (British version).¹²¹

Canon 220 has not been authoritatively interpreted by the legislator or by the Pontifical Council for the Interpretation of Legislative Texts. This means that there has been no

¹²¹ C. 220 - "Nemine licet bonam famam, qua quis gaudet, illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare." The British translation: The Code of Canon Law, in English translation, translation prepared by the Canon Law Society of Great Britain and Ireland, Collins Liturgical Publications, London, 1983, vi-319p.

authentic interpretation of the meaning of this canon at this time.¹²²

Practical interpretations would then have to build on various commentaries on the Code and on personal insights.¹²³ While the commentaries mention canon 220 and the right to a good reputation, only two deal with its implications in any detail. The first, the CLSA commentary, provides a recitation

¹²² C. 16.

¹²³ J. CORIDEN, T. GREEN, and D. HEINTSCHEL, (eds.), commissioned by the Canon Law Society of America, The Code of Canon Law - A Text and Commentary (=CLSA Commentary), Mahwah, N.J., Paulist Press, 1985, iii, 1152p.; L. de ECHEVERRIA (ed.), Código de derecho canónico, edición bilingüe comentada por los profesores de la Facultad de derecho canónico de la Universidad Pontificia de Salamanca, fourth edition, Madrid, Editorial catolica, 1984, iii, 921p.; P. LOMBARDIA y J. ARRIETA, Código de derecho canónico, edición anotada, Pamplona, Ediciones Universidad de Navarra, 1983, 1149p.; Münsterischer Kommentar zum Codex iuris canonici, unter besonderer Berücksichtigung der Rechtslage in Deutschland, Österreich und der Schweiz (=German commentary), Essen, Ludgerus Verlag, 2 vols., 1985; B. FRANCK, Vers un nouveau droit canonique? Présentation, commentaire et critique du Code de droit canonique de l'Église catholique latine révisé à la lumière de Vatican II, Paris, Editions du Cerf, 1983, 300p.; M. PETROCELLI, Diritto canonico, 8 ed., Napoli, Jovene, 1983, 415p.; see also P. BONNET, De Christifidelibus: de eorum iuribus, de laicis, de consociationibus, Romae, Pontificia Universitas Gregoriana, 1983, pp. 37-45; J. LISTL, H. MÜLLER, H. SCHMITZ, Handbuch des katholischen Kirchenrechts, Regensburg, F. Pustet, 1983, xiii, 1211p; R. PARALIEU, Guide pratique du Code de droit canonique, Bourges, Tardy, 1985, 460p.; R. PUZA, Katholisches Kirchenrecht, Heidelberg, C.F. Müller Juristischer Verlag, 1986, xvii, 421p; A. REY, "Les droits des chrétiens dans l'église", Chrétiens et droits de l'homme: penser les droits de l'homme, éduquer aux droits de l'homme, convergences bibliques, horizons théologiques, droits des chrétiens dans l'église, Meylan, Centre théologique, 1984, pp. 37-51; N. RUF, Das Recht der Katholischen Kirche, Freiburg, Herder, 1984, pp. 74-75.

of the sources of the canon and two short paragraphs indicating distinctions with the 1917 legislation.¹²⁴ The second, the German commentary, reviews the canon in greater depth, dealing with the implications of the right to both a good reputation and the right to privacy in a comparative fashion. It also reviews the terminology used and seeks to apply it in a general way.¹²⁵ This same commentary notes that when a person loses her or his reputation as part of a punishment, this is not to be considered to be an "illegal" violation of the right.¹²⁶ It also notes that someone who injures another's good name illegally may be punished with a just penalty, not excluding a censure.¹²⁷ Any damage unlawfully done must be repaired as much as possible.¹²⁸ In light of these commentaries and of other insights, we shall now attempt to determine the meaning of the legislation.

A. The Context

The first step would be to review the general context and placement of the canon. It is clear from our review of the evolution of this canon, that its present location in Book II,

¹²⁴ CLSA commentary, pp. 152-154.

¹²⁵ German commentary, pp. 220/1-220/2.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

"The People of God", part I, "The Christian Faithful", Title 1, makes it part of the general list of rights of the faithful of the Church.¹²⁹

Canon 220 is different from the other canons in Title I, save one¹³⁰ in that it does not mention the "Christifideles" like the other ones do. There is no specific mention of the "Christian faithful" in the text at all. No explanation for this fact is available, although it could be suggested that since the right is a "human right" rather than a "Christian right", all persons are entitled to it and none may thus unlawfully injure the right of reputation.¹³¹ It could be

¹²⁹ That it is part of the human rights recognized by the Church has already been examined in the previous section of this paper. For a more extensive examination of the meaning of Christian rights versus human rights see J. CORIDEN, "Reflections on Canonical Rights", in J. Provost and K. Walf, (eds.), Studies in Canon Law, Uitgeverij Peeters, Leuven, Leuven University Press, 1991, pp. 21-36; E. CORECCO, "Considerazioni sul problema dei diritti fondamentali del cristiano nella chiesa e nella società", Atti del IV Congresso Internazionale di Diritto Canonico, Friburg, 1980, pp. 1207-1234; N. GREINACHER, "Human Rights and Christian Rights", Concilium, 155(5/1982), pp. 40-50; P. LOMBARDIA, "Los derechos fundamentales del cristiano en la iglesia y en la sociedad", Atti del IV Congresso Internazionale di Diritto Canonico, Friburg, 1980, pp. 15-31; D. MAUGENEST, "Droits de l'Homme, Droits des Fidèles", L'Année canonique, 25(1981), pp. 345-356; J. PASSICOS, "Droits de l'Homme, droits du Chrétien", L'Année canonique, 25(1981), pp. 263-265; B. QUELQUEJEU, "Acceptance of the Rights of Man, Disregard for the 'Rights of Christians': The Inconsistency of Rome", Concilium, 201(1/1989), pp. 118-132.

¹³⁰ C. 218.

¹³¹ See footnote 9 of this chapter.

noted that the norm is situated in Book II of the Code, the People of God, rather than in Book VI on penalties.¹³²

Canon 220 is related to two other canons in this section: canons 221¹³³ and 223.¹³⁴ Both of these rights specifically refer to the Christian faithful, indicating that a right may be vindicated¹³⁵ and mentioning at least one way in which the exercise of a right may be limited.¹³⁶ The exact methods available for vindication of rights and the standards used in such processes will be examined fully in Chapter II.

A number of canons deal with the interpretation of rights presented in the Code. Canon 18 specifically notes that laws that limit the exercise of rights are to be strictly

¹³² In the 1917 Code, c. 2533, a penalty was established for those who unlawfully injured the reputation of another.

¹³³ C. 221 - "1. Christifidelibus competit ut iura quibus in Ecclesia gaudent, legitime vindicent atque defendant in foro competenti ecclesiastico ad normam iuris. 2. Christifideles ius quoque est ut, si ad iudicium ab auctoritate competenti vocentur, iudicentur servatis iuris praescriptis, cum aequitate applicandis. 3. Christifidelibus ius est, ne poenis canonicis nisi ad normam legis plectantur."

¹³⁴ C. 223 - "1. In iuribus suis exercendis christifideles tum singuli tum in consociationibus adunati rationem habere debent boni communis Ecclesiae necnon iurium aliorum atque suorum erga alios officiorum. 2. Ecclesiasticae auctoritati competit, intuitu boni communis, exercitium iurium quae christifidelibus sunt propria, moderari."

¹³⁵ C. 221.

¹³⁶ C. 223.

interpreted.¹³⁷ Initially, then, canon 220 is to be interpreted in a broad sense so that the right to a good reputation is protected.¹³⁸ Canon 17¹³⁹ may also be used in the interpretation of this canon where certain parts were not directly covered. Its application will depend on the information gleaned from the parallel passages of the Code when they are compared to the words of canon 220.

B. The Specific Words Defined Through Parallel Passages

There are three basic sections to the canon; the first establishes that "No one may illegally damage",¹⁴⁰ while the other two specifically indicate that the first portion refers to "the good reputation another enjoys"¹⁴¹ and to "the right of another person to protect his or her own privacy."¹⁴²

¹³⁷ C. 18 - "Leges quae poenam statuunt aut liberum iurium exercitium coarctant aut exceptionem a lege continent, strictae subsunt interpretationi."

¹³⁸ CLSA commentary, pp. 36-37.

¹³⁹ C. 19 - "Si certa de re desit expressum legis sive universalis sive particularis praescriptum aut consuetudo, causa, nisi sit poenalis, dirimenda est attentis legibus latis in similibus, generalibus iuris principiis cum aequitate canonica servatis, iurisprudencia et praxi Curiae Romanae, communi constantique doctorum sententia."

¹⁴⁰ "Nemini licet [...] illegitime laedere"...

¹⁴¹ "[...] bonam famam, qua quis gaudet [...]"

¹⁴² "[...] nec ius cuiusque personae ad propriam intimitatem tuendam violare."

1. Phrase one defined

In the first section, each word will be taken separately to seek out its proper meaning and context and then compare it to any parallel passages in the law.¹⁴³

a. "Nemini"

The first Latin word to be examined is "nemini". This is usually translated as "no one". Who is the "one"? Is it a Church official? Could it be a juridic person? Is it a physical person only? Who the "one" is under the law is not fully clear on the face of the term, so other avenues will eventually have to be sought for clarification.

There are nine parallel instances in the Code where "nemini" is used in some way.¹⁴⁴ Four of these are paired with "licet"¹⁴⁵ while the others use it in some other way.¹⁴⁶ None of these parallel canons is found in Titles I and II of Book II.

The four instances where "licet" and "nemini" are paired together most resemble canon 220. The first instance of

¹⁴³ X. OCHOA, Index verborum ac locutionum Codicis iuris canonici (=OCHOA), editio secunda et completa, Città del Vaticano, Libreria editrice Lateranense, 1984, vii-593.

¹⁴⁴ Cc. 487, §1; 862; 935; 953; 152; 628, §3; 1209; 1404; 1598, §1.

¹⁴⁵ Cc. 487, §1; 862, 935, 953.

¹⁴⁶ Cc. 152; 628, §3; 1209; 1404; 1598, §1.

"nemini" paired with "licet" is found in canon 487, §1¹⁴⁷ which refers to no one being allowed to enter the diocesan archives without the permission of the diocesan bishop,¹⁴⁸ the moderator of the Curia,¹⁴⁹ or the chancellor.¹⁵⁰ In this canon, it is obvious that only a physical person¹⁵¹ could enter an archive. Whether that person enters as the representative of a juridic person¹⁵² or as an individual is not addressed.

The second instance is in canon 862¹⁵³ which limits the conferral of baptism. Like the previous canon, it appears that the reference is to a physical person, rather than to a juridic one since only a physical person may confer baptism.

¹⁴⁷ C. 487 §1. - "Archivum clausum sit oportet eiusque clavem habeant solum Episcopus et cancellarius; nemini licet illud ingredi nisi de Episcopi aut Moderatoris curiae simul et cancellarii licentia."

¹⁴⁸ See cc. 381-402.

¹⁴⁹ See c. 473, §2.

¹⁵⁰ See c. 482.

¹⁵¹ See cc. 96-112.

¹⁵² See cc. 113-123.

¹⁵³ C. 862 - "Excepto casu necessitatis, nemini licet, sine debita licentia, in alieno territorio baptismum conferre, ne suis quidem subditis."

Canon 935¹⁵⁴ is very pointed in its reference to a physical person as this canon prohibits the keeping of the Eucharist on one's person except in certain circumstances. This obviously applies only to physical persons since juridic persons may not carry physical objects in this manner.

The final one of the first four canons, canon 953 on Mass offerings,¹⁵⁵ is similar to the previous norms in that it makes clear that "nemini" is to be applied to physical persons since only they can celebrate masses and accept offerings.

Five other canons use "nemini" in their texts. Canon 152¹⁵⁶ deals with the inappropriateness of the conferral of two incompatible offices on the same person. This too is obviously a reference to a physical person since only a physical person may hold an office as envisioned by the Code. Canon 628, §3,¹⁵⁷ prohibits anyone from diverting a religious from speaking with a visitor or allowing anyone to interfere

¹⁵⁴ C. 935 - "Nemini licet sanctissimam Eucharistiam apud se retinere aut secum in itinere deferre, nisi necessitate pastorali urgente et servatis Episcopi dioecesani praescriptis."

¹⁵⁵ C. 953 - "Nemini licet tot stipes Missarum per se applicandarum accipere, quibus intra annum satisfacere non potest."

¹⁵⁶ C. 152 - "Nemini conferantur duo vel plura officia incompatibilia, videlicet quae una simul ab eodem adimpleri nequeunt."

¹⁵⁷ C. 628, §3 - "Sodales fiducialiter agant cum visitatore, cui legitime interroganti respondere tenentur secundum veritatem in caritate; nemini vero fas est quoquo modo sodales ab hac obligatione avertere, aut visitationis scopum aliter impedere."

with the scope of the visitation. This too appears to refer directly to an individual physical person. Canon 1598, §1¹⁵⁸ indicates that a judge may restrict the access permitted to a particular act of a case. This canon also points to a physical person. Canon 1209¹⁵⁹ refers to the proof necessary to establish the dedication or blessing of a place. It again appears to include physical persons only. Likewise, canon 1404¹⁶⁰ in its reference to the First See seems clear in its reference to a physical person.

These canons all imply at least a physical person. It is not stated anywhere in the Code that juridic persons are to be implied in the interpretation of canon 220, although it does not seem that they are excluded here because of the nature of the prescription.

b. "Licet"

The second word to examine is "licet". This term is usually translated as "may" or "permitted" or "lawful" and appears obvious in its meaning. It is unclear if a

¹⁵⁸ C. 1598, §1 - "Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet, sub poena nullitatis, ut acta nondum eis nota apud tribunalis cancellariam inspiciant; quin etiam advocatis id petentibus spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat."

¹⁵⁹ C. 1209 - "Dedicatio vel benedictio alicuius loci, modo nemini damnum fiat, satis probatur etiam per unum testem omni exceptione maiorem."

¹⁶⁰ C. 1404 - "Prima Sedes a nemine iudicatur."

"permission" of some kind is necessary. Who decides what is to be permitted? What kind of permission, if any, is referred to here?

There are thirty-eight parallel references to "licet" in the Code.¹⁶¹ Eight of these are in Book II, although none specifically occur in the other canons listing the rights and obligations of the Christian faithful.¹⁶²

The most important canons to examine here are the four where "licet" and "nemini" are paired together. The actual instances where they are paired have already been noted in the previous section. In reviewing these same canons, paying special attention to the word "licet", we find that they canons do not indicate any special definition for the term, nor do they indicate an answer to the questions posed above. "Licet" is not used in any unusual way in these canons nor, indeed, in the other canons in which it appears.

What is important to note is that "licet" is not related to "validitas" or "nullitas" in that the action embodied in

¹⁶¹ Cc. 43; 179, §4; 270; 487, §1; 488; 533, §2; 540, §2; 558; 561; 567, §2; 828; 831, §2; 844, §2; 862; 905, §1; 907; 933; 935; 938, §4; 945, §1; 952, §1; 953; 954; 1003, §3; 1013; 1085, §1; 1180, §2; 1187; 1211; 1239, §2; 1259; 1263; 1269; 1335; 1528; 1603, §1; 1654, §2; 1739; 91; 127, §2, 2°; 136; 207, §2; 255; 283, §1; 185, §2; 323, §1; 531; 753; 827, §3; 856; 948; 976; 1030; 1105, §4; 1152, §1; 1215, §3; 1412; 1477; 1495; 1729, §3.

¹⁶² Cc. 270; 487, §1; 488; 533, §2; 540, §2; 558; 561; 567, §2.

this canon does not provide for any invalidity or nullity attached to an action affecting this particular right.

c. "Illegitime"

The word "illegitime" is most important in determining the meaning of this canon. What would be "illegitimate"¹⁶³ or "unlawful"¹⁶⁴ in this context? Is the term to be interpreted narrowly as an infringement of a right?¹⁶⁵ Are there lawful ways of infringing on the right? Who determines what is lawful in particular situations? Does this mean that some type of penalty may be attached to such unlawful conduct? This term also needs clarification before its parameters become fully apparent.

There are twelve parallel uses of "illegitime" in the Code besides canon 220.¹⁶⁶ Two of these are found in Book II,¹⁶⁷ but neither of them refers to instances involving rights.¹⁶⁸

¹⁶³ CLSA translation.

¹⁶⁴ British translation.

¹⁶⁵ C. 18 - "Leges quae poenam statuunt aut liberum iurium exercitium coarctant aut exceptione a lege continent, strictae subsunt interpretationi."

¹⁶⁶ Cc. 128; 154; 395, §4; 665, §2; 1044, §1, 1°; 1044, §2, 1°; 1281, §3; 1333, §4; 1384; 1385; 1386; 1389, §2.

¹⁶⁷ Cc. 395, §4 and 665, §2.

¹⁶⁸ C. 395, §4 - "Si ultra sex menses Episcopus a dioecesi illegitime abfuerit, de eius absentia Metropolita Sedem Apostolicam certiore faciat; quod si agatur de Metropolita, idem faciat antiquior suffraganeus." C. 665, §2 - "Sodalis, qui e domo religiosa illegitime abest cum animo sese

Two canons in Book I use the term. The first, canon 128,¹⁶⁹ is the most important as it indicates the repercussions for harming another by a juridic act or by any act placed with malice or culpability. Such a person must compensate for the damage inflicted upon another. Canon 154 refers to the conferral of an office where the current occupant holds it illegitimately.

Canon 1281, §3,¹⁷⁰ in referring to the liability of a juridic person for acts of its administrators, juxtaposes the terms "illegitime" and "valide". It appears then, that illegitimately or unlawfully as it is used in the law means less than invalidity under that same law.

The other canons involving "illegitime" include canon 395, §4 in reference to a bishop being "illegitimately" absent from his diocese for an extended period of time; canon 665, §2 which refers to the "illegitimate" absence of a religious from the house of residence; canon 1044, §1, 1° and §2, 1° which deals with irregularities for the exercise of orders and with

subducendi a potestate Superiorum, sollicite ab eisdem quaeratur et adiuvetur ut redeat et in sua vocatione perseveret."

¹⁶⁹ C. 128 - "Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum infert, obligatione tenetur damnum illatum reparandi."

¹⁷⁰ C. 1281, §3 - "Nisi quando et quatenus in rem suam versum sit, persona iuridica non tenetur respondere de actibus ab administratoribus invalide positis; de actibus autem ab administratoribus illegitime sed valide positis respondebit ipsa persona iuridica, salva eius actione seu recursu adversus administratores qui damna eidem intulerint."

impediments to their exercise; and canon 1333, §4 which refers to the collection of monies by a cleric while under suspension.

The next four canons deal with penalties. Canon 1384 refers to the unlawful exercise of orders; canon 1385 speaks of illegal trafficking in masses; canon 1386 indicates that a person who persuades a church official to act unlawfully is to be punished with a just penalty. The last of these penal canons, canon 1389, §2, states that a person who through culpable negligence, acts illegitimately through an act of ecclesiastical power, is to be punished with a just penalty.

These canons indicate that "illegitimately" acting under color of law differs profoundly from the concepts of validity and nullity. Actions involving illegitimacy are less serious than those involving nullity or invalidity.

d. "Laedere"

The next word "laedere" can be translated as "damage", "injure", or "harm". What is harm? Is there such a thing as too little damage to warrant vindication of the right?¹⁷¹ Is there a limitation on the type of injury that can be done? How long must the damage persist? By what standard is one to

¹⁷¹ C. 221, §1 - "Christifidelibus competit ut iura quibus in Ecclesia gaudent, legitime vindicent atque defendant in foro competenti ecclesiastico ad normam iuris." The methods of vindication will be dealt with in Chapter II of this dissertation.

determine what harm is done? Again, this term needs more clarification before the meaning of the canon becomes clear.

This term appears in six other canons in the Code besides canon 220.¹⁷² None of these parallel canons is in Book II. One canon, canon 1390, §2¹⁷³ refers specifically to the right to a good reputation and the imposition of a just penalty against one who has falsely injured the reputation of another. Such a penalty could include even a censure. This canon gives examples of situations where a reputation might be injured in some way. There is no indication, though, that the situations described there are to be considered as exclusive examples of injury to reputation.

Three canons mention injury to the "acquired" rights of another. Canon 36, §1¹⁷⁴ deals with the interpretation of administrative acts and notes where the acquired rights of others are injured, such acts are to be interpreted strictly.¹⁷⁵ This is also true for any act which restricts the

¹⁷² Cc. 36, §1; 38; 50; 1196; 1369; 1390, §2.

¹⁷³ C. 1390, §2 - "Qui aliam ecclesiastico Superiori calumniosam praebebat delicti denuntiationem, vel aliter alterius bonam famam laedit, iusta poena, non exclusa censura, puniri potest." See 1917 Code, c. 2355.

¹⁷⁴ C. 36, §1 - "Actus administrativus intellegendus est secundum propriam verborum significationem et communem loquendi usum; in dubio, qui ad lites referuntur aut ad poenas comminandas infligendasve attinent aut personae iura coarctant aut iura aliis quaesita laedunt aut adversantur legi in commodum privatorum, strictae subsunt interpretationi; ceteri omnes, latae."

¹⁷⁵ Ibid.

rights of a person. Canon 38¹⁷⁶ deals with the interpretation of a rescript. A rescript that harmed the acquired right of another or is contrary to a law or approved custom would lack effect unless the issuing authority added a derogating clause.¹⁷⁷ Canon 1196¹⁷⁸ indicates that certain persons may dispense from a private vow if such a dispensation does not harm the acquired right of another.

The two remaining canons, canons 50¹⁷⁹ and 1369,¹⁸⁰ address separate concerns. Canon 50 states that an administrative authority should seek out the necessary information and documentation and hear those who might be injured, if possible, prior to issuing an individual decree. Canon 1369 refers to "seriously damaging" good morals by a public show or speech, writing or other medium of social communication.

¹⁷⁶ C. 38 - "Actus administrativus, etiam si agatur de rescripto Moto proprio dato, effectu caret quatenus ius alteri quaesitum laedit aut legi consuetudinive probatae contrarius est, nisi auctoritas competens expresse clausulam derogatoriam addiderit."

¹⁷⁷ Ibid.

¹⁷⁸ C. 1196 - "Praeter Romanum Pontificem, vota privata possunt iusta de causa dispensare, dummodo dispensatio ne laedat ius aliis quaesitum [...]."

¹⁷⁹ C. 50 - "Antequam decretum singulare ferat, auctoritas necessarias notitias et probationes exquirat, atque, quantum fieri potest, eos audiat quorum iura laedi possint."

¹⁸⁰ C. 1369 - "Qui in publico spectaculo vel concione, vel in scripto publice divulgato, vel aliter instrumentis communicationis socialis utens, blasphemiam profert, aut bonos mores graviter laedit, aut in religionem vel Ecclesiam iniurias exprimit vel odium contemptumve excitat, iusta poena puniatur."

"Laedere" has no specific definition within the parallel canons presented here. It appears that all but one concern an action required before an administrative act is completed. However, not completing the actions referred to in these canons does not invalidate or nullify the subsequent administrative actions taken.

2. Phrase two

The second section of the canon deals specifically with the right at the heart of this dissertation. What is the "[...] good reputation which another person enjoys [...]"? Is one entitled to such a reputation by right alone or must one earn a reputation? One must go beyond the words and their context to establish the extent and any limitations of the right. Here too, we must look to other sources to clarify the canon's meaning. We will examine each phrase individually for its context and parallel references within the Code.

a. "Bonam famam"

The term "bonam" is translated as "good" from Latin to English. There is little doubt about what "good" means in English and little doubt of its role in interpreting a "good reputation" in this situation.

There are seven references in the Code to "bonam" or

"bona" or some other derivative of the word.¹⁸¹ Two of these are specifically paired with "famam".¹⁸² Three other canons are translated as referring to a "good reputation" but they use other terms to refer to reputation. Two use the term "existimatio"¹⁸³ and one uses the term "nomen".¹⁸⁴ The remaining references refer to the "good" morals required of one to be ordained to the Episcopate¹⁸⁵ and to the requirement of being a "good" householder.¹⁸⁶

There are six references to "fama" or a derivation of it,

¹⁸¹ Cc. 378, §1, 2°; 1029; 1284, §1; 1390, §2; 1483; 1717, §2; 1741, §3.

¹⁸² C. 1390, §2 - "Qui aliam ecclesiastico Superiori calumniosam praebet delecti denuntiationem, vel aliter alterius bonam famam laedit, iusta poena, non exclusa censura, puniri potest." C. 1483 - "Procurator et advocatus esse debent aetate maiores et bonae famae; advocatus debet praeterea esse catholicus, nisi Episcopus dioecesanus aliter permittat, et doctor in iure canonico, vel alioquin vere peritus et ab eodem Episcopo approbatus."

¹⁸³ C. 1029 - "Ad ordines ii soli promoveantur qui, prudenti iudicio Episcopi proprii aut Superioris maioris competentis, omnibus perpensis, integram habent fidem, recta moventur intentione, debita pollent scientia, bona gaudent existimatione, integris moribus probatis qui virtutibus atque aliis qualitatibus physicis et psychicis ordini recipiendo congruentibus sunt praediti." C. 1741, §3 - "[...] bonae existimationis amissio penes probos et graves paroecianos vel aversio in parochum, quae praevideantur non brevi cessaturae [...]."

¹⁸⁴ C. 1717, §2 - "Cavendum est ne ex hac investigatione bonum cuiusquam nomen in discrimen vocetur."

¹⁸⁵ C. 378, §1 - "Ad idoneitatem candidatorum Episcopatus requiritur ut quis sit: [...]2° - bona existimatione gaudens [...]."

¹⁸⁶ C. 1284, §1 - "Omnes administratores diligentia boni patrisfamilias suum munus implere tenentur."

in the Code.¹⁸⁷ Two have already been mentioned as paired with "bona". The remaining canons refer to the role of notaries in causes involving the reputation of a priest,¹⁸⁸ the protection of the good name of one being investigated by a penal process,¹⁸⁹ and the ability of a judge to oblige secrecy to protect the reputation of another.¹⁹⁰ The final canon translates "fama" by "rumor" in determining the credibility of evidence in judicial proceedings.¹⁹¹

These parallel references all apply to physical or juridic persons. None specifically defines either "reputation" or "good reputation".

¹⁸⁷ Cc. 483, §2; 1361, §3; 1390, §2; 1455, §3; 1483; 1572, §2.

¹⁸⁸ C. 483, §2 - "Cancellarius aliique notarii debent esse integrae fama et omni suspicione maiores; in causis quibus fama sacerdotis in discrimen vocari possit, notarius debet esse sacerdos."

¹⁸⁹ C. 1361, §3.

¹⁹⁰ C. 1455, §3 - "[...] Immo, quoties natura causae vel probationum talis sit ut ex actorum vel probationum evulgatione aliorum fama periclitetur, vel praebeatur ansa dissidiis, aut scandalum aliudve id genus incommodum oratur, iudex poterit testes, peritos, partes earumque advocatos vel procuratores iureiurando astringere ad secretum servandum [...]."

¹⁹¹ C. 1572, §2 - "[...] utrum de scientia propria, praesertim de visu et auditu proprio testficetur, an de sua opinione, de fama, aut de auditu ab aliis [...]."

b. "Qua quis gaudet"

The phrase "qua quis gaudet" is usually translated as "or the right which a person enjoys". Who is the person referred to here? Can it be a physical person? Can it be a juridic person? What is the context of this phrase? As with the other expressions, parallel canons must be consulted for assistance in understanding this section of the law.

The most important term in this phrase refers to a "persona". There are ninety-six uses of "persona" or its derivations in canons in the Code.¹⁹² These refer to physical persons on occasion and to juridic persons in other instances. There does not seem to be any rule that can be developed from the classifying of these references as applying to either physical or juridic persons, or both. It appears that in reference to the "persona" of this canon that it could be either a physical or juridic person since both of them may enjoy a certain reputation.

¹⁹² Cc. 10; 15, §3; 36, §1; 43; 47; 49 (twice); 52; 54, §1; 66 (twice); 78, §2; 80, §3; 94, §2; 95, §1; 96; 97, §1; 98, §1; 98, §2; 100; 108, §2; 108, §3; 115, §2; 124, §1; 125, §1; 127, §. 2 (three times); 131, §1; 133, §1; 155; 172, §1 (twice); 212, §3; 238, §2; 277, §2; 307, §2; 334 (twice); 357, §2; 363, §1; 363, §2; 393; 397, §1; 413, §1; 469; 472; 492, §3; 517, §2 (twice); 520, §2; 524, §3; 543, §2, 3°; 607, §1; 626, 666, 706, §3; 830, §1; 830, §2; 834, §2; 883, §2; 955, §1; 978, §1; 1057, §1; 1073; 1086, §1; 1090, §1; 1097, §1; 1097, §2; 1105, §1, 1°; 1111, §2; 1148, §3; 1181; 1196, §2; 1274, §3; 1279, §1; 1279, §2; 1281, §2; 1315, §1; 1339, §2; 1397; 1428, §1; 1438, §1; 1450; 1459, §2; 1470; 1471; 1497, §2; 1522; 1559; 1572, §1; 1573; 1578, §2; 1717, §1; 1733, §1.

3. Phrase three

The third section specifically refers to the "ius cuiusque personae ad propriam intimitatem tuendam" as parallel to the previous right. Is this right related in some manner to the right to a good reputation? If so, how? Are there parallel terms that can be applied in both cases? Is one entitled to privacy to maintain a good reputation even if that reputation is thus undeserved? From the text of the canon it appears that these rights are linked at least as a balance of rights. Still, too many questions remain unanswered to base an interpretation of this canon solely on the text and context of the canon itself.

It is unclear how this right is connected to the right to a good reputation. There is only one other time in the Code where the two rights are somehow implied as linked together,¹⁹³ and where the norm seems to suggest that a penal process must take into consideration the right to privacy as a manner of safeguarding the accused's right to a good reputation, unless circumstances demand otherwise. There is thus little to indicate how these two rights are to be linked, except as suggested by canon 1361. It is not our intention to

¹⁹³ C. 1361, §3.

examine this issue in detail since this would be well beyond the limited scope of this dissertation.¹⁹⁴

4. Conclusions regarding terminology

The Code is not specific in its presentation of the situations in which the right to a good reputation may need to be vindicated. From our study of the parallel canons involving reputation and of the terms used in canon 220 the following conclusions may be drawn.

1. The "no one" referred to may be any physical person subject to the law of the Church. A juridic person, through its representatives may also be referred to here. No exception is made to suggest that juridic persons cannot perform such actions that would violate the right.

2. The phrase "may unlawfully" distinguishes between actions that are envisioned by the Code and those that are outside its purview. No permission is implied nor is there any procedure noted for the granting of permission by some authority. To injure a person's reputation "lawfully" would mean that if such a reputation is injured as the result of a lawful exercise of power attached to the office held by that person, such action is permissible. This could include the

¹⁹⁴ Other scholars have begun to explore the limits of this right. See V. MARCOZZI, "Le droit à l'intimité propre dans le nouveau Code de droit canonique", Vie consacrée, 6(1985), pp. 370-379; G. LESAGE, "L'autonomie privée dans le droit de l'Église", Jus canonicum, 15(1975), pp. 181-194.

lawful exercise of administrative power or judicial power (for example, declaring a penalty or taking measures to avoid scandal). There are specific canons that outline the proper exercise of such power.

3. "Injure" is not well defined in the Code. It is simply mentioned and left to the person evaluating the situation to determine what such damage or injury would involve. No example of an injury is available from the parallel passages noted above. Nor is there any reference to the type or quantity of injury necessary for injury of a right. Likewise, there appears to be no limitation on the type of injury to the right contemplated under the law, or any indication that the damage must persist for a certain time or be of a certain magnitude. Furthermore, there is no standard in the law to determine what harm is done. Thus the scope of this term remains unclear. Jurisprudence will eventually help clarify some of these issues.

4. The "good reputation" envisioned here seems to relate to that which has historically been seen by the Church to be a basic human right available to all persons. The parallel references do not define a good reputation, but the historical examination of the term provides us with an idea that one does not have to earn a good reputation; rather, it is to be presumed to be a right of the person until, in some case, it is lawfully harmed. No distinctions are made between laity,

clergy, or religious in the area of reputation. No one is entitled to a better reputation than another.

5. The phrase "which a person enjoys" can be applied, again, to both physical and juridic persons. This phrase supports the idea that one is presumed to have a good reputation until it is proven otherwise.

6. The phrase "nor to violate the right of another person to protect his or her own privacy" may be related to the right to a good reputation since it is within the same canon, but the relationship is not spelled out. There are few parallel terms in the two phrases that are helpful in determining the relationship between the clauses. While the issue of protection of a good reputation, even when it is undeserved, is raised in one canon,¹⁹⁵ it not stated how this latter canon affects the interpretation of canon 220.

5. Situations where the right to a good reputation may be involved

The importance of a "good reputation" can be viewed within the context of the canons that establish the requirements for the appointment to an office. A good name or good reputation is considered in the following situations:

1. for a candidate to be admitted to the episcopacy;¹⁹⁶

¹⁹⁵ C. 1361, §3.

¹⁹⁶ C. 378, §1, 2°.

2. for a candidate to be admitted to ordination;¹⁹⁷
3. for the appointment of a person as a notary;¹⁹⁸
4. for the appointment of a person as a procurator or advocate;¹⁹⁹
5. for the removal of a parish priest from his office;²⁰⁰
6. it is also important in various judicial and administrative processes. The judge is admonished to protect it in the course of a trial and may restrict the publication of a portion of the acts in order to do so.²⁰¹ In the prior investigation and throughout a penal process the investigator is admonished to protect the good reputation of the person under investigation.²⁰²

A person who falsely provides information to a superior injuring another's good name is to be punished with a just penalty.²⁰³

It is conceivable, then, that any person whose reputation unlawfully suffers injury could have recourse to the legal system available under canon law. For example, such could

¹⁹⁷ C. 1029.

¹⁹⁸ C. 483, §2.

¹⁹⁹ Ibid.

²⁰⁰ C. 1741, §3.

²⁰¹ C. 1455, §3.

²⁰² C. 1455, §3.

²⁰³ C. 1361, §3.

arise between a bishop and one of his subjects. It could arise during an investigation of the suitability of a candidate for ordination or admission to religious life. It could also arise between a juridic person and a physical person. It might refer to a problem between two juridic persons. It could arise as the result of an administrative act or as the result of a judicial action. It could refer to members of the laity and the clergy who might have become embroiled in some controversy. It could involve an association of the faithful and a bishop, a penal process or a regular judicial process, an instrument of a juridic person or of an association of the faithful such as a newspaper or magazine, and some member of the faithful. The combinations of situations are bounded only by one's imagination.

Conclusion

Historically the Church has long demonstrated its concern for the protection of the good reputation of its members. It has demonstrated this concern through the application of ecclesiastical penalties. The reputation of the clergy has been of particular interest to the Church over the centuries. As a result of this fact, the penalties involving reputation had been almost exclusively focused on clerics, although the penalty mentioned in the 1917 code did not make any distinction between the reputation of the clergy and that of the laity.

Previous works regarding delicts of defamation have focused almost solely on their application within penal law.²⁰⁴ While some of the concepts that were part of the penal processes of the former code have relevance to the present processes, they cannot be applied without an understanding of the evolution of the entire concept of the right to reputation as distinct from any penalty applied for injury to reputation.

Vatican II highlighted the protection of reputation in a new way by recognizing it as a positive right. After much discussion about rights in general, the 1983 Code presented this positive right as one portion of canon 220. The development of the actual wording of the canon varied little over the years of preparation. Since the present code attempts to reflect the documents of the Council, this positive right must be viewed in a new light with additional tools for its safeguarding.

From our review of the parallel canons, it can be seen that there are still a number of unanswered questions. For instance, there are no standards within the canon itself regarding the types of harm to reputation that are envisioned, any presumptions underlying the canon, or regarding the parameters of any single individual right in relation to the common good of the faithful.

Hopefully the processes for vindication, which will be

²⁰⁴ C. 1390, §2 preserves that penal approach in the present law.

studied in Chapter II, will provide guidance and insight in these matters.

CHAPTER TWO

THE VINDICATION OF THE RIGHT TO ONE'S REPUTATION

The need to have ecclesiastical law outline a means to vindicate rights in the Church was well articulated in the sixth and seventh principles for the revision of the Code.¹

The sixth stated:

[...] The use of power in the Church must not be arbitrary, because that is prohibited by the natural law, by divine positive law, and by ecclesiastical law. The rights of each one of Christ's Faithful must be acknowledged and protected, both those which are contained in the natural and divine positive law and those derived from those laws because of the social condition which the faithful acquire and possess in the Church.²

The seventh principle was very clear about the need for realistic procedures for the vindication of rights in the Church. It stated:

The principle must be proclaimed in canon law that juridical protection applies equally to superiors and to subjects so that any suspicion or arbitrariness in ecclesiastical administration will entirely disappear. This end can only be achieved by avenues of recourse wisely provided by the law which allow a person who thinks his or her rights

¹ Communicationes, 1(1969), pp. 82-83.

² J. CORIDEN, "A Challenge: Make the Rights Real" (=CORIDEN), in The Jurist, 47(1985), p. 6.

were violated at a lower level to have them effectively restored at a higher level.³

One of the most important issues relating to the rights spelled in the Code is they can be vindicated.⁴ If they are simply presented without any adequate method of protection, they will atrophy and wither away. This is why the methods of vindication must be examined.

There are three basic methods available at this time to vindicate rights in the Church. The first, administrative recourse, is the most widely used since it involves recourse against the exercise of administrative power in ecclesiastical governance.⁵ The second, the judicial process, has historically been used primarily for the infliction of penalties or in cases concerning the status of persons. The third, involving conciliation, mediation, or arbitration, is a newer form and has come to be known as "due process" or "alternative dispute resolution" (ADR).

The three processes are referred to in the Code, although the detail in which they are treated differs greatly from one type to another. The purpose of this chapter, then, is to review these methods and their structure, and to examine the

³ Ibid.

⁴ J. BEAL, "Protecting the Rights of Lay Catholics" (=BEAL, Protecting Rights), The Jurist, 47(1987), p. 130. See J. ALESANDRO, "Law and Renewal: A Canon Lawyer's Analysis of the New Code", CLSA, Proceedings of the Forty-fourth Annual Convention, 45(1983), pp. 31, 33.

⁵ BEAL, Protecting Rights, p. 131.

manner in which they are to be applied to rights. How this happens will include a review of their standards of adjudication, an evaluation of their advantages and disadvantages, and an examination of their enforcement mechanisms.

I. AVAILABLE METHODS OF VINDICATION

A. Administrative Recourse

The norms concerning administrative recourse in the Code are contained in canons 1732-1739⁶ and provide for a review of the exercise of administrative authority.⁷ Of course, it must be recognized that in many instances a person's reputation was not violated by a person holding administrative power, but by someone else. In such cases administrative recourse would not be applicable. A person may have recourse

⁶ It is not my intention to deal with the specialized process involving the transfer and removal of parish priests that is contained in Book VII, Part V, Section II.

⁷ "Administrative authority is that aspect of the power of government which, within the limits of the law, promotes the public good by executing the laws and to some extent interpreting them, if necessary, by supplying for the law and completing it through various decrees and dispositions, by resolving controversies in a disciplinary as distinct from strictly judicial fashion, and by imposing certain penalties." T. Green in J. CORIDEN, T. GREEN, and D. HEINTSCHEL, eds., commissioned by the Canon Law Society of America, The Code of Canon Law - A Text and Commentary (=CLSA Commentary), Mahwah, N.J., Paulist Press, 1985, p. 1029.

against any decree, rescript, precept, privilege, dispensation, permission, and generally against any administrative act made by a church authority outside of judicial proceedings.⁸ A short summary of these procedures follows.⁹

1. Procedures at the first level

A person who feels unjustly injured by an administrative act of a Church official may seek redress from the author of the harmful action or that person's superior.¹⁰ The most common superior to whom recourse is addressed is the diocesan

⁸ See cc. 35-93. See J. BEAL, Confining and Structuring the Exercise of Administrative Discretion in the Particular Church: a Study of Adaptability of Certain Principles of American Administrative Law to the Exercise of Administrative Discretion by Diocesan Bishops, Washington, D.C., Catholic University of America, 1984, vi, 665p., for a complete treatment of the issues concerning the exercise of administrative discretion within the confines of administrative actions in the Church. It is our contention that confining and structuring administrative discretion in ways similar to those provided by American administrative law could help avoid difficulties that would result in the necessity to use this process.

⁹ See P. HUIZING, "The Administration of Justice in the Church", Concilium, 4(8/1968), pp. 69-74. F. McMANUS, "Administrative Procedure", The Jurist, 32(1972), pp. 417-438; F. MORRISEY, "The Procedural and Administrative Reforms of the Post-Conciliar Church", Concilium, 107(7/1977), pp. 77-87. D. STAFFA, "Dissertationes de administratione iustitiae in Ecclesia", Periodica, 61(1972), pp. 3-29.

¹⁰ CLSA commentary, p. 1032.

bishop¹¹ who, once the injured party has petitioned against the decree and no equitable solution has been found,¹² has eight courses of action open to him within thirty days of receiving the petition. He may:

1. revoke the decree;
2. amend it;
3. confirm it;
4. declare it invalid;
5. abrogate it;
6. substitute another in its place;
7. rescind it;¹³ or
8. not respond to the petition; this will be taken as a negative reply to the action requested by the petitioner.¹⁴

Once the period for response to the petition has passed or from the time any of the other actions listed above is

¹¹ C. 1734, §1 and §2. For a general review of the processes involving a situation where the recourse is based on an original action by a diocesan bishop see, J. HUELS, "The Correction and Punishment of a Diocesan Bishop", The Jurist, 49(1989), pp. 507-542.

¹² C. 1733, §1. The remainder of the canon provides for the establishment of other methods of dispute resolution if the Conference of Bishops so desires to provide for this. In the United States the NCCB issued its document entitled On Due Process in 1972 after approval was obtained from the Holy See for its promulgation. This document makes it optional for each diocese to establish an office of conciliation and arbitration as envisioned in c. 1733, §2 and §3. This canon also makes it clear that the Conference of Bishops can mandate the creation of such offices in every diocese under its authority.

¹³ C. 1739.

¹⁴ C. 57 §2.

communicated to the petitioner, the time for recourse against that decision begins to toll. The petitioner has fifteen available days in which to seek recourse against that decision.¹⁵

2. Recourse beyond the first level¹⁶

Appeal against a decision of a diocesan bishop or another superior may be made to the competent dicastery of the Roman Curia.¹⁷ When a petition is thus presented, it is reviewed to determine whether there has indeed been an unlawful exercise of administrative power. Once this decision is made, the

¹⁵ C. 1737 §2.

¹⁶ It is sometimes asked whether the Second Section of the Apostolic Signatura exercises administrative or judicial power. It is beyond the scope of this work to attempt to determine what type of power is being exercised when a recourse is presented under the norms to be outlined below. For an examination of this issue see K. MATTHEWS, "The Development and Future of the Administrative Tribunal" (=MATTHEWS), Studia Canonica, 18(1984), pp. 135-137.

¹⁷ The concept of administrative tribunals has been presented as an additional alternative to administrative recourse. The schema on processes originally submitted to the Pope for his approval contained canons requiring the establishment of administrative tribunals, but these were not part of the Code when it was promulgated for the Church in 1983. See Z. GROCHOLEWSKI, "I tribunali regionali amministrativi nella Chiesa", De iustitia administrativa in Ecclesia - La giustizia amministrativa nella Chiesa, Romae, Officium Libri Catholici, 1984, pp. 135-165; I. GORDON, "De iustitia administrativa ecclesiastica", Periodica, 61(1972), pp. 251-378 for a look at the earlier schema on administrative tribunals. See also Z. GROCHOLEWSKI, "Atti e ricorsi amministrativi", Apollinaris, 57(1984), p. 259; Z. GROCHOLEWSKI, "Giustizia amministrativa nel nuovo Codice di diritto canonico", Angelicum, 63(1986), pp. 333-355.

parties have thirty continuous days to lodge further appeal to the Apostolic Signatura.¹⁸

Recourse from this decision may be presented to the Second Section of the Apostolic Signatura if the matter falls under its competence¹⁹ as set out in article 123 of Pastor Bonus:²⁰

Article 123 - 1. Furthermore, it examines recourses, put forward within a peremptory time limit of thirty working days, either against singular acts of administration from one of the Dicasteries of the Roman Curia or decisions approved by them, whenever it is contended that a law has been violated either in application or in procedure.

2. In these matters, in addition to determining illegitimacy, it may also determine, if the person so requests, the reparation of damages incurred by an illegitimate act.

¹⁸ MATTHEWS, p. 138.

¹⁹ See PAUL VI, Apostolic Constitution "Regimini Ecclesiae Universae", August 15, 1967, AAS, 59(1967), pp. 885-928.

²⁰ "Art. 123 - 1. Praeterea cognoscit de recursibus, intra terminum peremptorium triginta dierum utilium interpositis, adversus actus administrativos singulares sive a Dicasteriis Curiae Romanae latos sive ab ipsis probatos, quoties contendatur num actus impugnatus legem aliquam in decernendo vel in procedendo violaverit. 2. In his casibus praeter iudicium de illegitimitate, cognoscere etiam potest, si recurrens id postulet, de reparatione damnorum actu illegitimo illatorum. 3. Cognoscit etiam de aliis controversiis administrativis, quae a Romano Pontifice vel a Romanae Curiae Dicasteriis ipsi deferantur necnon de conflictibus competentiae inter eadem Dicasteria", JOHN PAUL II, Apostolic Constitution, Pastor Bonus, June 28, 1988, AAS, 80(1988), pp. 891-892. For an evaluation and summary of this document see J. PROVOST, "Pastor Bonus: Reflections on the Reorganization of the Roman Curia" (=PROVOST, Pastor Bonus), The Jurist, 48(1988), pp. 499-535.

3. Moreover it can examine any other administrative controversies, which have been brought to it by the Roman Pontiff or decisions of the Dicasteries of the Roman Curia concerning conflicts of competence between these same dicasteries.²¹

It is still somewhat unclear at this point whether this new statement of competence of the Apostolic Signatura has changed the limits of its power in any real way. The most significant difference between Regimini Ecclesiae and Pastor Bonus is found in paragraph two of the latter document. The Second Section may now determine if reparation is to be awarded for damages caused by illegitimate administrative acts. To the best of our knowledge there have been no published comments concerning this prerogative either suggesting it has changed the competence of this section of the Apostolic Signatura, or that it has remained practically the same.

There are many aspects to the procedures used by the Second Section. The basic steps in the process are:

(1) introduction of the case -- this involves specific

²¹ Ibid. This section indicates that the Apostolic Signatura is an "[....] administrative tribunal of recourse against singular administrative acts by dicasteries or approved by them; [and for] other administrative controversies referred to it by the pope or dicasteries [... and that it] resolves conflicts of competence between dicasteries", PROVOST, Pastor Bonus, p. 532.

requirements for the petitioner's submission asking for recourse;²²

(2) admission or rejection of the recourse -- notification of all interested parties is made by the Secretary of the Apostolic Signatura and they are given thirty days to respond with relevant acts and documentation. The parties and, later, the promoter of justice,²³ may respond to this initial evidence. Once all the procedural requirements have been completed, the Congresso will meet to determine whether the petition for recourse will be admitted;²⁴

²² These specifics include the "[...] name, domicile or place of residence of the one having recourse, or the title by which one person represents another [...] the administrative act or decree in question and the date the notification was received, [...] a summary exposition of the facts, the grounds on which the recourse rests, the laws reputedly violated and conclusions, [...] the signature of the party having recourse or of the advocate with special mandate. Without this signature, the recourse is considered invalid; likewise, if the one having recourse or the object of the recourse are not certain. It is the task of the Secretary to assure that the recourse is not null [...]", MATTHEWS, p. 138.

²³ See J. MESZAROS, The Present and Possible Functions of the Promoter of Justice in Administrative Procedures of the Church, Romae, Officium libri catholici, 1980, pp. 64-80, for a treatment of the possible role of the promoter of justice in administrative procedures.

²⁴ MATTHEWS, pp. 138-139. If the petition for recourse is rejected, it is because there are clear problems with it such as: "[...it] could be 1) null, when one of the essential requisites for recourse is missing, 2) unacceptable, because [it was] lodged outside previously accepted time limits, or because the act itself is not subject to this process, or 3) it may manifestly lack foundation in law. Recourse against rejection is made to the judging college and there is no remedy against their decision", MATTHEWS, p. 139.

(3) judgment on the recourse -- those considering the recourse may do as they see fit to ensure a just result including seeking the opinion of experts, gathering further evidence and extending time limits as required.²⁵

B. Judicial Process

The judicial process for the Church is outlined in canons 1400-1752. There are three distinct procedures involved in these canons as they apply to the vindication of rights: the ordinary contentious procedure,²⁶ the oral contentious procedure,²⁷ and the penal procedure.²⁸ Any one of these procedures might be used in a given case involving the vindication of a person's right to a good reputation.²⁹ In this section, we shall consider the general thrust of the ordinary contentious procedure, then note the elements of the oral contentious and penal procedures that set them apart from the ordinary one.

²⁵ MATTHEWS, p. 139.

²⁶ Cc. 1501-1655.

²⁷ Cc. 1656-1670.

²⁸ Cc. 1713-1731.

²⁹ S. WOYWOD, A Practical Commentary of the Code of Canon Law, 2 vols., third edition, New York, Joseph F. Wagner, 1929, vol. II, p. 327. This look at the practical processes available under the 1917 Code indicates that a criminal procedure could be implemented in cases involving defamation. Woywod views this type of case as a "private matter" except where the protection of the public good demands action on the part of the promoter of justice.

1. The ordinary contentious procedure

Not too much has been written about the ordinary contentious process³⁰ since 1983, except in regard to its applicability to marriage nullity procedures. It was originally envisioned that it would be used by administrative tribunals in their adjudication of rights cases, but since that structure was eliminated from the Code, the same tribunals that deal with marriage cases, separation issues, and other juridic matters are left to deal with rights cases as well. This section will review the basic steps in this procedure, and any variations in rights cases will be compared

³⁰ B. FRANCK, Vers un nouveau droit canonique? Présentation, commentaire et critique du Code de droit canonique de l'Eglise catholique latine révisé à la lumière de Vatican II (=FRANCK), Paris, Editions du Cerf, 1983, 300p; T. GREEN, "The Revision of the Procedural Law Schema: Implications for Tribunal Practice", The Jurist, 40(1980), pp. 349-383. This article is primarily concerned with the procedural matters most useful to those in marriage nullity cases. For a comparison of the canons regarding the contentious process in the 1917 and 1983 Codes see W. O'CONNELL, "Il processo contenzioso" (=O'CONNELL), Apollinaris, 57(1984), pp. 223-246. See also CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, Report on the Schema Canonum de Modo procedendi pro tutela iurium seu de processibus, London, The Canon Law Society of Great Britain and Ireland, 1977, 21p., for a view of the 1977 Schema of this book along with this Society's suggestions for changes in that draft; T. GREEN, "The Revision of Canon Law - Theological Implications", Theological Studies, 40(1979), pp. 617-652; T. GREEN, "Revision of the Code: The First Decade" (=GREEN, First Decade), The Jurist, 36(1976), pp. 353-441; T. GREEN, "The Revised Code of Canon Law", Theological Studies, 47(1986), pp. 593-679 provide a general overview of the manner in which this schema was developed.

to this ordinary method of adjudicating cases.

The object of a judicial trial is very clearly stated: "(1) to prosecute or to vindicate the rights of physical or juridic persons, or to declare juridic facts; (2) to impose or declare the penalty for offenses."³¹ The second section of the canon restricts this object: "controversies which have arisen from an act of administrative power can be brought only before the superior or administrative tribunal." Thus, vindication of rights falls firmly in the area of judicial action except for those cases emanating from an act of administrative power. To initiate an action to vindicate a right a party must present a libellus to the competent court for adjudication.³²

The next matter to be determined is whether a specific judge or tribunal is indeed competent to hear a given case. Canons 1401, 1404-1416 delineate the various fora that could entertain a vindication of rights libellus. The options are many. It can be at the tribunal of the domicile, quasi-domicile,³³ or in some situations the place of actual residence³⁴ of the respondent. If no other lawful forum is

³¹ C. 1400, §1.

³² Cc. 1501-1504. Once a petition is presented, it must be accepted or rejected within thirty days of its submission or it is automatically deemed accepted. c. 1506. The reasons for the rejection of a petition are listed in c. 1505, §2.

³³ C. 1408.

³⁴ C. 1409, §1.

available it may be instituted in the tribunal of the plaintiff's place of domicile or residence.³⁵ The matter may also be brought to the court where the obligation -- in this case the obligation to respect the good reputation of another -- arose.³⁶ The local first instance court would generally be the appropriate forum for the filing of the initial libellus in most cases involving injury to reputation.³⁷ Persons may, however, bring a suit before the Holy See, in this case the Roman Rota, if they prefer to do so rather than submitting their contentious matter to a local court for adjudication.³⁸

The usual procedures for appointment of a court to investigate the matter are to be followed.³⁹ In either a public or private matter involving an allegation of harm to reputation, a single clerical judge may be appointed to hear the matter.⁴⁰ He may employ the services assessors in such

³⁵ C. 1409, §2.

³⁶ C. 1411.

³⁷ One exception would be those cases listed in c. 1405, §1 and §3.

³⁸ C. 1417, §1. This action may also be carried out at any stage of the proceedings regardless of the fact that the case has already been introduced in a lower court of first instance. The jurisdiction of the judge is not suspended except in cases of appeal. A judge may proceed to a definitive judgment, in any but an appeal case, unless instructed otherwise by the Apostolic See; c. 1417, §2.

³⁹ Cc. 1419-1422.

⁴⁰ Cc. 1424-1425.

cases.⁴¹ The parties may use advocates or procurators⁴² as they would in any contentious matter. The judge may appoint, ex officio, an advocate for a person who lacks one if he feels it is appropriate.⁴³ A notary must be appointed in each case.⁴⁴

The need for the appointment of a promoter of justice in a rights case will depend on whether the public good is at stake or not. Some cases alleging harm to reputation will require a promoter of justice as the public good may be involved. The diocesan bishop is to determine whether such is the case unless the intervention of the promoter of justice is already required by law.⁴⁵ If the matter is well known in the Church community and involves two or more persons who hold offices in the Church, the bishop may determine that it is necessary to protect the public good formally through the appointment of a promoter of justice. Each individual fact situation would have to be analyzed to determine if protection of the public good is necessary. Once a promoter is appointed, the office must be filled at all subsequent levels involving

⁴¹ C. 1424.

⁴² Cc. 1481-1486.

⁴³ C. 1481, §1 and §3. See also cc. 1478-1479.

⁴⁴ C. 1437.

⁴⁵ C. 1431, §1.

the case.⁴⁶

When the Court has been properly appointed, the investigation may go forward. If it has been determined that the matter is private in nature, the judge may proceed at the request of one of the parties.⁴⁷ Otherwise he is to proceed on his own initiative.⁴⁸ He is to cite the other party or parties⁴⁹ and proceed to join the issues as required by law.⁵⁰

The parties are then to present the proofs they wish considered by the Court in determining the outcome of the case.⁵¹ The person presenting the initial libellus has the burden of proving the allegations against the other party.⁵² In a case involving an allegation of harm to reputation, the petitioner must prove (1) that the act by which the alleged harm was done was propounded by the respondent; and (2) that this resulted in an injury to reputation on the part of the petitioner. These proofs may include the declarations of the parties,⁵³ testimony by witnesses,⁵⁴ evaluations of experts,⁵⁵

⁴⁶ C. 1431, §2.

⁴⁷ C. 1452, §1.

⁴⁸ Ibid.

⁴⁹ Cc. 1507-1512.

⁵⁰ Cc. 1513-1516.

⁵¹ C. 1516.

⁵² C. 1526, §1.

⁵³ Cc. 1530-1538.

documents,⁵⁶ or other pertinent information deemed relevant by the Court. A respondent who initiates a counterclaim or defense alleging an exception has the burden of proof of those allegations.⁵⁷

Once the proofs have been gathered and the parties have had an opportunity to review the acts⁵⁸ and present their briefs and observations on this matter,⁵⁹ the judge or panel of judges is to discuss the evidence and render a sentence as required by law.⁶⁰ This sentence must be based on the moral certitude of the judge(s) derived from the evidence in the case,⁶¹ and is to be published to the parties.⁶²

The remedies available to a judge in such a proceeding are many. He can assess fault on the part of one party or on the part of both. He may require an apology in public or in private.⁶³ He may assess money damages if required to repair

⁵⁴ Cc. 1547-1573.

⁵⁵ Cc. 1574-1581.

⁵⁶ Cc. 1539-1546.

⁵⁷ C. 1526.

⁵⁸ C. 1598.

⁵⁹ Cc. 1601-1603.

⁶⁰ Cc. 1610-1613.

⁶¹ C. 1608.

⁶² C. 1615.

⁶³ See P. LOPEZ-GALLO, "Case of Rights and Defamation", *The Jurist*, 49(1989), pp. 286-302.

the harm done. He may even require that a certain type of publication occur if the matter involved a writing that was widely disseminated. He may determine if it is appropriate to begin a penal procedure should the situation warrant such a step. He may require good works to be done to make amends for the damage done. He is free to fashion a specific remedy to fit the situation and the particular parties involved. As always in such cases, justice and equity⁶⁴ are to be the most important considerations of the judge in weighing the evidence presented to the Court and in handing down a decision.

Once a decision is made in first instance, the parties may appeal it within fifteen available days of the notification of the publication of the judgment.⁶⁵ The parties may appeal directly to the Roman Rota at any point. Otherwise, if appealed, the case is submitted to the appropriate second instance tribunal. While it is being considered by this second court, the execution of the judgment is suspended.⁶⁶ The second instance court is bound to determine whether the decision of the lower court is to be confirmed or reformed, either in whole or in part.⁶⁷

⁶⁴ See M. AMEN, "Canonical Equity Before the Law", The Jurist, 33(1973), pp. 1-24, 256-295.

⁶⁵ C. 1630 §1.

⁶⁶ C. 1638.

⁶⁷ C. 1639, §1.

2. The oral contentious procedure

The oral contentious procedure differs from the ordinary procedure because of the format used.⁶⁸ It is available for the adjudication of rights cases as these are not specifically excluded.⁶⁹ It is designed to shorten the time necessary to handle some judicial matters, yet it retains many of the features of the ordinary contentious procedure including

[....] contestatio, action, exception, proofs, publication, discussion and reasoned sentence. All formalities, unnecessary delays and many written forms are omitted. The heart of the process is the hearing, which proposes to meet three needs: the gathering of the proofs (questioning of parties and witnesses and examination of documents), the publicizing of the proofs, which are gathered in the presence of the parties and their advocates, thereby precluding the need for a formal publication, and the oral discussion of the case by the advocates before the judge.⁷⁰

The norms that are followed throughout the procedure, in keeping with its title, emphasize the oral accumulation of the evidence, rather than its compilation in written form. The initial libellus requires a clear statement of the facts on which the complaint is based along with the submission of any evidence immediately available in documentary form.⁷¹ It also

⁶⁸ GREEN, First Decade, p. 435. See O'CONNELL, pp. 244-246.

⁶⁹ Cases involving validity of marriage, imposition of penalties and the validity of sacred ordination are specifically excluded; cc. 1690, 1710, 1728.

⁷⁰ GREEN, First Decade, p. 435.

⁷¹ C. 1658, §1, 1° and 2°. O'CONNELL, pp. 244-245.

requires that the petitioner indicate those facts deemed necessary to prove the case so the judge may immediately proceed to the gathering of evidence.⁷² Furthermore, there is provision for seeking mediation, and it is indicated that if an attempt at a resolution of the conflict has proven fruitless, but the judge deems the libellus has some foundation, he is to order by decree that a copy of the libellus be notified to the respondent⁷³ who has fifteen days to reply to this complaint.⁷⁴ If the answer presented by the respondent requires it, the judge is to assign the plaintiff time to reply.⁷⁵ Once this information is assembled, the judge is to join the issue and summon the parties and their advocates to a hearing.⁷⁶

The heart of the procedure centers on this hearing where the proofs are gathered. The procedures are conducted in an oral format. Matters covered in cc. 1459-1464 must be dealt with prior to the gathering of information involving the libellus.⁷⁷ The parties and their advocates may assist at the

⁷² C. 1658, §1, 2°.

⁷³ C. 1659, §1. O'CONNELL, p. 245.

⁷⁴ Ibid. Section two of this canon indicates that this notification is the equivalent of a judicial summons.

⁷⁵ C. 1660.

⁷⁶ C. 1661, §1. According to c. 1661, §2 the parties may submit a short written statement to the tribunal at least three days before the hearing.

⁷⁷ C. 1662.

interrogations unless the judge determines otherwise.⁷⁸ The replies of all those who present evidence are to be written down in summary fashion "[...] restricting the record to those things which bear on the substance of the controversy [...]." ⁷⁹ Once the procedure has begun the judge may admit additional evidence only in accordance with canon 1600.⁸⁰ When the evidence has been collected, a discussion is to ensue on the issues to be adjudicated.⁸¹ This may involve the parties, their advocates, assessors, and the promoter of justice if one is involved in the matter. A decision is to be given as quickly as possible and is not to be deferred for more than five canonical days unless for good cause.⁸² The full text of the decision, including the reasons for it, is to be published to the parties within fifteen days.⁸³

After the completion of this procedure, either party may appeal the decision to the appropriate court of second instance, and then to the Roman Rota if desired.

⁷⁸ C. 1663, §2. O'CONNELL, p. 245.

⁷⁹ C. 1664.

⁸⁰ C. 1665.

⁸¹ C. 1667.

⁸² C. 1668, §1 and §2. O'CONNELL, p. 245.

⁸³ C. 1668, §3.

3. The penal procedure⁸⁴

This penal procedure would be used very rarely in an attempt to vindicate rights because penalties are frowned upon by the Code⁸⁵ and because invoking this procedure requires a determination that some type of penalty will have to be enforced to achieve the result necessary for justice in the case. A penalty must be the only way to remedy the situation and no other type of action to restore the injury is available. This type of process specifically excludes use of the oral contentious procedure.

Initially, the Ordinary may inquire into a matter that might require the application of this process without any formal convocation of the procedure itself.⁸⁶ Once the decision is made, though, to seek penalties in the formal sense, the Ordinary may either invoke a formal judicial procedure or proceed by administrative decree without a

⁸⁴ C. 1390 §2 and §3 refer specifically to imposition of a penalty for those who commit calumny. The penalties described here could obviously be used when the delict of calumny has been committed, it would seem that it need not be the only method of handling an injury to the right to reputation. Like all penalties, it would be used only as a last resort and after the application of the penal procedure. The specific standards to inflict such a penalty are contained in a variety of Rotal decisions. The third portion of the canon addresses the need for reparation. It does not mention a specific process to achieve such reparation.

⁸⁵ C. 1341.

⁸⁶ C. 1717.

trial.⁸⁷ In the judicial procedure, the accused can be cited before the tribunal of the place where the offense was perpetrated, even if the accused is absent. These types of cases are sometimes reserved to a panel of three judges.⁸⁸ Because this matter involves the public good, a promoter of justice is required to be appointed by the diocesan bishop.⁸⁹ The accused is also to have a personally selected advocate or one appointed by the judge.⁹⁰ Once a court is constituted, the judge may proceed with the matter without the request of a party.⁹¹ The other procedures to be followed in a contentious trial apply in a formal penal trial.

An injured party may present an action for damages sustained as part of a penal procedure.⁹² If a penal sentence becomes a res judicata, it does not establish by that very fact the right of the injured party to receive reparation.⁹³ The penal action and the action for reparation are to be considered separate in regard to their adjudication and to the

⁸⁷ C. 1720.

⁸⁸ C. 1425, §1.

⁸⁹ C. 1431.

⁹⁰ C. 1481, §1 and §2.

⁹¹ C. 1452, §1. This "party" may also be the promoter of justice.

⁹² C. 1729, §1.

⁹³ C. 1731.

rights of the parties to appeal through regular channels any decision made on either matter.⁹⁴

C. Alternative Dispute Resolution (ADR)

Canon 1341 is explicit in its admonition that neither a judicial nor an administrative process is to be pursued if an alternative method is available to repair scandal, restore justice, and reform the accused. Canon 1446 makes clear that it is the duty of all Christ's faithful, but particularly of the Bishop and the judge in specific cases, to seek a solution to disputes through mediation⁹⁵ or arbitration⁹⁶ as the situation warrants. These requirements certainly establish that all available means of settlement are to be used to achieve the goals embodied in the canon before other official avenues are pursued. The canons give examples of the type of action that might be employed to avoid such processes including "fraternal correction, rebuke and other ways of pastoral care",⁹⁷ as well as mediation and arbitration under canons 1713-1716.⁹⁸

⁹⁴ CLSA commentary, p. 1028.

⁹⁵ C. 1446, §2.

⁹⁶ C. 1446, §3.

⁹⁷ C. 1341.

⁹⁸ C. 1446.

This canon may be observed in situations involving rights as a penalty may be applied if the situation warrants it.⁹⁹ In those cases not involving the imposition of a penalty, this canon can probably be applied by analogy.¹⁰⁰ Besides the actions listed in the canon, ecclesiastical superiors in the United States have at their disposal procedures for arbitration and conciliation (mediation) promulgated by the National Conference of Catholic Bishops (NCCB) with the approval of the Holy See.¹⁰¹ A new draft of norms for such procedures has recently been approved by the Canon Law Society of America which was the originator of the original document eventually promulgated by the NCCB.¹⁰² This second document has not yet been presented to the Bishops' conference for consideration.

The most extensive set of norms available on alternative methods of resolving disputes in the Church applies in the

⁹⁹ C. 1390.

¹⁰⁰ C. 17.

¹⁰¹ NATIONAL CONFERENCE OF CATHOLIC BISHOPS (NCCB), On Due Process (=Due Process), Washington, D.C., USCC, 1972, pp. 1-48.

¹⁰² CANON LAW SOCIETY OF AMERICA, Protection of Rights of Persons in the Church - Revised Report of the Canon Law Society of America on the Subject of Due Process (=CLSA, Protection of Rights), Washington, D.C., Canon Law Society of America, 1991, pp. iii-48.

United States.¹⁰³ Because of the information available concerning this process and its detail, we have thus chosen to focus exclusively on alternative dispute resolution in this country.

The document On Due Process presently in force is not mandatory in all dioceses in the United States. It is applicable only to those cases involving vindication of rights which are initiated against the exercise of administrative authority in the Church.¹⁰⁴ The document's primary function is to provide a set of procedures for the settlement of disputes within the Church without having recourse to tribunal procedure. The value of this form of settlement is that it is viewed as biblically based and preferable to engaging in the

¹⁰³ BEAL, Protection of Rights, pp. 129-164. MATTHEWS, pp. 55-94; this study provides a global view of the history of alternative dispute resolution along with a general outline of the types of procedures that are used in such cases; H. HEIMERL, "Arbitration and Reconciliation in the Church", Concilium, 107(7/1977), pp. 69-76; this article reviews a variety of methods of reconciliation of disputes in summary fashion; I. HERMANN, "Conflicts and Conflict Resolution in the Church", Concilium, 8(3/1972), pp. 107-118 provides a review of the sociological aspects of conflict and their application to the Church; K. MCKONE, "Ecclesiasticus 'ombudsman' tamquam conciliator", Periodica, 67(1978), pp. 737-739; P. VALDRINI, "Recours et conciliation dans les controverses avec les supérieurs", L'Année canonique, 28(1984), pp. 83-89, an excellent look at canons 1732-1739 on arbitration in the Code; P. WESEMANN, "Fora arbitrii conciliationis et tribunalia administrativa in Germania", Monitor ecclesiasticus, 100(1975), pp. 189-194. CANON LAW SOCIETY OF AUSTRALIA AND NEW ZEALAND, Resolutions of Disputes in the Church, 16(1982), pp. 108-124; this document delineates suggested procedures for mediation and arbitration in Australia and New Zealand.

¹⁰⁴ Due Process, p. 13.

more formal procedures available for the settlement of such conflicts.¹⁰⁵

1. Conciliation

Conciliation is not mentioned specifically in the Code. References to such a process are implied, but are not specific except when the law deals with arbitration.¹⁰⁶

Conciliation is the biblically based process embodied in the On Due Process document to allow the parties to a dispute, with the help of a conciliator, to attempt to resolve the dispute themselves. The document presents five basic elements essential to any process for conciliation:

1. Each participant must have the opportunity of a face-to-face dialogue with the person with whom [s/]he is in conflict. To be treated as a human person is to be given not only a hearing, but a response. There is no substitute for the dialogue of persons.

2. Unmediated dialogue may become debate; each participant, therefore, must have the opportunity of stating [her]/his side of the conflict to a conciliator who will attempt to lead the participants to be reconciled with one another. The conciliator should be informed of the facts and feelings of each participant so that [s/]he may understand what each participant believes to be "the real reason" for the dispute.

3. Dialogue and mediation will fail if either side is convinced that abstract principles such as "the right of conscience" or "the rights of authority" be vindicated at any cost. There are few imperatives of conscience that make only one course of action

¹⁰⁵ Ibid.

¹⁰⁶ C. 1713.

mandatory, and few rights of authority which can be asserted in only one specific way.

4. Delay and concealment of relevant information have no place in a process of conciliation. Wounds should be healed quickly. Persons should not be left in suspense about their status for protracted periods. The candor of brothers [and sisters], not the paternalistic assumption that the truth cannot be borne, must characterize exchange designed to heal.

5. The obligation rests with each person in authority or guided by authority to teach by his [or her] example that [s/]he belongs to a religion whose essence is love.¹⁰⁷

The process designed to meet the criteria listed above is included in the appendix to the same document. The steps for establishment of a process of conciliation, and the process itself are as follows.

1. Establishment of a conciliation council composed of two persons appointed by the diocesan bishop; two persons elected by the Presbyteral Council, or if there is no such body, by all the priests of the diocese; and one person elected by the faculty of the Catholic college of the diocese.¹⁰⁸ These persons shall serve in office for terms of

¹⁰⁷ Due Process, pp. 14-15.

¹⁰⁸ Due Process, pp. 18-19. Should there be more than one Catholic college in the diocese, the colleges, in alphabetical order, will rotate the election. If there is no Catholic college, then the Presbyteral Council shall elect three persons, or if there is no such body, all the clergy of the diocese shall elect three persons. In CLSA, Protection of Rights, the members of the Conciliation Panel are all to be appointed by the diocesan bishop for three year terms. They are to meet semi-annually, maintain an active list of available conciliators, and review each petition for intervention that the conciliation clerk has determined should

three years.¹⁰⁹ The council members elect their own chairperson, secretary, and treasurer.¹¹⁰ The council's expenses are to be borne by the diocese.¹¹¹ The establishment of the council along with its methods of operation are to be announced to the faithful by the Ordinary.¹¹²

2. Any person in conflict with another person or group who exercises administrative authority within the diocese may have recourse to the council for conciliation.¹¹³

be dismissed as an unallowable dispute.

¹⁰⁹ An exception is made regarding the terms of office of the initial members in no. 3 of the guidelines. Due Process, p. 19.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid. In contrast to this general statement provided for in the NCCB document, the CLSA Protection of Rights document is far more specific in its restrictions on the jurisdiction over disputes to be submitted to conciliation. It states:

"Section 1 - Allowable and Non-Allowable Disputes.

1. The kinds of disputes that are allowable:

a. disputes between a person and a parochial or diocesan administrator or administrative body within the diocese where it is contended that an act or decision (including administrative sanctions and disciplinary actions) has violated a right recognized as such in the law of the Church or in the documents of the magisterium.

b. disputes between a person and a parochial or diocesan administrator or administrative body within the diocese where it is contended that failure to act or failure to make a decision has violated a right recognized as such in the law of the Church or in the documents of the magisterium.

2. The following are not subject to settlement under this procedure:

a. canonical criminal cases in the strict sense (not administrative sanctions and disciplinary actions);

3. The person initially perceiving the conflict is to present a statement to any member of the council for conciliation.¹¹⁴ The council member is to elicit sufficient information to determine who are the parties to the conflict.¹¹⁵ The council member is then to contact the person

b. non-criminal matters where there is a question of validity of marriage or holy orders;

c. non-criminal matters that are specifically reserved by canon law to other processes within the structure of the Church (e.g. transfer and removal of pastors [cc. 1740-1752]);

d. disputes involving religious in their strictly internal affairs; and

e. spiritual matters whenever a claim is made that requires payment."

¹¹⁴ See CLSA, Protection of Rights, p. 12 for a different development of the initial operation of the conciliation panel. In this latter document, a conciliation clerk is the person charged with the receipt of the petition for action, for determining the allowability of the matter presented, and the responsibility of contacting the person exercising administrative power. The panel is to oversee the operation of the office.

¹¹⁵ Due Process, p. 20. See CLSA, Protection of Rights, pp. 14-15 for a different procedure in selecting the conciliator and resolving the dispute submitted to conciliation. In this section the conciliation clerk is to assist the parties in agreeing on the conciliator. The conciliator has fifteen days from the date she or he is chosen to schedule a meeting with the parties. Every effort is to be made to resolve the matter within thirty days of this first meeting and the time period should not extend beyond forty-five days from this first meeting. No mention is made regarding the parties and any finding of good faith or bad faith. Should the dispute be resolved, the conciliator is to file a memorandum to that effect detailing the nature of the resolution. If the dispute is not resolved within that time frame the conciliator is to file a report indicating the reasons no resolution has come forth and the parties' intentions regarding the continuation of conciliation or agreement to enter arbitration.

exercising administrative authority indicating that there is a problem with another person.¹¹⁶ This member is then to ask if the person exercising authority will submit to conciliation with a person mutually agreed upon by both persons in conflict.¹¹⁷ The person exercising administrative authority has two weeks to reply to the initial invitation to conciliation.¹¹⁸ Should she or he fail to respond in a timely fashion, the chairperson of the council is to endeavor to persuade that person to submit to conciliation.¹¹⁹ If, within four weeks she or he has not agreed to conciliation, the matter is to be referred to the Ordinary so that he may attempt to persuade the person to agree to work with the council.¹²⁰ Special provisions are made in this process when the person exercising administrative authority is the diocesan bishop himself.¹²¹

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Due Process, pp. 20-21 indicates that if the matter is to involve the Bishop, he is first to be approached to submit to conciliation. If he does not do so within the time limits allowed, the chairperson of the council is to refer the matter to the Chairman of the Bishop's Committee on Arbitration and Mediation (this committee has been subsumed into the Bishop's committee on Canonical Affairs in the United States) who is to endeavor to persuade the bishop to submit to a conciliation process. See CLSA, Protection of Rights, pp. 12-15, as no specific mention is made regarding the involvement of the

4. The process, once agreed to by the participants, consists of a series of meetings between them and the conciliator.¹²² The initial meeting is to be between the conciliator and the participants alone.¹²³ Subsequent meetings may involve other persons as advisors as long as the other party may also involve the same number of advisors at that time.¹²⁴ All meetings are to be held without any publicity and are to be private and confidential in nature.¹²⁵ Should the parties arrive at a resolution of their conflict, the conciliator is empowered to reduce this agreement to writing in summary fashion.¹²⁶ If, after six months and despite their good faith effort, the parties are unable to resolve their conflict, the conciliator is to offer them the opportunity to continue the process, or to arrange for the appointment of a

diocesan bishop in these proceedings. It appears that the bishop is to be treated as any other superior.

¹²² Due Process, pp. 21-22.

¹²³ Due Process, p. 21.

¹²⁴ Due Process, p. 22. See CLSA, Protection of Rights, p. 14, which notes that a party may not be represented by a civil lawyer in conciliation matters. The same guidelines also empower the conciliator or conciliation panel to determine whether to proceed with the process if the issue being negotiated is introduced in civil court. If information is pending in a civil court on a matter that is presented in a petition for conciliation, the conciliation panel will determine whether to accept such a petition.

¹²⁵ Due Process, p. 23.

¹²⁶ Due Process, p. 22.

new conciliator.¹²⁷ If one or both of the parties prefers to cease the efforts, the conciliator is to file a memorandum indicating the facts together with the final disposition.¹²⁸ A conciliator who determines that one or both of the parties is coming to conciliation in bad faith, is to notify the Ordinary of this fact and he, in turn, is to attempt to persuade the party or parties to resume the process in good faith.¹²⁹

2. Arbitration

Arbitration is a method of resolution of disputes specifically referred to in the Code.¹³⁰ Limitations on the use of this method of dispute resolution include its exclusion for matters involving the public good and other matters where the parties are not free to make such arrangements.¹³¹ In a dispute involving the vindication of rights, this method may

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid. These procedures indicate that the conciliator is to contact the Chairman of the Bishop's Committee on Arbitration and Mediation if the person acting in bad faith is a bishop who has consented to conciliation.

¹³⁰ Cc. 1713-1716.

¹³¹ C. 1715, §1. See CLSA, Protection of Rights, pp. 16-17, which indicates which disputes are allowable and which are non-allowable. These are the same categories as disputes treated under conciliation in the same document.

be properly used except when it has been determined that a penalty¹³² is to be applied.

The guidelines in the NCCB On Due Process document concerning the establishment of an office of arbitration are initially similar to those for the council of conciliation.¹³³ In the membership, the only difference is that is not provided that a member is to be elected from a Catholic college in the diocese. The staggering of terms is the same as the term of office itself, although no member may serve more than two consecutive terms in office.¹³⁴ The major function of the office of arbitration¹³⁵ is to select qualified persons to serve as arbitrators¹³⁶ and to receive

¹³² A penal case automatically involves the public good and it involves the promoter of justice as protector of that good. (cc. 1717-1731).

¹³³ In CLSA, Protection of Rights, p. 17, it is the responsibility of the conciliation clerk to select a panel of persons to be considered as arbitrators by the parties. The parties themselves must agree to a single arbitrator or panel of arbitrators.

¹³⁴ Due Process, p. 23. See CLSA, Protection of Rights, p. 17, which is much less specific in regard to the types of qualifications necessary to be an arbitrator. Terms are not mentioned nor is any type of specific appointment necessary.

¹³⁵ See CLSA, Protection of Rights, pp. 16-17, which does not call for a specific office of arbitration, but views this function as one to be administered by the conciliation board.

¹³⁶ Ibid. The qualifications for arbitrators are also noted in the document which gives preference to those persons demonstrating competence and impartiality in this type of work. There are to be a minimum of ten arbitrators available for selection by the parties. Due Process, pp. 24-25.

petitions or statements regarding disputes to be considered by arbitration.¹³⁷

The Arbitration Office is competent to hear a number of disputes:

"[i] all matters between individual members of the Church, or groups within the Church, where the controversy concerns an ecclesiastical matter;

[ii] all disputes between a person and a diocesan administrator or administrative body, where it is contended that an act or decision (including administrative sanctions and disciplinary actions) has violated Church law or natural equity;

[iii] all disputes between administrative bodies of the diocese when the dispute involves conflict of competency."¹³⁸

The process involved in the arbitration of a dispute begins after the initial presentation of a party's statement requesting arbitration.¹³⁹ If the other person or persons involved in the controversy is agreeable to begin the process, then the next step is the parties' decision regarding the

¹³⁷ Due Process, p. 24.

¹³⁸ Due Process, p. 28. This same section limits the competence of the arbitration office by restricting it from hearing criminal cases in the strict sense, non-criminal cases where there is a question of dissolving a marriage, spiritual matters whenever the award requires payment by means of temporal goods. Due Process, pp. 28-29. It also restricts its use in regard to benefices, but this section has become obsolete since the promulgation of the 1983 Code of Canon Law.

¹³⁹ Due Process, p. 25. See CLSA, Protection of Rights, pp.17-18, for an alternative process for the conducting of arbitration hearings. This latter document is more specific in describing the functions of the arbitrator and in requiring the determination of the relevance of the material to be presented at the arbitral hearing than is the 1972 document.

choice of an arbitrator or panel of arbitrators to hear the case. The arbitrators selected must generally be agreeable to the parties to the conflict.¹⁴⁰ It is required that the parties sign a written statement agreeing to abide by the decision of the arbitrators (hereafter decision-makers) and abandoning any right they might have to appeal against such a decision except on the grounds specifically listed in the On Due Process document.¹⁴¹

Once the decision-makers are selected, the parties are required to present their case, either personally or through a representative who may be a canonist or some other person recognized for this purpose.¹⁴² The parties are to submit appropriate evidence for consideration by the decision-maker.

¹⁴⁰ Due Process, p. 25.

¹⁴¹ Due Process, pp.29-30. This section of the document requires the creation of a Court of Arbitration to act as the board of review of arbitral awards. This Court is to be the diocesan court with a specially assigned turnus of judges to handle such matters. The only grounds for a petition of review of such awards are (1) procurement of the award by fraud, corruption, or other undue means; (2) evidence of partiality on the part of an arbitrator; (3) the arbitrators exceeding their powers; (4) the refusal of the arbitrators to postpone a hearing notwithstanding the showing of sufficient cause for such postponement, or refusal to hear evidence material to the controversy, or otherwise conducting the hearing so as to affect prejudicially the substantial right of one of the parties; (5) the method of selection of the arbitrators agreed to by the parties was not followed; (6) the decision was based on spurious documents; (7) the discovery of new evidence of a character that demands a contrary decision to the one issued; and (8) principles of fundamental fairness were violated. Due Process, p. 30.

¹⁴² Due Process, p. 26.

This may include books, papers, records, affidavits, or other proofs deemed appropriate during the proceedings.¹⁴³ A complete recording of the entire process can be requested by one or both parties and is to be provided by the decision-makers.¹⁴⁴ The latter must give timely notice of their intent to close the proceedings before proceeding to adjudication of the matter.¹⁴⁵ The decision itself is to be made in a timely fashion and in written form with the signatures of all the decision-makers.¹⁴⁶

Expenses for the office are to be borne by the diocese while the expenses of the individual witnesses are to be the responsibility of the party presenting them.¹⁴⁷ The decision makers may determine how any costs associated with the process are to be assessed to the parties in their final award.¹⁴⁸

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid. See CLSA, Protection of Rights, p. 19, where it indicates that confidentiality in these proceedings is to be observed by all. This was not mentioned in the 1972 document in regard to arbitration.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

II. APPLICATION OF METHODS

A. Standards of Adjudication

In reviewing the standards used in the various processes presented here, it must be remembered that there are limitations on the right to a good reputation that must be balanced in any process seeking to provide justice in the tradition of Church law. Canon 221 §1 indicates that the faithful have the right to vindicate their rights in the appropriate forum. This right is qualified by canon 223 §2 which permits ecclesiastical authorities to temper the exercise of rights with the interests of the common good. While the common good is a concept long steeped in canonical and theological tradition, its actual application in the exercise of the protection of a right to a good reputation remains unclear.

1. Administrative processes

The goal of the administrative process is to determine whether the action was done lawfully. Its purpose is not specifically to protect and vindicate rights.¹⁴⁹ Rather, the basic standard of review in this process allows the local superior to whom recourse is first made, to modify his or her own judgment on the matter rather than simply indicating

¹⁴⁹ MATTHEWS, p. 157.

whether the action was done within the law.¹⁵⁰ Beyond that level, the Roman dicasteries including the Apostolic Signatura are generally limited to determining whether the exercise of executive administrative power was within the scope of the law.¹⁵¹

To accomplish this task, the Second Section of the Apostolic Signatura considers a wide variety of questions including any harm if the administrative action in question is executed, the legitimacy of the action to be executed, and the violation of the law by the administrative action.¹⁵²

2. Judicial processes

In regard to the right to a good reputation, a judge in a judicial process is without specific guidance in determining the standards whereby the alleged injury to reputation is to be judged. It is clear that the judge must have moral certitude to issue a sentence in a case alleging harm to a good reputation. It is still unclear, though, which kinds of situations represent lawful ways to injure a reputation and

¹⁵⁰ C. 1739.

¹⁵¹ See MATTHEWS, pp. 137-157, for a discussion of the specific aspects of administrative procedure and its standards for the Apostolic Signatura. The Pope may, however, authorize the Apostolic Signatura to pronounce on the merits of the case, and not only on the procedure followed.

¹⁵² For an excellent discussion of the concepts of legitimacy and the violation of law as a basis for judgments of the Second Section of the Signatura, see MATTHEWS, pp. 144-150.

which ones represent unlawful ways. Certainly the standard imposed by the judge in viewing the lawfulness or unlawfulness of specific actions will strongly influence the final outcome of a dispute.

3. Alternative dispute resolution

In conciliation or mediation, the only question that needs a standard for adjudication is the determination of the competence of the Council for Conciliation to be involved in such a matter. Otherwise, the standards for adjudication are set by the parties themselves together with the facilitator of the process.¹⁵³ This type of process presumes that the parties know the full range of options available to them to adjudicate their interests in a matter, and that they are motivated to avoid a formal type of procedure. This type of process, as envisioned in the U.S. document On Due Process, is not of the precedent-setting variety. Specific standards for adjudication are not available in such a situation since the adjudicating is being done by the parties themselves or by a person free to craft a specific solution to a problem with only equity and justice as a guide.

¹⁵³ In CLSA, Protection of Rights, p. 18, there are guidelines for procedural matters, but no specific standards for adjudication.

B. Advantages and Disadvantages

1. Administrative processes

One of the major advantages to the administrative process is general efficiency in most cases. Much of the discussion regarding this concept prior to the promulgation of the present canons centered on the need for a locally controlled method of appeal that would provide justice in situations where the exercise of administrative discretion was injurious to others. The fact that the present set of canons establishes some local recourse for those injured by actions of officials other than the religious superior or diocesan bishop certainly is a start. But, subsequent steps are taken at the level of the Holy See.

This fact means that the drawbacks mentioned by so many authors regarding the remoteness and lack of accessibility of the previous system remain with the present law. Individuals must wait, often for years, for an expensive procedure in a far away city to run its course. Both the expense and the time spent pursuing such cases means that justice is as often denied by delay as it was prior to the implementation of the present canons.

Beyond that, unresolved questions concerning the subjection of certain administrative acts to such processes

make it unclear which actions are subject to this process and which are not.¹⁵⁴

Other disadvantages include the fact that this process is designed only for the protection of rights damaged by some type of administrative act. The purpose of the process is to evaluate the extent of an individual claim of injury against the presumption of the right of the administrator to act for the common good. Thus, even when decisions are made in conformity with the norms of the various Roman congregations and the Apostolic Signatura, they generally fail to establish any type of history of conduct that can be relied upon by others in the exercise of their administrative duties.

2. Judicial processes

The judicial process, in its variety of procedural forms, certainly has on the surface the advantage of being specifically tailored to meet the demands of those seeking a vindication of rights. All the judicial procedures embodied in the present canons are designed to put the burden of proof on the person bringing the claim, while at the same time protecting the rights of those against whom the claim is brought. The process involves a variety of people in many different capacities as well as a great deal of time and effort before any conclusion is reached. Nevertheless, this

¹⁵⁴ BEAL, Protection of Rights, pp. 156-158.

certainly is an attempt to provide justice in an equitable manner.

Both the ordinary contentious procedure and the oral contentious procedure provide the judge with much flexibility in fashioning a remedy to the situation presented. This reality may result in some differences between various judgments in similar situations, but it does have the advantage of individuality that recognizes the importance of reconciliation as well as justice being done in each case.

These same procedures, however, have a number of drawbacks. These include the lack of experience of present tribunal personnel in regard to handling such matters. These persons are already overwhelmed with the number of claims involving marriages with little training or time left over to handle these other types of processes. Judicial procedures require much commitment in both time and money since a complete investigation and recorded hearing must be conducted for the results to be in compliance with the law.

Canonical jurisprudence provides little guidance in the interpretation and adjudication of rights cases. In the past, penalties were used to protect the good name of another. While certainly those kinds of standards may be applied in cases involving the application of a penalty, there is no guidance for those persons simply seeking the vindication of the right to a good reputation. Without help in this area, judges will

be reluctant to entertain such cases since the decision will be almost alone in its conclusions.

The fact that the judge has great discretion in fashioning a remedy for the parties can lead to abuses. It can also lead to an uneven application of justice and thus possible scandal to the faithful since the perception could be that the courts provide different responses depending on a person's status in the church (i.e. cases involving religious, laypersons or clerics) rather than on the facts of an individual case.

There are other disadvantages including the manner of appeal for these types of decisions. Should a decision be made in a local court of first instance, the person wishing to appeal that decision is left to pursue it in the court of second instance or in the Roman Rota. After that, any other appeal would have to be lodged with the Roman Rota¹⁵⁵ or the appropriate court of third instance for that country. These various levels of appeal present the same obstacles as those found in the appeal of marriage nullity cases. Such appeals are often so time consuming as to be almost another case of "justice delayed equals justice denied". Furthermore, the costs involved in pursuing such an appeal are also very high, even for those who can afford the time necessary for such

¹⁵⁵ This is in regard to cases emanating from the United States or Canada, as there is no third instance court regularly available in North America at this time.

actions. The tremendous distances to be bridged, both in actual distance between the domicile of the person lodging the appeal and in the understanding of the proper administration of justice, leave many feeling powerless and unheard.

3. Alternative dispute resolution

The single largest attempt to determine the impact of On Due Process was a study commissioned by the Canon Law Society of America (CLSA) and published in 1987.¹⁵⁶ This study concluded that much further work needed to be done in this area if the norms in force in the United States were to be readily available to the faithful.¹⁵⁷

Advantages of this type of process, whether it be mediation, conciliation or arbitration, include the perception of fairness generated by the actual hearing of such a dispute under such circumstances.¹⁵⁸ It settles disputes at the lowest possible level without the long delays associated with more formal proceedings. This relatively quick settlement of disputes lowers the probability of the conflict spreading to other persons and thus reduces the risk of scandal. This type

¹⁵⁶ CANON LAW SOCIETY OF AMERICA, Due Process in Dioceses in the United States 1970-1985 - Report on A Survey Task Force to Survey Due Process Experience (=CLSA, Due Process Survey), J. Provost, ed., Washington, D.C., Canon Law Society of America, 1987, ii, 251p.

¹⁵⁷ CLSA, Due Process Survey, p. 47.

¹⁵⁸ CORIDEN, p. 3.

of process has the ability to craft the solution to the parties on an individual basis and thereby increases the chance that the accord will be observed fully with no further involvement by the institution. It is a process designed to recognize individuals as adults and treat them in a way that empowers them to deal with their own conflicts. Such a personal process also provides the most obvious opportunity for a true Christian reconciliation between the parties.

Disadvantages are also present in these types of situations. ADR presumes that the parties are equal in bargaining power and most often wish to continue their relationship with one another. In this type of situation ADR works very well.¹⁵⁹ It cannot be presumed, though, that the parties to any conflict within the Church are of equal bargaining power. Depending on the personalities of the parties and their status in the Church, they may be of such unequal power that the dispute might not be of the kind amenable to ADR. Such an unequal bargaining situation could result in the surrender of rights rather than their protection.¹⁶⁰ This type of process focuses on private, rather than public, resolutions of disputes and thus "inhibits aggregate solutions and the emergence of precedents that clarify and interpret the meaning of rights asserted in the

¹⁵⁹ BEAL, Protecting the Rights, p. 148.

¹⁶⁰ BEAL, Protecting the Rights, p. 147.

law."¹⁶¹ The lack of precedents will slow the collective development of the area of law regarding the protection of rights. While private solutions may be viewed as an advantage, they may also result in disparate solutions for similar situations, thus risking the charge that justice is not truly done in such circumstances. There are certainly disputes that cannot appropriately be settled with this type of process.

One final observation about this type of process is the will of the bishop and diocese to make it available to all. It requires more than just a set of procedures on paper; it must include training personnel to facilitate the processes and informing those parties who will use them. It requires time for implementation and resources to support such a system.¹⁶²

C. Mechanisms for Enforcement

1. Administrative processes

There are no clear mechanisms for the enforcement of decisions made in an administrative process. It appears that the good will of the parties and their desire to follow the law remain the major methods the Church calls upon to enforce its will on others in such circumstances.

¹⁶¹ Ibid.

¹⁶² BEAL, Protecting the Rights, p. 152.

It is true that penal precepts may be levied by the superior as a last resort,¹⁶³ but such penalties may not be levied against another without compliance with the proper penal procedures. Instituting these and having them lead to the actual imposition of a penalty, could delay even more the situation through an appeal by the person receiving the penalty.

With specific reference to the decisions of the Second Section of the Apostolic Signatura, it is unclear how such judgments are to be enforced. One commentator maintains that should the authority of the Apostolic Signatura and repeated warnings not produce the desired results, the Second Section could also use "[...] disciplinary measures and make intercession to the Roman Pontiff."¹⁶⁴ Enforcement of judgments made by the Apostolic Signatura rests on the respect those who present matters to it have for the institution.¹⁶⁵

2. Judicial processes

The enforcement mechanisms for judicial processes rely on the same basic tenets as those in the administrative process. The good will of the parties is the primary consideration regardless of the type of process used. Without

¹⁶³ C. 1399.

¹⁶⁴ D. STAFFA, "Dissertationes de administratione iustitiae in Ecclesia", Periodica, 61(1972), p. 29.

¹⁶⁵ MATTHEWS, p. 140.

the parties' assent to the final outcome and their accord in actually applying the solution given, the court is left simply to rely on a variety of sanctions, including penalties, if other pastoral means, such as fraternal correction or rebuke, are not successful in eliciting the necessary action from the parties.¹⁶⁶

One method of enforcement that is not readily part of canon law is that of publicizing the decision of the court in an effort to get the public will to come to bear on the parties so they will conform to the decision of the court. This would certainly have to be done in a manner to conform to the law, but making such a judgment public and indicating that the parties are to abide by it could be construed as protecting the common good since the enforcement of such judgments is in the interest of all the faithful of the Church. Compliance with the decisions of the court is certainly in the best interests of an ordered church society.

The decisions of the Roman Rota may be enforced in the same manner as those of the Apostolic Signatura. Disciplinary measures and an appeal to the Roman Pontiff are both available to assist the parties in carrying out their responsibilities in this regard.

These processes are handicapped, however, in that they do not clearly present ways to force persons, against their

¹⁶⁶ C. 1341.

will, to conform to the judgment handed down by the court. Unlike the processes available to the civil legal world, church courts are unable to bring more than simple moral pressure to bear on those they would have conform to their decisions.

3. Alternative dispute resolution

The ADR type of resolution of conflict relies entirely on the good will of the parties and their desire to avoid resorting to some other type of more formalized process. This reliance is highly effective in this process since the parties themselves come to their own agreement, thus hopefully meeting their own needs in the conflict. If their needs are met through their own efforts, they are more likely to adhere to the agreed-upon solution for its own sake rather than requiring some type of threat of intervention to enforce an imposed solution. This method of enforcement is based on the parties' desire to avoid any type of formalized process that would require more time and possibly more expense.

CONCLUSION

The three types of processes available at the present time all have substantial limitations when dealing with rights cases. Perhaps the greatest limitation is the Church's

relative inexperience with the entire notion of the vindication of rights through any procedure but the imposition of penalties. Distinctions between the processes are great as each is designed to serve a specific purpose. Problems arise when the limited, narrow purpose for which a specific process is designed is inadequate in some way for the goals envisioned in a vindication of rights case.

The administrative process was not designed specifically to vindicate rights while the judicial process has few standards whereby to judge the injury to the right to a good reputation. The questions that arose in the first chapter of this work regarding the limits of unlawfulness and the specific components of an injury are not readily addressed through the processes provided here. Certainly in an administrative process a judge has more guidance in determining the lawfulness of an administrative action; this aspect of the law has been utilized more since the creation of the Second Section of the Apostolic Signatura. In the judicial process, though, it is very clear that judges are left to their own devices in determining the limitations of the right to a good reputation and the standards to be applied to any given situation. Where may a judge look for assistance when canon law is limited in its approach to a specific situation? Perhaps it is time to consider the lessons another judicial system has learned from its struggle with the right to a good reputation.

CHAPTER THREE

THE RIGHT TO REPUTATION IN THE UNITED STATES

Different legal systems deal with the concept of rights in various ways. While canon law descends in many ways from the classic Roman codes, U.S. law is more a grandchild of that tradition. Its direct parent is the common law of Great Britain which traces its roots to the Roman law, medieval ecclesiastical law, and the Germanic tradition. We have chosen to examine the U.S. legal system's treatment of the right to a good reputation because of its extensive practical experience in protecting and adjudicating disputes involving rights. The judicial actions that involve the right to reputation are considered under the tort of "defamation".¹

¹ "Defamation - Holding a person to ridicule, scorn or contempt in a respectable and considerable part of the community; may be criminal as well as civil. Includes both libel and slander...[it] is that which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him...", H. Black, Black's Law Dictionary (=Black's Law Dictionary), fifth edition, St. Paul, Minn., West Publishing, Co., 1979, p. 375, col. 2.

"Tort. - A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction... Three elements of every tort action are: Existence of legal duty from defendant to plaintiff, breach of duty, and damage as proximate result", Black's Law

"Defamation" under the laws of the United States is a concept that has been developing since the earliest days of the nation's history. The concept originally came to the United States from the common law of England, but since the establishment of the United States, courts in that country have struggled to develop an interpretation and application that follows the common law tradition yet applies the more recent statutory provisions defining this tort in many states.² The courts in the United States have also sought to balance the Constitutional rights of free speech and a free press.³

Dictionary, p. 1335, col. 1.

² In this section we will use law review footnote format of A Uniform System of Citation, Cambridge, The Harvard Law Review Association, Fourteenth edition, 1986, 255p., as the reference for citation of legal precedents and treatises. All other references will follow the format used previously in this work.

³ The Constitutional line of cases in the US commenced with New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964). Since that time the Supreme Court has decided twenty-seven libel cases. These include Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965); Linn v. United Plant Guard Workers, 383 U.S. 53 (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Coop. Publishing Association v. Bresler, 393 U.S. 6 (1970); Monitor Patriot Company v. Roy, 401 U.S. 265 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Association, 443 U.S. 157 (1979); Keeton v.

This chapter will begin with a brief overview of legislation and decisions relating to defamation in England from medieval times and later in the United States. The second part will note some of the differences between the canonical and the U.S. legal systems. The third part will examine the procedures available to deal with the tort of defamation, and review the basic definition of defamation under the laws of the United States. Finally, we shall consider the advantages and disadvantages of specific elements relating to the adjudication of this tort as they are presently applied by the courts.

I. DEVELOPMENT OF THE LAW OF DEFAMATION IN ENGLAND AND IN THE UNITED STATES

The common law of England derived its manner of handling defamation cases from the canon law of the Roman Catholic Church and the Roman Law as it was interpreted in the Middle Ages.

Hustler Magazine, 65 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984); Bose Corp. v. Consumers Union, 466 U.S. 485 (1984); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 149 (1985); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989); Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990); Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419 (1991).

A. Developments in the Law of England

The recognition of the civil tort of defamation in England dates from at least the fourteenth century. While state sponsored courts did not officially recognize an action between private parties based on an injury to reputation until the seventeenth century, the canonical courts were bound to a constitution enacted by the Council of Oxford in 1222. The document was widely known as Auctoritate de patris.⁴

At that time the courts of the state were not widely involved in the adjudication of disputes involving defamatory allegations.⁵ This was a major province of the ecclesiastical courts who had claimed jurisdiction after the fall of Rome and it remained so until the 1600s partially because the king's

⁴ R. HELMHOLZ, (ed.), Select Cases of Defamation to 1600 (= Select Cases), London, Seldon Society, 1985, pp. xiv-xxiv. See S. MILSOM, Historical Foundations of the Common Law (=MILSOM), second edition, Toronto, Butterworths, 1981, p. 380. A. KIRALFY, Potter's Historical Introduction to English Law and Its Institutions (=KIRALFY), fourth edition, London, Sweet & Maxwell Limited, 1958, p. 431. V. VEEDER, "The History and Theory of the Law of Defamation" (=VEEDER, I), Columbia Law Review, 3(1903), p. 550. See also V. VEEDER, "The History and Theory of the Law of Defamation", Columbia Law Review, 4(1904), pp. 33-56.

⁵ A number of reasons for this fact have been suggested: "Until that time no actions on the case were common, presumably because litigants preferred the cheapness of local justice; and perhaps words never seemed to matter enough. Or perhaps it was the judges who feared the flood of difficult and pointless litigation that did indeed ensue when actions were accepted. Or again, like other wrongs, defamation had been treated in local courts from the two aspects that we should call criminal and civil: the victim might be compensated, and the wrongdoer might be punished", MILSOM, p. 379.

courts did not feel it appropriate to allow such cases to be treated as civil wrongs and partially because defamation was considered a "spiritual" offense.⁶

The Oxford constitution mentioned above required that the complainant show some kind of harm.⁷ This was often the preliminary step to a process known as canonical purgation whereby those who believed they had been wrongfully imputed of a crime could come to an ecclesiastical judge and ask to "purge" themselves of it. If this was successful a trial for defamation would follow.⁸ The judges in such a process could not award monetary damages, but there were occasions when they were asked to award such damages none the less.⁹

The state courts became involved in defamatory actions in a limited way in 1275 with the passage of the statute known as Scandalum Magnatum¹⁰ which allowed a limited group of

⁶ MILSOM, pp. 379-380. "No distinction was made between crimes punishable by the secular courts and those punishable by the Church. The royal courts were developing the rule that if the crime were one they alone could try, a writ of prohibition would lie. Under this doctrine, defamation in the ecclesiastical tribunals would be limited to the imputation of distinctly spiritual crimes -- heresy, adultery and the like . . . all crimes were treated alike in defamation actions. And the court records show negligible numbers of prohibitions interrupting suits for defamation. The Church courts went their way largely unmolested in this area", HELMHOLZ, p. 260.

⁷ HELMHOLZ, pp. 262-263.

⁸ HELMHOLZ, p. 263.

⁹ Ibid.

¹⁰ KIRALFY, p. 432. VEEDER, I, p. 553.

members of the aristocracy to seek, through the king's council, a remedy to defamation.¹¹ This same statute inflicted criminal remedies and was expanded to include "[...] prelates, dukes, earls, barons, and other great men of the realm [...]."¹² The Star Chamber,¹³ under the direct authority of the sovereign, enforced this statute and exercised considerable power in doing so. "[...] by the time of Elizabeth the Star Chamber had assumed jurisdiction of cases of ordinary or non-political defamation, which it decided in the way of criminal

¹¹ VEEDER, I, p. 553. The statute itself provided: "Whereasmuch as there have been aforesaid found in the country devisers of tales * * * whereby discord or occasion of discord hath arisen between the king and his people or great men of this realm * * * it is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people and the great men of the realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was first author of the tale", *ibid.*, from 3 Edward I, c. 34; Statutes at Large, i, 97.

¹² VEEDER, I, p. 553. These statutes were directed at dealing with treason and sedition rather than with the establishment of the right to reputation. These men were viewed as being of such noble birth or official dignity that they were not to be judged by any but their sovereign. See, VEEDER, I, p. 554.

¹³ "A court which originally had jurisdiction in cases where the ordinary course of justice was so obstructed by one party, through writs, combination of maintenance, or overawing influence that no inferior court would find its process obeyed. The court consisted of the privy council, the common-law judges, and (it seems) all peers of parliament. In the reign of Henry VIII and his successors, the jurisdiction of the court was illegally extended to such a degree (especially in punishing disobedience to the king's arbitrary proclamations) that it became odious to the nation, and was abolished", *Black's Law Dictionary*, p. 1261, col. 1.

proceedings."¹⁴ These cases, rather than being a recognition of the right to reputation, were designed to deal with sedition and treason on the part of those of nobler birth.¹⁵

The sovereign's courts of common law began hearing cases involving defamation during the reign of Elizabeth I. These were few in number initially, but increased dramatically once it became well-known that such pleas would be entertained.¹⁶ These courts fashioned remedies that could not be provided by the ecclesiastical courts, namely: monetary damages.¹⁷

Over the centuries the common law of defamation has been seen to protect three different concepts or dimensions: reputation, honor, and dignity. The first was a property right;¹⁸ a concept based on the idea that reputation was a product of the marketplace. Under this concept, one works for a good reputation and "earns it" through her or his actions. The fact that reputation is considered to be an intangible property emphasizes the individual's role in the marketplace where both money and barter have value.¹⁹ This property is an

¹⁴ VEEDER, I, p. 555.

¹⁵ VEEDER, I, p. 554.

¹⁶ VEEDER, I, p. 557.

¹⁷ MILSOM, p. 381.

¹⁸ R. POST, "The Social Foundations of Defamation Law: Reputation and the Constitution" (=POST), California Law Review, 74(1986), p. 693.

¹⁹ Ibid.

extension of a person's earned character and thus it also has applications outside the strict business sphere.²⁰

The concept of reputation as property presupposes that individuals are connected to each other through the institution of the market. The market provides the mechanism by which the value of property is determined. The purpose of the law of defamation is to protect individuals within the market by ensuring that their reputation is not wrongfully deprived of its proper market value.²¹

This concept of defamation thereby makes it simple to look to monetary damages to take care of an injury. Money is a product of the marketplace, and therefore the best means of restoring the harm done. The marketplace will determine the value of the person's reputation and whether it may be repaired in any other manner.²²

A second common law concept of defamation consisted in protecting a person's honor. Under this concept, persons did not earn the honor given to their reputation; they were accorded it because of their station or position in society. This system assumes the existence of a stratified society where some are more deserving of honor than others. It often describes the distribution of wealth, insists on a particular social behavior, and is absolute in its application of this system.²³

²⁰ POST, p. 694.

²¹ POST, p. 695.

²² POST, pp. 697-698.

²³ POST, p. 700.

Honor differs from the concept of reputation as property in each of these characteristics. Whereas reputation as property presupposes that individuals are unequal. An individual's honor is but the personal reflection of the status which society ascribes to his social position. Individuals are therefore inherently unequal because they occupy different social roles. It is characteristic of honor that these social roles are hierarchically arranged.²⁴

In this type of system the value of reputation is fixed rather than dependent on market estimates of its value. It can be lost by improper behavior, but is not gained through individual effort. "The value of honor is the value of a meaningful life, and for that reason its worth cannot be measured by the marketplace."²⁵ In a class-conscious type of society, reputation is a social possession, while in a market society it is a private one.²⁶ In the former type of society the goal of defamation law is the restoration of honor rather than compensation for injuries.²⁷

According to traditional common law the victim was given a choice of pursuing either a criminal cause of libel or a civil cause for damages. The criminal cause did not allow truth to be a defense for the person accused of the crime.²⁸ This type of remedy was akin to restoration of honor by

²⁴ Ibid.

²⁵ POST, p. 701.

²⁶ POST, p. 702.

²⁷ POST, p. 703.

²⁸ POST, p. 704.

"bloodshed" that would thereby "bleach" the honor clean.²⁹ If the victim chose to pursue a civil action, the defendant could not be punished but could be compelled to pay damages. In this type of action truth was considered a complete defense to the charge of defamation.³⁰ In these proceedings a plaintiff could be dishonored by not acting in accordance with her or his social role and thus, in order to obtain damages, might be asked to prove that he or she had been acting honorably beforehand.³¹

The third reason for actions of defamation is the protection of the dignity of the individual. A portion of Justice Potter Stewart's concurring opinion in Rosenblatt v. Baer³² presents this view well:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic part of our constitutional system.

The dignity that defamation law protects is the respect that arises from full membership in a given society. This means

²⁹ Ibid.

³⁰ POST, p. 708.

³¹ POST, p. 706.

³² 383 U.S. 75, 92 (1966).

that those persons who are socially acceptable are protected and accepted, while those who are not are ostracized and ignored.³³

Unlike the other two dimensions of defamation, the protection of dignity does not allow for an easy evaluation of an injury. How does one value an injury to social dignity? An assessment of monetary damages would be inadequate since dignity cannot be restored in this manner.³⁴ An attempt to "vindicate" the honor of another through punishment or compulsory payment of damages would also be inadequate.³⁵ Instead, the decision of a court, after both parties have had an opportunity to present their views, could be seen as that of a representative of the community. If the plaintiff is vindicated, the court speaks for the community as a whole when it welcomes the plaintiff back into the fullness of the social fabric. In this situation, the individual dignity of the person defamed is balanced against the good of the community. The court acts as an arbiter of the good of all while at the same time looking after the interests of the individual.³⁶ It creates "two analytical and operationally distinct functions

³³ POST, p. 711.

³⁴ POST, p. 712.

³⁵ Ibid.

³⁶ POST, p. 713.

for defamation law: the rehabilitation of individual dignity and the maintenance of communal identity."³⁷

These three objects of protection, including reputation, dignity and honor, have been most important in the development of the common law concept of defamation.

B. Developments in the United States

Until 1964 the courts and legislatures of the United States generally used the common law concepts developed in England in their treatment of defamation. The common law standard was applied with most cases being situated either in the areas of libel³⁸ or of slander.³⁹

The Supreme Court of the United States has most often been concerned with protecting the right of reputation as

³⁷ POST, p. 715.

³⁸ "A method of defamation expressed by print, writing, pictures, or signs. In its most general sense, any publication that is injurious to the reputation of another. A false and unprivileged publication in writing of defamatory material. A maliciously written or printed publication which tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession", Black's Law Dictionary, p. 824, col. 1.

³⁹ "The speaking of base and defamatory words tending to prejudice another in his reputation, office, trade, business, or means of livelihood. ..Oral defamation; the speaking of false and malicious words concerning another, whereby injury results to his reputation", Black's Law Dictionary, p. 1244, col. 2.

either a property right or as individual dignity.⁴⁰ These distinctly different roots have led to varying results in different portions of the common law of defamation.⁴¹ For instance, the fact that corporations and other inanimate objects can sue for injury to reputation reflects the rationale of protection of property, while the irrebuttable presumption of general damages is an example of the dignity approach.⁴²

In the twentieth century, the impact of the mass media that covered events nationally and immediately (i.e. television and radio) presented the courts with new problems. Those facts and a literal "litigation explosion" in the area of tort law were instrumental in bringing about a constitutional standard⁴³ of adjudication which changed the

⁴⁰ See footnote 30 of this chapter. Also see Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1562 (1986); at 1566-67 (J. Stevens dissenting), Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 105 S.Ct. 2939, 2945 (1985) (opinion of J. Powell) and at 2951 (J. White concurring).

⁴¹ POST, p. 717.

⁴² Ibid.

⁴³ The term "constitutional standard" of adjudication is in reference to those decisions (mentioned previously in footnote 3) which distinguished U.S. law from English common law in the area of defamation. It was initially designed to do away with the "chilling effect" of traditional libel laws referred to by Justice Brennan in New York Times v. Sullivan. The standard as a whole touches on a variety of areas including under what conditions one may sue another, what standard may be applied in such a cases, what state of mind is necessary for culpability, and when damages may be awarded. It is not stated in any one particular case, as U.S. case law does not often present itself in such a manner. Instead, the

common law basis of the tort in a way that has remained uniquely that of the United States and is still applied today, as we shall now see.

II. BASIC CONCEPTS IN THE PRESENT U.S. LEGAL SYSTEM

A. The Basic Concepts Between the Two Legal Systems

Many of the laws and legal traditions of the United States are based on laws and concepts of the common law of Great Britain as it existed in the late eighteenth century. Since that time the legal system has developed its own particular variety of jurisprudence.

The legal system in the United States is not one single system but fifty-one⁴⁴ different ones interlocking in certain areas. Each state legal system is particular to that state within a broad framework of requirements established by the federal courts and local legislative initiative. The legal system of the United States is one where only those specific powers reserved to the federal government may be exercised by that level of government. All other powers are the province of state governments.

standard has evolved over time with each decision in the New York Times v. Sullivan line. Each case (listed in footnote 3) has contributed to the standard in some way. It is referred to as the "constitutional standard" because its generation was from the First Amendment of the Constitution and its reference was to the right of freedom of speech.

⁴⁴ The federal system and the fifty individual state systems.

What this means is that the vast majority of cases, both criminal and civil, are heard by state courts under the color of state laws which may have basic concepts in common, but their exact composition will differ significantly from jurisdiction to jurisdiction. Thus the decisions made in applying these laws will differ from state court to state court.

The federal legal system hears those cases specifically relevant to federal law and, on appeal, to those laws whose interpretation may touch on federal law. Under the current interpretation of the U.S. Constitution, the rule of stare decisis⁴⁵ is to apply. This doctrine has determined the parameters under which various rights are adjudicated.

The legal system in the United States is primarily a law of minimums. For example, a person who exceeds the speed limit on a highway could be ticketed. A person who kills another will not remain unpunished except under certain circumstances. Anyone who drinks before the legal drinking age could incur

⁴⁵ "Stare decisis - ... Under doctrine, when point of law has been settled by decision, it forms precedent which is not afterwards to be departed from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. The doctrine is a salutary one, and should not ordinarily be departed from where decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it... The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to dicta or obiter dicta", Black's Law Dictionary, p. 1261, col. 2.

certain consequences. Anyone who commits a forbidden act is liable to punishment by fine or imprisonment or some other type of remedy.

This system has attempted to deal, in the best tradition of the common law principle of equity, with the wrongs perpetrated between its citizens.

One of the basic tenets of the U.S. legal system involves the belief that money damages may compensate persons for the wrong done to them. For example, a person who loses an arm in a car accident may be successful in a tort action against the driver who caused the accident. If that driver is found to have been the cause of the accident, then the court may award damages to the person suffering the loss. The amount awarded would depend on the actual loss suffered by the injured person. For instance, a highly skilled plastic surgeon who loses an arm would recover more than the person, with the same injury, who walked dogs for a living. The surgeon has lost her or his career and any future lifetime income in that profession, while the dog walker would have been inconvenienced, but would probably not have to give up the occupation completely.

Besides awarding damages, the U.S. courts have practical methods to enforce their decisions, such as fines, imprisonment, garnishment,⁴⁶ and attachment.⁴⁷

B. Differences Between Canon Law and U.S. Law

U.S. law differs significantly from canon law in a number of areas. First, the United States of America is a constitutionally based representative democracy. One of the basic premises of that constitution is that power (i.e. legislative, executive, and judicial) is to be diffused among three independent institutions with each governmental branch having a specific function for the exercise of legal power.

Rather than relying on the legislator for the interpretation of laws, the Supreme Court of the United

⁴⁶ "Garnishment - A statutory proceeding whereby a person's property, money, or credits in possession or under control of, or owing by, another are applied to payment of the former's debt to a third person by proper statutory process against debtor or garnishee", Black's Law Dictionary, p. 612, col. 2. This may include garnishment of wages after proper due process has been observed.

⁴⁷ "Attachment - The act or process of taking, apprehending, or other judicial order, and bringing the same into the custody of the court for the purpose of securing satisfaction of the judgment ultimately to be entered in the action. While formerly the main objective of attachment was to coerce the defendant debtor to appear in court by seizer of property, today the writ of attachment is used primarily to seize the debtor's property in order to secure the debt or claim of the creditor in the event that a judgment is rendered", Black's Law Dictionary, p. 115, col. 2.

States⁴⁸ serves as the ultimate interpreter of any given federal law in that country. State supreme courts stand as the final arbiters of those laws specific to their jurisdictions.

While canon law views various rights as important, it believes that at times the exercise of individual rights may be sacrificed for the "common good". On the other hand, individual rights and their safeguard are of paramount importance in the U.S. legal system; indeed some rights⁴⁹ are so basic as to have the same force as the Constitution. Individual rights are to be balanced against the interests of the state in the form of governmental regulation. These rights include juridic procedural rights and recognized individual human rights. The concept of "common good" is not the same as under canon law.⁵⁰

⁴⁸ This is the proper title for the highest court in the United States. The purpose of using this title is to avoid confusion with the supreme courts or individual states. For example, the Supreme Court of the State of Idaho, etc. Within the individual states, these are the highest courts in those individual jurisdictions.

⁴⁹ The Bill of Rights (the first ten amendments to the Constitution are known as the Bill of Rights) are the primary example of rights which have the same force as the constitution itself. A sampling of these rights would be the right to freedom of the press, to freedom of assembly, to freedom of speech, and freedom of religion. These four rights are contained in the First Amendment to the United States Constitution.

⁵⁰ The canonical concept of common good is presented in two documents of the SECOND VATICAN COUNCIL, Dignitatis humanae 6, AAS, 58(1966), pp. 933-934 and Gaudium et spes 26, AAS, 58(1965), p. 1046. The former states "Cum societatis commune bonum, quod est summa earum vitae socialis condicionum, quibus homines suam ipsorum perfectionem possunt

With its strong emphasis on the equality of all before the law, the U.S. does not allow the law to be relaxed (i.e. dispensed as under canon law), even for a good reason. Rather it does allow certain actions to be "excused"⁵¹ from culpability in given circumstances, but the letter of the law remains intact despite the excuse.

In its judicial system, the U.S. operates on a rather pragmatic level: it attempts to meet out justice under the color of law. Thus the "rule of law"⁵² is the governing basis

plenius atque expeditius consequi, maxime in humanae personae servatis iuribus et officiis consistat." The latter applies the same principle to families and groups as well as to individuals. J. CORIDEN, "Reflections on Canonical Rights", J. Provost and K. Walf, eds., Studies in Canon Law, Leuven, Leuven University Press, 1991, p. 27. This article also discusses the various aspects of the common good as a reflection of the principles of participation, equality, coordination, and inclusion. It views the common good as something more than the simply the aggregation of individual rights for the community as a whole. Coriden describes it as "consisting in the observance of the rights and duties of the Christian faithful in the context of their local communities", *Ibid.*, p. 30.

⁵¹ Examples of excuses from culpability include insanity, self-defense, or privilege depending on the types of torts involved in any specific case.

⁵² "A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a 'rule,' because in doubtful or unforeseen cases it is a guide or norm for their decision. The rule of law, sometimes called 'the supremacy of law', provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application", *Black's Law Dictionary*, p. 1196, col. 1. This concept has been contrasted with the rule of a monarchy where there is much discretion in the application of law to coincide with the wishes of the monarch.

for the entire U.S. legal system. Because this system is an institution of an actual state government with all the practical means of personal coercion at its disposal, enforcement of its decisions is far more available than in the canonical system.

C. Similarities Between Canon Law and U.S. Law

The similarities between the two legal systems are general in nature. Beyond their common ancient roots, they both exercise judicial, legislative and executive power. They honor the rights of individuals although in different ways.⁵³ Both believe in the proper process of law for the vindication of rights; both wish to assure the well-being of their subjects, although in different arenas.⁵⁴

The judicial processes of both systems rely on the learnedness of their judges, lawyers (i.e. advocates), and

⁵³ The civil law system sees rights as generally beginning first with the individual and then with the state. One of the highest goals of the state is the observance and vindication of individual rights. The concept of the rights of the state is seen as limited in the United States system. The canonical system views individual rights as part of the common good of the whole society. See footnote 50 for a more complete discussion of this issue within the canonical system.

⁵⁴ The most obvious difference between the two systems is the emphasis of the Church on the spiritual aspects of the individual. The United States government is most concerned with providing its citizens with the freedom necessary to pursue their own destiny in a singularly secular sense. The government of the United States is required by its own law to refrain from interference with the exercise of freedom of religion, nor may it establish a state church. The United States views its role as separate from that of any religion.

upon the parties themselves in an effort to formulate a just and equitable decision in any given case. Both systems have elaborate appeals processes that may take months or years to complete. Both rely on the guidance of higher courts, but the U.S. courts are bound to observe these decisions, while church courts are not.

III. DEFAMATION IN THE UNITED STATES TODAY

The third portion of this review of the law will be confined to those elements generally recognized in the laws of the United States today.⁵⁵ These include examining methods of redress and basic concepts relating to defamation, as well as evaluating the stands of adjudication.

A. Methods of Redress for a Civil Cause of Defamation

Of the three methods of adjudication available in a Church case of defamation -- Alternative Dispute Resolution (ADR), administrative procedure, and judicial action -- two are available under U.S. law. ADR and a judicial solution are options for settlement of such a dispute in the civil realm.⁵⁶

⁵⁵ This tort is primarily under the jurisdiction of the fifty state judicial systems in the U.S. It is unnecessary, in a work of this limited length, to review the practices of all these separate jurisdictions.

⁵⁶ For an evaluation of out-of-court libel settlements see R. WISSLER, R. BEZANSON, G. CRANBERG, and J. SOLONSKI, "Resolving Libel Cases Out of Court", *Judicature*, 7(1988), pp. 197-201.

The actual method employed in either of these options will depend on the laws and rules of the individual jurisdiction.

ADR settlements are available, but are not always formally encouraged by statute under the current court system since some believe that the present system already favors out-of-court settlements. Since the costs of maintaining a civil action of any kind in the judicial system involve extensive attorney's fees and high court costs, it is suggested that these factors in and of themselves encourage the use of ADR settlements. Formal rules and methods of application for ADR differ from jurisdiction to jurisdiction. Generally, they are not required for tort actions although settlement is usually encouraged for the same reasons mentioned above. There has been more recognition within the past ten years that these types of settlements are preferable to one imposed by a judicial official because they give the parties ownership of the solution and thus these are more likely to keep the final agreement. ADR is viewed in some quarters as the instrument that will unclog the presently overburdened judicial system.

Administrative procedures similar to those envisioned by the Code are not generally available under U.S. law for redress in this situation since civil law generally limits the applicability of administrative remedies under law to

situations where executive power is exercised.⁵⁷ By statute,⁵⁸ the federal and many state governments have consented to liability for the torts of their employees or agencies, but these actions are generally decided in a judicial action rather than a pursuit of administrative remedies.

Judicial solutions to this type of injury are far more common in U.S. law than in canon law. We shall examine various portions of the judicial process and its solutions since this is one major area where canon lawyers lack practical experience and where they might be able to learn from this extensive practice.

⁵⁷ J. BEAL, Confining and Structuring the Exercise of Administrative Discretion in the Particular Church: a Study of Adaptability of Certain Principles of American Administrative Law to the Exercise of Administrative Discretion by Diocesan Bishops, Washington, D.C., Catholic University of America, 1984, vi, 665p., provides a study of some principles operative in US administrative law.

⁵⁸ The federal law that allowed for these types of claims is called the "Federal Tort Claims Act" which was made law in 1946. This act "largely abrogated the federal government's immunity from tort liability and established the conditions for suits and claims against the federal government. The Act preserves governmental immunity with respect to the traditional categories of intentional torts, and with respect to acts or omissions which fall within the 'discretionary function or duty' of any federal agency or employee", Black's Law Dictionary, p. 553, col. 1. This is an outgrowth of the doctrine of sovereign immunity which "precludes [a] litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless [the] sovereign consents to it", Black's Law Dictionary, p. 1252, col. 1.

B. Basic Concepts of Defamation in U.S. Judicial Law

1. Defamation defined⁵⁹

The definition of defamation generally recognized by the federal courts is contained in the Restatement (Second) of Torts, § 558 and reads as follows:

To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁶⁰

This restatement sets forth the four basic elements of the tort of defamation. We shall review each of these in turn.

a. A false and defamatory statement concerning another

i. A false statement

The first element of defamation contains three parts, the first of which concerns the truth or falsehood of the statement. This element appears simple on its face; but, if someone says something that appears disparaging to another,

⁵⁹ In this work we have specifically chosen to use the AMERICAN LAW INSTITUTE's Restatement (Second) of Torts (=Restatement (Second) of Torts), St. Paul, Minn., American Law Institute Publishers, 1977, §558-§596 as the basis for the discussion on the current US law because this portion of this work is a basic summary of defamation principles generally applicable in the United States.

⁶⁰ Ibid., p. 155.

and the disparaging remark is also true, no recovery will be made. The fact that something is generally known means that it is not defamatory. Under U.S. law the truth may generally be viewed as an absolute defense to a suit for defamation.

ii. A defamatory statement

The second portion highlights the definition of defamation found in Restatement (Second) of Torts, § 559:

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.⁶¹

Many decisions have addressed the question of what is defamatory in an individual context.⁶² A defamatory statement may reflect unfavorably on a person's morality or integrity or may discredit that person in the financial, business, or

⁶¹ Ibid., p. 156.

⁶² Statements of libel (i.e. libel per se at the common law) included false imputations that another had committed a crime, that affected another's trade or business, that imputed immorality or dishonesty. Restatement (Second) of Torts, § 569, pp. 182-186. Slander that was considered actionable on its face (i.e. slander per quod) included imputations of criminal conduct, moral turpitude, that another had a "loathsome" disease, imputations affecting business, trade or profession. Restatement (Second) of Torts, § 571-§ 574, pp. 186-197. A number of states still retain these causes of action. The difference between these court actions and others sounding in defamation is the requirement to prove damages. Special damages need not be proved, but the traditional awarding of nominal damages is in doubt under the U.S. Supreme Court's decisions requiring proof of actual damages. Restatement (Second) of Torts, §569, comment c, p. 187.

industrial community.⁶³ Imputations of physical or mental attributes may deter third persons from associating with that party.⁶⁴

The standard by which defamation is determined is best summarized in Restatement (Second) of Torts, § 559, comment e:

A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made to one or more of them or in a manner that makes it proper to assume that it will reach them.⁶⁵

⁶³ Restatement (Second) of Torts, § 559, comment b, pp. 156.

⁶⁴ Restatement (Second) of Torts, § 559, comment c, p. 156.

⁶⁵ Pp. 157-158. The remainder of the comment provides additional qualifications regarding this standard: "On the other hand, it is not enough that the communication would be derogatory in the view of a single individual or a very small group of persons, if the group is not large enough to constitute a substantial minority. If the communication is defamatory only in the eyes of a minority group, it must be shown that it has reached one or more persons of that group, although it is published in a newspaper it will be presumed, unless the contrary is shown, that it was read by them. Although defamation is not a question of majority opinion, neither it is a question of the existence of some individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent. The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them. If the communication is obviously defamatory in the eyes of the community generally, the fact that the particular recipient does not regard it as discreditable is not controlling.

The use of the word "communication" in this context means that an idea is brought to the perception of another.⁶⁶ The reasonableness and context of the communication is relevant to its characterization as defamatory.

U.S. law makes a distinction between oral and written defamation. Oral defamation is characterized as slander and written defamation is considered libel.⁶⁷ Much litigation has been carried out to determine the finer points of this distinction.

iii. Who can be defamed

The third portion of this first element is concerned with the person who can be defamed. It is obvious that any living individual human person may be defamed as he or she holds a reputation that might be injured in the community in some

⁶⁶ Restatement (Second) of Torts, § 559, comment a, p. 156. This concept is further refined in § 563, p. 162 of the same source which states: "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."

⁶⁷ Restatement (Second) of Torts, § 568, pp. 177-178 states: "(1) Libel consists of the publication of defamatory matter by written and printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words. (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in subsection (1). (3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander."

way.⁶⁸ U.S. law generally does not recognize the ability to defame a dead person.⁶⁹ Corporations,⁷⁰ partnerships, and associations⁷¹ may also be defamed under the same basic standards as those applied to human persons. Other groups or classes of persons may have recourse for damages in a defamation action under certain conditions.⁷²

b. An unprivileged publication to a third party

⁶⁸ A further caveat to this statement is contained in Restatement (Second) of Torts, § 564, p. 165 which notes: "A defamatory communication is made concerning the person to whom its recipient correctly or mistakenly but reasonably, understands that it was intended to refer."

⁶⁹ Restatement (Second) of Torts, § 560, p. 158 states: "One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives." There may be statutory exceptions for this rule depending on the jurisdiction.

⁷⁰ Restatement (Second) of Torts, § 561, p. 159 states: "One who publishes defamatory matter concerning a corporation is subject to liability to it (a) if the corporation is one for profit, and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it, or (b) if, although not for profit, it depends upon financial support from the public, and the matter tends to interfere with its activities by prejudicing it in public estimation."

⁷¹ Restatement (Second) of Torts, § 562, p. 161 states: "One who publishes defamatory matter concerning a partnership or an unincorporated association is subject to liability to it as if it were a corporation."

⁷² Restatement (Second) of Torts, § 564A, p. 167 indicates: "One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if, (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member."

i. What is unprivileged

This second element of the definition implies that there are both privileged and unprivileged communications under the law. Two classes of privileges exist: absolute and qualified.

Absolute privileges

are based chiefly on the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests.⁷³

Those persons who may exercise this type of privilege may not be questioned by either a court or jury in civil proceedings brought against them for misconduct in their positions. "This protection is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the actor."⁷⁴ Examples of those entitled to an absolute privilege as a defense to defamation include lawyers, legislators, jurors, witnesses, and judges.⁷⁵

⁷³ Restatement (Second) of Torts, § 584, introductory note, p. 243.

⁷⁴ *Ibid.*

⁷⁵ This privilege is interpreted very narrowly. It is available only on determined occasions that are specifically related to the tasks of the position and exercised under certain conditions. Hutchison v. Proxmire, 443 U.S. 111, 99 S. Ct. 2675 (1979).

A person may enjoy a qualified privilege. For instance,

[o]ne who published defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused.⁷⁶

Qualified privileges are "based on public policy that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests,⁷⁷ the interests of third persons⁷⁸ or certain

⁷⁶ Restatement (Second) of Torts, § 593, p. 261.

⁷⁷ Restatement (Second) of Torts, § 594, p. 263 states: "An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."

⁷⁸ Restatement (Second) of Torts, § 595, p. 268 notes: "(1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the recipient or a third person, and (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct. (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that (a) the publication is made in response to a request rather than volunteered by the publisher or (b) a family or other relationship exists between the parties."

interests of the public."⁷⁹ It is a defense to an action for defamation.

There has been much litigation over the application and extent of the qualified privilege. The individual fact situation will be very important in determining whether a privilege exists for the person alleged to have published the defamatory communication.

ii. Publication

Publication is the second part of this element. In this tort publication is defined as follows:

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.

(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.⁸⁰

⁷⁹ Restatement (Second) of Torts, Topic 3: Conditional Privileges, Title A: Occasions Making a Publication Conditionally Privileged, Scope Note (1977), pp. 258-261. See Restatement (Second) of Torts, § 596, pp. 274-275: "An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." See "Annotation: Defamation - Religious Activities", American Law Reports 2d, Annotated, 87(1963) for a general note on the application of the privilege in the religious context and "Professions -- Privileged Communications", American Law Reports 4th, Annotated, 9(1981), sec. 5, pp. 824-827 for an application of this privilege to ministerial associations.

⁸⁰ Restatement (Second) of Torts, § 577, p. 201.

Publication is essential to any finding of liability in a defamation action. Unless the communication is made to a third party, the reputation of the person defamed is not considered diminished in the eyes of the community.⁸¹ The defamatory communication must be brought to the attention of a third party in a manner that this party could understand.⁸² Furthermore, a person who repeats the defamatory statement of another, even if the source of the original statement is mentioned, is as liable for the defamation as was the original person.⁸³

⁸¹ "The law of defamation primarily protects only the interest in reputation. Therefore, unless the defamatory matter is communicated to a third person there has been no loss of reputation, since reputation is the estimation in which one's character is held by his neighbors or associates. The communication of disparaging matter only to the person to whom it refers is not actionable defamation, irrespective of the vile or scandalous character of the communication and its effects upon the feelings of the person." Restatement (Second) of Torts, § 577, comment b, p. 202.

⁸² Communication in a foreign language that is not understood by the third party would not be considered defamatory. Communication in a foreign language that was understood by the third party would be considered defamatory. Restatement (Second) of Torts, § 577, comment d, pp. 202-203.

⁸³ Restatement (Second) of Torts, § 578, p. 212 notes: "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."

iii. Third Persons

Any person besides the actual subject of the defamation may qualify as third person in the context of this element.⁸⁴

2. The standard of liability for fault

a. Public officials

There are two standards under the law in regard to liability for fault on the part of the person making the defamatory communication. Where a public official or public figure has allegedly been defamed, that official or figure may recover damages only after proving (1) that the person making the communication did so knowing that the statement was false and that it defamed the person or (2) that the person making the communication acted in "reckless disregard of these matters."⁸⁵

This standard was put forward in New York Times Co. v.

⁸⁴ Restatement (Second) of Torts, § 577, comments a through p, pp. 201-208.

⁸⁵ Restatement (Second) of Torts, § 580A, p. 214: "One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters." In comment d, p. 218 of the same section, "Reckless disregard is held not to be measured by whether a reasonable, prudent person would have published the statement without more investigation. Reckless disregard is said to exist, however, when there is 'a high degree of awareness of...probable falseness' of statement, or there are 'serious doubts as to [its] truth.'"

Sullivan, 376 U.S. 254 (1964) which held that the Constitution of the United States did not permit a public person (or figure in later cases) defamed in regard to her or his conduct, fitness or role as a public servant, to maintain an action for defamation unless one of the two elements listed above was proven.

Public officials have been defined as those

governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs; and it has added that the 'position must be one which would invite public scrutiny of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.'⁸⁶

Criticisms of the official's private conduct may be viewed as a comment on his qualifications for the office or position held.

Public figures are also covered under this interpretation of the law. There is no exact definition for a "public figure". Those persons who have acquired a general fame or notoriety in a particular area may fall into this category. Thus a person may be considered a public figure in one area of public society or controversy and not so in another. The court determines who is a public figure: it may ask whether the person is a "household name" or whether that person has

⁸⁶ Restatement (Second) of Torts, § 580A, comment b, pp. 215-216.

relinquished anonymity by seeking fame, fortune or influence in making such a determination.

Few persons are considered public figures in all areas. Most courts have found that persons may be considered public figures in some areas (i.e. in the field of entertainment, or in the public arena involving conservation issues, etc.) and comments made regarding these areas will be held to the standard listed above, while comments made about areas outside the "public" areas will be held to the standard of a private person.

b. Private persons

Private persons will be able to recover damages in a defamation action under the following standard:

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.⁸⁷

Section (a) listed above is derived from the common law approach to defamation that was specifically overruled by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). If a plaintiff claiming defamation can prove that the defendant was significantly at fault by knowing that the communication was

⁸⁷ Restatement (Second) of Torts, § 580B, pp. 221-222.

false prior to making it, liability will lie with the defendant.

Under section (b) reckless disregard for the truth of a matter will also result in liability. The meaning of the phrase "reckless disregard for the truth" has been litigated by the courts and will have specific meaning in each situation.

Section (c) indicates that even negligence⁸⁸ will result in culpability for the defendant in a case of defamation.⁸⁹ Three elements are used to determine whether a person has negligently defamed another.⁹⁰ The first of these is the time element. It asks whether there was time and opportunity to investigate freely a situation prior to publication. The

⁸⁸ Negligence is defined as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances", Black's Law Dictionary, p. 930, col. 2 and p. 931, col. 1.

⁸⁹ A description of negligence in defamation is contained in Restatement (Second) of Torts, § 580B, comment g, pp. 227-228: "Negligence is conduct that creates an unreasonable risk of harm. (See § 282). The standard of conduct is that of a reasonable person under like circumstances. (See § 283). Insofar as the truth or falsity of the defamatory statement is concerned the question of negligence has sometimes been expressed in terms of the defendant's state of mind by asking whether he had reasonable grounds for believing that the communication was true. Putting the question in terms of conduct is to ask whether the defendant acted reasonably in checking the truth or falsity or defamatory character of the communication before publishing it."

⁹⁰ Restatement (Second) of Torts, § 580B, comment h, pp. 228-229.

second element inquires about the nature of the interests that the defendant is seeking to promote by publishing the communication, because informing the public in a democracy is considered a vital interest to the protection of their rights. Finally, the extent of the damage to the plaintiff's reputation is to be considered.⁹¹

A third person who in some way carries on the publication of a defamatory statement of another is as liable for the defamation as would be the person making the original defamatory statement.⁹²

3. Available remedies for one claiming defamation

The most common remedy for a cause of defamation is the award of monetary damages. U.S. courts equate the awarding of money with the ability to place the aggrieved person back in the position she or he would have been in had the wrong not occurred. There are several types of monetary damages that may be claimed in this type of case.

a. General damages

General damages are those losses sustained which are "normal and usual and are to be anticipated when a person's

⁹¹ Ibid.

⁹² Restatement (Second), § 581, p. 231.

reputation is impaired."⁹³ At common law such damages were to be awarded by the jury without the requirement of proof of actual injury by the petitioner.⁹⁴ Under Gertz v. Robert Welch Inc. the Supreme Court changed the requirement for this award somewhat: in order to avoid unreasonable awards against the mass media, the Court ruled that the plaintiff in a defamation suit must introduce actual evidence that the defamatory publication did actual harm to the plaintiff's reputation.⁹⁵

Compensatory damages are those that are awarded for losses which are the "natural, proximate, and necessary result"⁹⁶ of the defamatory publication. These are reasonably foreseeable. They are the most common type of damages awarded in a defamation action.⁹⁷

⁹³ W. KEETON, ed., Prosser and Keeton on Torts (=Prosser and Keeton), West Publishing Company, St. Paul, Minn., fifth edition, 1984, p. 843. Restatement of Torts (Second), § 621, p. 319 states: "one who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed." Also Restatement of Torts (Second), § 904.

⁹⁴ Ibid.

⁹⁵ Gertz v. Robert Welch, Inc., 418 U.S. 348, 349 (1974).

⁹⁶ Restatement (Second) of Torts, § 621 General Damages, comment a, p. 319 states: "In defamation actions general damages are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation." See 50 Am Jur 2d, Libel and Slander, § 350, p. 869.

⁹⁷ Prosser and Keeton, pp. 843-844, 50 Am Jur 2d, Libel and Slander, § 350, pp. 869-870.

In a case involving written publication of the defamatory statement, the inquiry may consider the area of distribution of the publication, the prominence of the defamatory statement within the publication, and the placement of the statement within the context of the article or story itself. A national newspaper that reaches millions of people where the defamatory statement was a front page headline involving several mentions of the damaging allegations would require more compensation than that made by a rural weekly paper which ran a single defamatory statement among the month's high school baseball scores.

Special compensatory damages may also be pleaded by the plaintiff if the facts warrant this. These damages are to be pecuniary or material in nature.⁹⁸ It must be demonstrated

⁹⁸ "Special damages are essentially identical to those damages that are awarded in the typical contract or tort action. All elements that are awarded in an ordinary tort action -- pecuniary loss, defendant's fault, and a causal connection -- are necessary to prevail in such a claim", J. HULME, "Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation" (=HULME), The American University Law Review, 30(1981), p. 381. See Restatement (Second) of Torts, § 575, note, pp. 197-198.

that they were proximately caused⁹⁹ by the defamatory publication.¹⁰⁰

b. Nominal damages¹⁰¹

Nominal damages are those that would be awarded as proof of the vindication of the plaintiff's character in a defamatory action even though no injury was shown to have resulted or no injury was claimed.¹⁰² General damages and nominal damages may not be awarded in the same action due to

⁹⁹ The "proximate cause" of the damages awarded must be the defamatory publication. This means that recovery is limited to those damages which are regarded as "reasonably foreseeable" or normal consequences of the defamation. As a result of this ruling, the original person making the defamatory publication is liable for the damage done by third persons who disseminated the original defamation under the authority or intention of the original publisher. The Court has indicated that such actions, when reasonably foreseeable, will result in liability for the original publisher. Prosser and Keeton, p. 844.

¹⁰⁰ Prosser and Keeton, p. 844. 50 Am Jur 2d, Libel and Slander, § 350, p. 870.

¹⁰¹ "Nominal damages are awarded when the insignificant character of the defamatory matter, or the plaintiff's bad character, leads the jury to believe that no substantial harm has been done to his reputation, and there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation. They are also awarded when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury that establishes the falsity of the defamatory matter", Restatement (Second) of Torts, § 620, comment a, pp. 317-318. See also Restatement (Second) Torts, § 907.

¹⁰² This may be because the reputation of the plaintiff is unassailable in the community.

the nature of these types of damages.¹⁰³ The jury will make the determination regarding the award of the specific type of damage.¹⁰⁴

b. Punitive damages

Punitive damages may be awarded when it is demonstrated that the defendant had published maliciously either in the sense of (1) an improper motive,¹⁰⁵ or (2) "knowledge of the falsity of the statement, or recklessly with respect to truth or falsity."¹⁰⁶ These are designed to punish the offender and "as a deterrent to others inclined to commit similar acts."¹⁰⁷ They are awarded at the discretion of the jury in most states. State statutes determine the permissibility of such an award. Punitive damages may be awarded with nominal damages or general damages.¹⁰⁸

¹⁰³ Nominal damages may be awarded when the plaintiff has not sufficiently proved facts for an award of general damages. Nominal damages also recognize a technical invasion of the plaintiff's rights or a breach of duty. Black's Law Dictionary, p. 353, col. 2.

¹⁰⁴ Restatement (Second) of Torts, § 620, comment c, pp. 318-319, Prosser and Keeton, p. 845, 50 Am Jur 2d, Libel and Slander, § 351, pp. 871-872.

¹⁰⁵ According to Prosser and Keeton, p. 845, there is considerable doubt that recovery for punitive damages based on a claim against a private person with an "improper motive" will be constitutionally permitted.

¹⁰⁶ Prosser and Keeton, p. 845.

¹⁰⁷ 50 Am Jur 2d, Libel and Slander, § 352, p. 872.

¹⁰⁸ 50 Am Jur 2d, Libel and Slander, § 352, pp. 872-874.

Any award against the press or the media on the simple basis of improper motive has been abrogated by this series of court decisions.¹⁰⁹ The new constitutional standard requires that actual malice -- "knowing falsity or reckless disregard for the truth"¹¹⁰ be proved before any recovery is permitted.

c. Mitigation of damages

i. Truth

Truth has often been called the "complete defense" in defamation actions.¹¹¹ At common law it was considered a bar to all recovery. Under the constitutional standard a plaintiff must allege and prove the falsity of a statement.¹¹²

The defendant may assert as a justification for the publication the truth of the matter.¹¹³ The defendant may present as broad or as narrow a defense as is necessary to prove fully the justification of the publication. Liability may not be avoided by proving the imputation was true in part,

¹⁰⁹ Gertz v. Welch, Inc., 418 US 323 (1974), Prosser and Keeton, p. 845.

¹¹⁰ HULME, p. 384.

¹¹¹ Restatement (Second) of Torts, § 581A, p. 235 states "[o]ne who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."

¹¹² See M. FRANKLIN, "The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law", Stanford Law Review, 16(1964), pp. 786-848.

¹¹³ Prosser and Keeton, p. 839.

"or, if the charge is one of persistent misconduct, by showing that it was true in a single instance."¹¹⁴

ii. Other methods of mitigation of damages

Other methods of mitigation of damages include the printing of a retraction if the defamatory statement was made in a publication. Such methods are usually required by statute. ¹¹⁵The retraction or correction of the statement must be made in a place similar to the original defamatory statement and in a similar size of type or style. In other words a page one headlined defamatory statement is not to be corrected in a half inch story on page eighty-five. The object of the retraction is to reach approximately the same audience who would have seen the original defamatory statement and thereby at least lessen the damage done by that first statement. A retraction may also be ordered by the court as part of the damage award itself.¹¹⁶

C. An Evaluation of Standards of Adjudication

1. Burden of proof of the Plaintiff

The entire system of defamation adjudication has been

¹¹⁴ Prosser and Keeton, p. 841.

¹¹⁵ Restatement (Second) of Torts, § 623, special note, p. 329.

¹¹⁶ Ibid.

fodder for reform-minded jurists for a long time.¹¹⁷ Some see the current U.S. system as needing reform in the area of burden of proof because it requires the defendant to prove her or his innocence. That is considerably different from the division of the burden of proof in other tort actions.

Under the current system the initial burden of proof is on the plaintiff who alleges that there has been an injury to reputation through defamation by the defendant. Although this was not the case at common law where the good reputation of the plaintiff was presumed, the constitutional standard requires the plaintiff to set forward proof of his or her good reputation and the facts of the alleged defamation.

The disadvantages of this type of standard are many. This burden on the plaintiff has put most plaintiffs in a difficult position since proving their own good reputation and the wrongfulness of the allegations of the defendant requires a great deal of time and money because of the expense of the present legal system. This discourages even those who have a clear case of injury from bringing it before a jury for review

¹¹⁷ Criticism of the present method of defamation adjudication is legion. See D. ANDERSON, "Is Libel Law Worth Reforming", University of Pennsylvania Law Review, 140(1992), pp. 487-554, R. BEZANSON, "The Libel Tort Today", Washington and Lee Law Review, 45(1988), pp. 535-556, P. LABEL, "Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework", Nebraska Law Review, 66(1987), pp. 249-319, M. FRANKLIN, "Good Names and Bad Law: A Critique of Libel Law and a Proposal", University of San Francisco Law Review, 18(1983), pp. 1-49.

since the burden mentioned above can be very onerous. It can take years to bring a civil case to trial as well as a great deal of capital. This has resulted in fewer defamation suits against those defendants who have a "deep pocket" for payment of a high damage award. It has also resulted in a limited number of defamation cases against primarily media defendants rather than against individuals, and only in a few cases solely involving individuals divorced from the mass media.

This type of burden is advantageous in that it reduces frivolous suits and discourages litigation when there is little hope of substantial return. The burden required of plaintiffs in this type of tort is no different from that required of any other person who claims injury.

The manner of approach by the courts today is more in the line of considering reputation as a property right rather than as a dignity belonging to an individual member of society.

2. Defenses

a. Truth

Truth as a defense was most available under the application of the common law. In the majority of states it is still available as a defense by right of statute.

This defense is to be affirmatively pleaded by the defendant who must prove that the actual statement made is true in its completeness. This defense is at the heart of a

defamation case. If a person's reputation is injured by the truth, what was the basis of the reputation? If a person states the truth of a matter, should the law punish that person? Truth is a value in U.S. society and its availability to defendants can be to their advantage.

Disadvantages concerning this defense center around the ability of the defendant to prove the truthfulness of her or his statement. The availability of that truth and the actual definition of "truth" in that particular situation will be instrumental in determining the outcome of the suit.

b. Privilege

The establishment of privileges for various persons within the context of the defamation tort has many advantages. The absolute privileges (i.e. for elected members of Congress, lawyers, judges, and other public servants) are designed to allow a public official, acting under the color of law and therefore on behalf of the public good, to do what is proper within the context of her or his position so the public may be properly served. These privileges allow those to whom they apply to act forthrightly to protect the public even though the reputation of an individual may be injured in some way. In a sense the good of all oversees the interests of the individual.

The qualified privileges are designed to balance the rights of individuals rather than the public at large as

represented by governmental officials. These are designed to protect the free expression of ideas within a particular factual setting and are based on specific types of relationships between the parties.

Privileges allow differing values to be weighed and protected. They have advantages in that they can be structured to meet specific needs and situations in a broad way. They can also be used as a simple way of establishing distinctions between particular groups if differing standards of adjudication are necessary. Privileges reflect protection of reputation as an honor rather than as a dignity since they encourage a stratification of the community into those who possess such a privilege and those who do not.

Privileges have disadvantages since they are so general in character that they allow for abuse. A public servant may use her or his position and the privilege attached to it to seek vindication of a personal wrong under color of authority. Privileges may not look to the personal motivation of the person claiming the privilege and thus allow injury based on vengeance or vendetta. The manner in which the privilege is drawn may limit this abuse: the stratification that is likely to occur in a privilege system may also be viewed as a disadvantage since it places some persons on a less equal footing in vindication of reputation than others. The question, of course, is the balance to be given to specific interests.

3. Damages

a. General damages

Under the common law the plaintiff did not have to prove the existence of any general damages. This presumption at common law had the advantage of narrowing the relevant issues in a defamation case. The later constitutional standard¹¹⁸ requiring proof of general damages in the same manner as special damages has added a more onerous burden to the plaintiff since he or she must decide whether there is sufficient evidence to prove the existence of an injury that would warrant such a damage award. It has also led to more time being spent in the damage phase of a trial since the plaintiff must present proof to lay a foundation for such an award.¹¹⁹

For the defendant the newer constitutional standard has made it easier to fight defamation cases; it was designed to protect the mass media. The defendant still has the ability to present evidence that would mitigate any damage award that might be given, but with the increased burden of proof on the plaintiff, the work of the defendant is proportionately reduced.

¹¹⁸ Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

¹¹⁹ HULME, p. 381.

b. Special damages

Even though the Supreme Court expanded the concept of general damages in Gertz,¹²⁰ special damages are still available in defamation actions. These damages have the same advantages or disadvantages listed above for general damages since the burden of proof as the basis of recovery is very similar.

c. Punitive damages

Punitive damages are designed to deter a defendant from any future defamatory conduct. Gertz noted that punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."¹²¹ These are in essence criminal penalties imposed in a civil process.¹²² Under the common law, the defendant's state of mind was the primary issue in determining the award of this type of damage. Under the constitutional standard noted above, it has become even more difficult for plaintiffs to procure such damages since the standard of proof regarding the defendant's action has been increased substantially. The defendant,

¹²⁰ Ibid.

¹²¹ Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

¹²² HULME, p. 383.

usually a member of the media, has gained considerable protection under this standard for the same reason.

d. Nominal damages

Nominal damages were readily available under the common law and under the constitutional standard. The advantage of this type of remedy was the ability of the plaintiff to have her or his name vindicated in some way even if it was only in a symbolic manner. While this may satisfy the plaintiff in some situations, it is an expensive way to vindicate one's reputation after another has unlawfully damaged it. Attorney fees and time spent pursuing the case must be weighed carefully prior to the pursuit of an action for these damages alone.

For the defendant in these types of actions, the attorney fees and time are also negative considerations. The heavy weight of defending one's self against any defamation action, even if no other damage award is made, may prove to be a penalty in and of itself.

4. Enforcement mechanisms

The courts in the United States have a variety of options available to enforce the judgments made by them in their pursuit of justice. For the pursuit of monetary damages, these

methods include garnishment¹²³ and attachment.¹²⁴ For enforcement of judgments other than monetary damages, other remedies include the contempt powers of the court¹²⁵ and its power to fine the parties until they submit to the will of the court. The variety of ways in which a court will enforce its will on a party will depend on the requirements of the judgment itself. Different enforcement mechanisms are available for different results.

CONCLUSION

The system of vindication of the right to reputation in U.S. law is based primarily in the administration of justice through the court system. The courts hear cases regarding injury to reputation under the tort of defamation, including both written and oral defamation. The law applied in adjudicating this tort has its roots in the common law of England and somewhat in ecclesiastical law.

Until 1964 the common law standards of this tort were

¹²³ See footnote 46 of this chapter.

¹²⁴ See footnote 47 of this chapter.

¹²⁵ In an constructive (or indirect) contempt of court proceeding the judge may order that the person who must comply with the judgment immediately, or within a specific time, or face time in jail. This type of contempt power is exercised only when there is "disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command", Black's Law Dictionary, p. 288, col. 2.

applied in the United States. At that time a constitutional standard was enunciated that changed many aspects of the tort. In succeeding opinions other changes were also introduced.

These changes included increasing the burden of proof on the plaintiff, limiting the defense of truth for defendants, establishing differing standards of proof for public and private individuals, and requiring proof for any award of damages.

These changes, while in some ways making the system of vindication more equitable between the parties, have also resulted in limiting the availability of the judicial remedy to those who can afford to institute one, and against those who can most likely afford to pay any judgment. These changes have confused the object of the tort's protection.

Portions of the system, however, do have distinct advantages in the actual vindication of the right to reputation. Our next task will be to explore the ways concepts of the civil law experience might be applied to the canonical system.

CHAPTER FOUR

PRACTICAL APPLICATIONS FOR THE VINDICATION OF THE RIGHT TO ONE'S REPUTATION

The questions associated with the right to reputation¹ under canon law have been demonstrated earlier in this work. These can be divided into two areas: the first consisted in defining the contents of the canon and thus some limitations on that right, while the second dealt directly with the process for the vindication of rights in a practical context.

This chapter will be devoted to providing ways of addressing a number of subsidiary questions: what does canon 220 mean to an individual? What does it mean to the community? What are the practical aspects of implementing a right under the present canonical processes? What can canon law look to from U.S. law for guidance in the adjudication of its own procedural law? Finally, what should a canonical process involving a case for the vindication of the right to reputation look like?

I. DEFINING THE CONTENTS OF CANON 220

The portion of canon 220 under study here is certainly an individual right established in the context of the canon

¹ C. 220.

within which it is placed. As can be seen through both its history as a concept prior to and after Vatican II and its particular development, this canon establishing the right to reputation is designed to complement human dignity so central to all human rights.

This right differs under the present code from previous Church attempts to protect reputation in that it is presented positively as a right of the faithful, rather than negatively as a penalty to be imposed on an individual.² In terms of vindication, this means that as well as being able to seek a prosecutorial action in the Church to punish one of the faithful in a public way (i.e. as in a penal trial), individuals are able to protect their reputations against an abuse of administrative authority and can undertake an action against another individual for damage to their reputation.

The exact dimensions of canon 220³ will still be developed as administrative and judicial decisions are made in the future. Nevertheless, a number of basic ideas are apparent from a review of the text of the canon itself. First, it establishes a right for every individual and an obligation on the part of the community to refrain from injuring that right, except in certain limited circumstances. Second, the

² See Codex iuris canonici auctoritate Benedicti PP. XV promulgatus (=1917 Code), Libreria editrice Vaticana, 1917, v, 916p., c. 2355.

³ C. 220.

right can be the possession of either a physical or a juridic person. Third, it may be limited in specific situations.⁴ Finally, one must say that to date the Church has had little experience in defining or vindicating this positive right.

A. To Whom The Right Applies

1. Individual persons

The right applies to individual persons; this is apparent from its listing in the section on rights and obligations of the faithful. This right, as envisioned by canon 220, is obviously important to individuals since the role they may have in the community may be limited by the reputation they enjoy there.⁵ There does not appear to be any difference in the manner in which persons are to be treated regardless of their state of life in the Church.

⁴ This may be done either through the exercise of a lawful action (c. 220) or through the limitation of the right for the common good (c. 223 §1). A further explanation of these limitations is presented later in this chapter.

⁵ Within the code itself, persons must be of good reputation to hold the offices of chancellor and notary, c. 483; judicial vicar, c. 1420, §4; judge, c. 1421, §3; promoter of justice and defender of the bond, c. 1435; and procurator and advocate, c. 1483. One must also be of good reputation to be qualified for ordination as a priest, c. 1029.

2. Juridic persons

Juridic persons possess rights in accord with their nature.⁶ Juridic persons may be involved in actions with other juridic persons or with specific individuals. In regard to the right to a good reputation, that of a juridic person may be injured in some way that would result in harm to it. As with individual persons, this may be the result of an action of an ecclesiastical authority, a private person, or another juridic person.

It seems logical to apply, by extension, the presumptions of canon 220 to juridic persons since the importance of a juridic person's reputation within the community cannot be overemphasized. Such persons rely on good will to obtain financial support for their works, to promote the aims of the group, and to attract other persons to join them in their service to the Church. Unlawful damage to their reputation may result in the elimination of services, the loss of trust on the part of those whom they serve, or other damages particular to their own goals as a juridic person. This is not to say that their reputation is different from that of an individual person, but that the importance of the ability to vindicate this right is equally important to a juridic person.

⁶ c. 113 §2.

3. The individual right and the community

The community is a major component of the concept of reputation. One cannot have a reputation in a vacuum. A person's reputation is dependant on the community since that is where the reputation truly resides, even though the reputation itself is the possession of the individual.

It can also be suggested that just as an individual has the right to enjoy a good reputation, so too the community has an obligation to avoid damaging the reputation of its members except within the confines of the law.⁷ The importance of this two-fold view of rights cannot be overemphasized. The difficulty lies in balancing the right of the individual and the obligation of the community and is one of the major challenges in presenting the right to reputation in a positive manner. When the application of penal law was the norm for any violation of reputation, it was easier to determine what role the community played and where the individual fit into the process.⁸ Under the current application of a positive right, the balance between the two interests is less clear.

According to the present canon, however, there would be lawful ways to injure a reputation as well as to limit its vindication.

⁷ This may be implied from the canon; where there is a right, there is a corresponding obligation.

⁸ In a penal process, the community punished the wrongdoing of another on behalf of the one whose reputation had been injured.

a. Lawful ways to injure a reputation

The text of canon 220 presupposes that there may be lawful ways to injure a person's reputation. For instance, within the confines of canon law, it appears that any action sanctioned by that law could conceivably lawfully injure a reputation. Because we are examining a limitation on a right which must be interpreted narrowly,⁹ this places certain restrictions on the type of action that could be considered lawful if a person's reputation were injured.

i. Administrative power

It appears that the appropriate exercise of administrative power could on occasion lawfully injure a person's reputation within the parameters of the canon,¹⁰ provided the exercise of this power were within the confines of the law. We would also suggest that for it to be lawful, no other manner of producing the same effects would be available. Thus, if the same result could be achieved otherwise without injuring the reputation of a party, regardless of a lawful

⁹ C. 18.

¹⁰ Exercises of administrative power could include granting dispensations, cc. 85-93; rescripts, cc. 59-75; decrees, cc. 29-34; precepts, cc. 48-58; privileges, cc. 76-84; and any other singular administrative act.

right to impose a penal precept, the right to injure the reputation of another would be questioned.¹¹

ii. Judicial power

Another possible lawful way to injure a person's reputation would involve the exercise of judicial power. This could be within the context of a contentious matter (such as a marriage case), or of the judicial imposition of a penalty. Again, the same question is raised regarding the lawfulness of the exercise of the power. If, for example, a respondent in a marriage case has not been given the opportunity to present a defense to allegations of alcoholism or mental illness, the sentence itself would be irremediably null¹² and any injury to the respondent's reputation could be viewed as done unlawfully. The opposite would also be true: if a respondent had been given every opportunity to present a defense to a variety of reputation-damaging evidence, and refused to say anything at all, then the sentence resulting in possible damage would be lawful.

The point then is this: if an action carried out according to the proper requirements of canon law injures the reputation of another, the one whose reputation has been

¹¹ This conclusion is a result of interpreting the exercise of rights broadly and the restriction of the exercise narrowly in accordance with c. 18.

¹² c. 1620,7°.

injured will not succeed in an attempt to vindicate the right to a good reputation unless it can be proven that the same result could have been accomplished without the injury to reputation.

b. The "common good" of the community

The law recognizes community involvement in the right to a good reputation by noting that the common good¹³ or the good of the community is to be considered in any eventual restriction of the vindication of the right. Determining the limits of the "common good" is left to ecclesiastical authorities¹⁴ with certain advantages and disadvantages.

i. Advantages

The first advantage is the ability of the local ecclesiastical authorities to tailor the limitation of rights to specific conditions in the local community. Since these same authorities have the responsibility for seeing to the welfare of all the People of God within their charge, they should be most aware of the dangers of allowing the right of one person to injure the good of the whole community. They would also be aware of local interests at stake and be able to

¹³ C. 223 §1 and §2.

¹⁴ C. 223 §2.

gauge the degree of injury to an individual's reputation because of their access to the local community.

Secondly, the vindication of this right without the resort to a penal trial is advantageous as it allows for more direct rehabilitation of the injured reputation if it was unlawfully injured. With the first decision being made at the local level, swift justice would be an advantage, although the possible prolonged appeal process might outweigh any initial benefits gained from this first decision.

ii. Disadvantages

The ability to tailor the limitation of rights to individual communities also has disadvantages. For instance, it can lead to a perception that rights of individuals can be limited in an arbitrary manner since the exercise of a right might be limited for one person under one set of facts and not limited for another in a somewhat similar situation. There is also the potential conflict of interest in this ability to limit the vindication of a right by those exercising administrative or judicial authority, as they may be the ones who have injured the right to begin with. Because of the governmental structure of the Church, those who exercise either judicial and administrative authority would generally be the first line of recourse against the unlawful injury of

a right as a result of their own actions.¹⁵ In such a situation, the person seeking damage for the unlawful vindication of the right would be expected to bring the initial claim before the executive or judicial branch that injured the right, rather than before some truly neutral or higher forum. It is only after a decision has been reached at the local level, in most cases, that the person claiming the harm to reputation is able to receive a decision from a body that at least has a greater appearance of neutrality.

B. A Definition of Reputation for Juridic Purposes

There has been little to date in the way of guidance toward a definition of "good reputation" that could be applied in an administrative or a judicial process. Compared to the reasons civil law invokes to protect reputations, canon law protects the right to reputation on the basis of personal dignity.¹⁶ It does not view this type of right as a "property" right where money is used to compensate a person whose "property" has been damaged. This is not to say that a canonical decision-maker would not wish to use an assessment of money damages under specific circumstances, but rather, that under canon law there is little agreement about the

¹⁵ See c. 1405 §3, however, for certain significant exceptions to this statement in matters relating to judicial processes. For administrative recourse, c. 1734 §1 would apply.

¹⁶ See c. 208.

universal applicability of an award of money to repair damages to a reputation.¹⁷ The ability to enforce such a judgment is also problematic given the reliance of church courts on moral authority and persuasion rather than on forcible means of implementing a decision.

1. A presumption

Since canon law, as is customary in most situations, avoids giving a clear definition of what a good reputation, it seems that we must presume that each person has such a reputation within the community unless it is proven otherwise. How is this done?

2. A standard

In this case, we would suggest that the U.S. civil law evaluation of a "community standard" would be appropriate. Thus, the standard to be applied would hold that the injurious statement

need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made to one or more of them or in a manner that makes it proper to assume that it will reach them.¹⁸

¹⁷ See, however, c. 128.

¹⁸ Restatement (Second) of Torts, § 559, comment e, pp. 157-158.

The community standard for establishing the reputation of a person seems to be in concert with the values of the canonical right itself since it emphasizes the existence of the right within the context of the local community which has the obligation of avoiding injury to it.

3. Advantages and disadvantages

This standard works well in a practical sense as seen by its application in U.S. civil law circumstances. It allows for the possibility that a person may have a poor reputation that would not be injured by the negative remarks of another member of the community. It also allows for the possibility that a person may have such a strong reputation in the community, that anything negative would be unable to harm it.¹⁹

Another advantage of the community-based standard is that it allows for the fact that the reputation of a particular person depends on the community as a whole. It is practical since the decision-maker may draw on the resources of the local community to determine the amount of harm done, as well as its extent. It also recognizes the fact that any required rehabilitation of the reputation would take place in this same community. According to this standard, damages may be tailored specifically to the community's own particular circumstances.

¹⁹ This is not to say that, nevertheless, damages could not be awarded.

The disadvantages of such a standard center around the ability to determine the damages in a quantifiable way. What portion of the local community must be affected before a reputation is actually damaged? Is a decision-maker to hear a dozen witnesses regarding the reputation of a person, or, is a poll of the local sentiments to be taken? In spite of these concerns, it still seems that the advantages of this standard far outweigh any disadvantages. It is left to the decision-maker to determine the best way to establish a reputation within the community to fit the context of the particular case.

This standard also provides a defense to the defendant by allowing him or her to present evidence that the plaintiff has a bad reputation in the community and thus, even if the defendant did say something potentially injurious to the plaintiff's reputation, no damage was done since there was not a good reputation to injure in the first place.

D. A Canonical Definition for Damage to Reputation

1. The definition

As was the case with "reputation", canon law does not provide us with a clear manner of evaluating any injury that may be unlawfully done to a person's reputation. On the other hand, the U.S. civil law definition of defamation, or damage to reputation is very well developed. We would suggest, then,

that it could be the basis of a simple definition to be used by any decision-maker in a canonical process.²⁰

The definition would have four parts and thus to demonstrate injury to reputation, a person must prove:

1. that a false and unfavorable statement has been made about another;
2. that the statement made is not privileged and was made to another person other than the plaintiff;
3. that the person making the statement did so with neglect of the facts; and
4. that actual injury resulted from the statement made.²¹

Each of these elements would have to be established by those contending injury to their reputation before any action for damages would be considered.

a. A false and unfavorable statement concerning another

A false and unfavorable statement concerning another could be considered as having three elements. First, the statement²² made must be false. Some statements are more easily proved false than others, but this challenge should be left to the parties themselves. They should be permitted to put forward proof concerning the truth or falseness of the

²⁰ This definition could be used in either an action of administrative recourse or in a judicial vindication of this right.

²¹ Based on Restatement (Second) of Torts, § 558.

²² Statement may be defined very broadly to include any action, gesture, writing, video, or other type of communication. We would not suggest taking on the US civil law categories of libel and slander since these have become obsolete in attempting to establish areas of defamatory actions.

statement under scrutiny. Since speaking the truth is a value for the community, encouraging a clear vision of each member, truth could be used as a defense to an allegation that one has injured another's reputation.

The second element is that the injuring statement be unfavorable. In other words, a false statement that reflects well on the plaintiff is not actionable. This element is designed to avoid frivolous claims involving statements that would enhance another's reputation.

The third element concerns who may be defamed. This portion of the statement establishes that the one claiming injury may not have done the injury.

b. The statement made is not privileged and was made to another person other than the plaintiff

i. The statement is not privileged

The next portion of the definition requires that a statement lack privilege. While privilege is both a canonical and civil law concept, in the canonical context it could be expanded to reflect the concept of lawfulness that is part of canon 220. A "privilege" in this situation could mean that a canonical decision-maker, either within a judicial or an administrative process, has the right -- and at times the obligation -- to injure the reputation of another through the proper conduct of a canonical process. The actual nature of this "privilege" would touch on the concept of the common good

of the faithful and the limitations of the exercise of the right to reputation.

ii. That the statement was made to a person other than the plaintiff

The statement must also have been made to one other than the plaintiff. Simply injuring the reputation of the person, to no one else but that person, would lack the community element mentioned previously. Even if the individual's feelings were hurt, the person's reputation within the community has not been diminished in any way. This element brings together the two portions of reputation, that of the individual and that of the community, in a way that reflects the canonical values of the right itself.

While canon law is silent on the requirement that the other person to whom the statement is made must understand it, it would seem that such should be a condition since the actual involvement of a member of the community would be in keeping with the canonical concept of reputation.

c. The person making the statement did so with neglect of the facts

The third element of the portion of the definition we are proposing is more difficult to define. The element itself is designed to allow a defense to the person making the statement. It also allows for the possibility that a person may injure the reputation of another after a careful study of

the facts of the matter and comes to this conclusion after consulting a variety of sources demonstrating that the plaintiff did indeed do something injurious to her or his own reputation.

A neglect of the facts could mean that a person would be required to have carried out beforehand a serious inquiry into the truthfulness of any matter that might injure the reputation of another. This would mean that the defendant would be able to suggest that the statement was made after consultation of a variety of written or verbal sources to determine its truthfulness. It would be up to the plaintiff to prove that the defendant was neglectful or actually intended to make the injuring statement despite any previous consultation. The defendant could, in fact, maintain that the statement made was a true reflection of the sources consulted prior to its making and thus she or he was not liable for simply establishing the truth.

This element may prove difficult for a canonical decision-maker to determine. Both sides on this issue should be heard in an attempt to determine whether the actual damage done was the result of neglect of the facts or of intentional harm, or because of some other motive on the part of the injuring party.

d. That actual injury resulted from the statement made

Actual injury to the plaintiff must have resulted from the action of the defendant toward the plaintiff's reputation. The type of injury is not specified, so this definition is left to the canonical decision-maker.²³ What is important here is to show that there is an actual link between the damaging statement made by the defendant and the injury of the plaintiff. If harm befell the petitioner from sources other than the defendant, then the defendant could not be held responsible for the damage done.

In cases involving more than one person who injured another at the same time, the degree of culpability would have to be assessed by the canonical decision-maker. Not all may be equally culpable for the damages done.²⁴ Any assessment of damages, then, would have to reflect the assessment of the degree of fault of the individual defendant in question.

2. Advantages of the proposed definition

The proposed definition has a number of advantages. First, it is not so strict as to limit the kind of statement that may actually injure a reputation. It may be a gesture,

²³ This could include harm of a personal, financial, emotional nature, or some other type of harm.

²⁴ Among a group all may be equally culpable and, under a similar law regarding penalties (c. 1329, §1 and §2), all are to be punished in the same manner for the same offense.

an oral statement, a written one, or any other kind of statement that would somehow negatively reflect on another. Second, by allowing that there might be a privileged situation where the reputation could be injured lawfully, it takes into account prescribed canonical limitations of the canon. Third, it places the burden of proof on the person making the statement to prove that the facts of the situation had been investigated before injuring the reputation. Fourth, it specifically requires that some kind of injury, without however determining it in detail, result from the statement. A final advantage is its general guidance to a decision-maker while, at the same time, leaving room for individual application to the specific facts.

II. PROCEDURES FOR THE ADJUDICATION OF THE RIGHT TO REPUTATION

There are numerous questions to be addressed in regard to the proper adjudication of the right to reputation under canon law. This section will be divided according to the various processes to be considered.

A. Administrative Recourse

1. In general

The administrative process available under the Code can vindicate the right to reputation only in specific circumstances, such as injury of reputation through actions

taken by a bishop or one acting under the color of administrative authority.²⁵

Such recourse would be taken against the decree or other administrative action in accordance with canons 1732-1739. A person could bring an action against such an exercise of administrative authority, using as a basis the fact that his or her reputation had been unlawfully injured.

2. The basic issues of the process

In such a proceeding, the basic question of defining reputation would arise within the context of the lawfulness of the administrative action. There would thus likely be two parts to the proceeding. The first would establish whether the harm had really been done by the administrative action alleged to have caused it. The second would establish the lawfulness of the action and thus its ability to injure the reputation of another under color of law. It seems that had there been no harm, it would be unnecessary to proceed to the question of the lawfulness of the administrative action.

If there were proof of harm, the next step would be to determine whether the administrative action was lawful. The definition for injury to reputation mentioned above could be applied in such circumstances.

²⁵ C. 1733 §1.

If harm resulted from the unlawful administrative action, then persons conducting the inquiry would proceed to the next step of considering proper compensation for damages inflicted. To determine the amount to be awarded, the proper hierarchical superior would have to make a determination based on the facts of the case.

The damage process would most likely draw upon the concept of the common good as a limitation on the vindication of the right in question because of the decree-making process itself.

3. Burden of proof

Who must shoulder the burden of proof in this type of proceeding is unclear from the history of this right when considered as a penalty. In former times, the one seeking to have the penalty imposed would have had the burden of proof.

In any challenge of an administrative action on the basis of harm to reputation, two issues would come to the fore. First, was the reputation actually harmed by the administrative action? Second, was the action being examined lawfully carried out so that the injury to reputation was done within the context of the law?

4. Lawfulness within the process

Even if there is proof of harm to reputation, the issue of the lawfulness of the action will come into play. This

issue is important because the canon itself appears to allow for lawful injury of the right. If "lawfulness" is simply the requirement that the procedural rules of the law be followed, then any injury to reputation as a result of a "lawfully" propagated administrative action would be lawful. Under this approach, one would presume that any procedurally correct exercise of administrative power was being performed in the interests of the common good and could, thereby, rightly infringe on an individual's right to a good reputation.

But, more than just the procedural aspects of a situation should be taken into account. A deeper question would be whether the ends intended by the administrative action could have been accomplished without the injury to the right. This broader understanding of the right to good reputation is in keeping with the idea that rights should be restricted only in carefully limited circumstances.²⁶

The first approach -- considering lawfulness -- would be advantageous to administrators since they would simply have to establish that they followed the requirements of the procedural law prior to exercising their authority. This is an objective standard whose interpretation would be determined in a manner similar to that applied on the appeal against an administrative decision. The appeal authority either confirms or overturns the actions of the lower level rather than

²⁶ C. 18.

indicating what course should have been followed. This approach is also advantageous because administrators would not be second guessed regarding the discretionary decisions they make in a given situation. Rather, they could rely simply on their enactment of procedural rules to ensure that any infringement of an individual right was done in order to further the "common good".

This second approach would place an additional burden on those exercising executive power. It would entail a more subjective standard whereby those exercising executive power would be challenged to establish that they had considered the eventual injury to the right of reputation of an individual and had been unable to accomplish the same ends in some other manner. It would also require that the administrators be creative in determining the best way to exercise their power.

This second approach would be advantageous to the individual claiming harm since, once the proof of the actual injury to reputation had been established, the burden of proof would shift to the one exercising the administrative authority who would now have to demonstrate that this was the best solution in the situation. This interpretation would place a heavier burden on those who review an administrative action within a recourse process, since it would require the gathering of more information concerning the motives for the decision and the alternative considered before the decision was actually made.

It is clear that this would be a sharp departure from the current method used in the administrative recourse process. While it would indeed be a sharp departure, it would be in keeping with the principle of the protection of individual rights mentioned in the principles for revision of the code. It would mean that those persons reviewing a lower level recourse would have to be more evaluative in the exercise of their power.

5. Damages

Damages may be considered within the context of an administrative process when deemed appropriate by the decision-maker. It is unclear who would have the burden of proof in regard to damages, but since the judicial process requires that the one who asserts the injury provides the proof,²⁷ the same principle would likely be applied to the matter of proof of damages.

There is no specific limitation regarding the type of damages that may be awarded. The decision-maker is thereby free to craft a specific damage remedy for the party alleging the harm.

Both parties could be asked to provide evidence regarding the actual damage done. For example, a person who has been unlawfully injured by being wrongly excommunicated for a stand

²⁷ C. 1526 §3.

on abortion should be permitted to offer proof of the damages suffered to business, personal, professional, and parochial relationships. The administrator who injured the reputation unlawfully should be prepared to present information about what has been done, if anything, to repair the reputation of the injured person.

There is no limitation on the amount or types of damages that may be awarded. The decision-maker may be as creative as necessary in such a matter. A written or verbal apology may be ordered. Other measures in order to restore the damaged reputation may also be instituted where appropriate.

B. Judicial Processes

The judicial processes available under the Code are the most obvious manner in which the right to reputation will be vindicated. This may be done using either the ordinary contentious process or the oral contentious one. Either may be employed when an individual would seek to vindicate reputation.

It should be noted in passing that in a penal action where one is to be punished for injuring the reputation of another, the norms of the penal process must also be observed.

1. The ordinary contentious procedure

a. Defamation defined

To define the concept of defamation for use in a judicial procedure, we must keep in mind both sides of the right. Both its individual nature and its connection to the community as a whole must be considered. The definition regarding injury to reputation put forward previously should be applied here.

Particularly in a judicial context, this definition has advantages since it places the major elements of proof squarely before the court and the parties.

b. Burden of proof

Within the confines of a canonical judicial process, it is clear who has the burden of proof. The person who asserts that his or her reputation has been injured has the onus of proving that assertion.²⁸ It seems that the person²⁹ alleging the injury should prove all the elements of our definition. The one alleging the injury should also be responsible for proving the damages that actually occurred.

Whoever claims that the damages were less than those put forward by the one alleging injury, has the burden of proving that they were indeed less than otherwise shown. In brief, the

²⁸ C. 1526, §1.

²⁹ This may be a plaintiff or a respondent depending on whether the action is asserted as a claim or a counter action.

one who asserts must prove the truth of the allegation whether we are dealing with an action or a counter-action.

c. Standard of proof

The judge in the judicial process must determine the outcome of the case based on a specific standard of proof. The standard to be applied is important both to the parties and to the decision-maker.

As in all judicial actions, a level of moral certitude is required for an affirmative decision regarding the allegations. In a case to determine whether a right to reputation has been injured, the judge is bound to determine whether there was indeed an injury, and if so, whether the proof of the injury is sufficient to meet the burden of proof required by the law.

d. Defenses

i. Truth

The defendant in judicial actions will be interested in the proper defense to this type of action. As is well established in civil law, the truth of the alleged defamatory statement should be a full defense for the defendant to an assertion of unlawful injury to reputation.

The task of the court is to judge what the truth actually is in a given circumstance. A particular fact situation will

illustrate this point. A well-known Catholic columnist printed a portion of an official statement made by the local chancellor. The statement implied that the chancellor opposed a position officially held by a Congregation of the Holy See on the same matter. The original statement had indicated that some persons within the chancellor's diocese believed the statement made by the Roman Congregation to be wrong, but the chancellor, in later paragraphs of the statement, indicated that she or he recognized the Congregation's position in this case and would implement it. The question of whether the statement was actually made by the chancellor is answered as the truth. The chancellor did make the statement but the columnist, by printing only part of the whole, misrepresented the chancellor's views. Would not the presentation of only a part of the truth of a statement be culpable under church law? It seems that an interpretation of the defense of truth as referring only to the literal truth would be inadequate to deal with the facts in the example above. Of course, there will be times when the literal truth of a matter will end the case, but in situations like the one noted above, the actual injury done may be very great. What we have here is a case of a true statement presented in a false light.

ii. Privilege

The concept of privilege under canon law is not new. Whether such a concept should be applied within the context

of a juridic process for vindication of a right is a new question, however.

Within the context of the vindication of the right to a good reputation, privileges could be constructed that would protect the right to injure someone's reputation lawfully. This is done in U.S. civil law in order to protect the person who carries out actions to further the public good. While the terms "common good" and "public good" are not synonymous in either usage or application, the basic notion that one charged with protecting the public welfare must be free to injure the reputation of another in certain limited circumstances is a sound one. Creating a "privilege" as a defense to an allegation that one has injured the reputation of another would assist in establishing the definition of both "unlawfully" and "common good".

The basic categories of absolute privilege under U.S. civil law could be applied in some cases in canon law. For example, judges, advocates, assessors, defenders, promoters, and other officers of the church courts may say things that injure the reputation of another within the exercise of the obligations of their offices. As they carry out their obligations, these persons may have to characterize the actions of another in a way that would injure the reputation of that person if the statement were made outside the judicial context. We would suggest, then, that what is said by these persons as they carried out their duties within the canonical

system, should be privileged; that is, privileged to injure the reputation of another under color of law.

This is not to say that a person who holds a judicial office would have complete license to injure the reputation of another in any context. Such a person would, as in U.S. civil law, enjoy a privilege under limited circumstances. It would exist only within the strict performance of the official judicial duties of the person exercising the office, as when making official statements within the court, in their written work for the judicial process, or in arguments presented within the confines of the process itself.

These same persons would not be able to make privileged public statements outside those required by law, such as the final publication of a sentence at the conclusion of a process.³⁰ This would mean that public statements beyond those required by law would not be protected. But even protected statements would have to be carefully drawn to avoid doing more damage than necessary. This would allow protection of the actions of individuals carrying out official duties and would comply with the requirements of canon 1455, §3.³¹

³⁰ C. 1614.

³¹ The establishment of any limits to the privilege in regard to the actions of individual officials as they exercised their offices would be left to the decision-maker.

e. Determination of damages

i. In general

The whole question of damages will obviously be of particular importance in a judicial proceeding. Canon law leaves their assessment and formulation to the judge in each proceeding. There is no specific formula that would be of help in such a matter.

ii. When to consider damages

The initial question is when to consider the question of damages. It seems that this portion of the judicial proceeding should take place after there has been an initial finding that a reputation has been unlawfully injured. The reasons for this are simple. In the first phase of a reputation case, the parties can focus on the question of the injury itself. They can answer questions such as: did the injury actually occur? Were there mitigating circumstances at that time? Who actually injured the person's reputation? Once the court has been able to decide these issues, it may then proceed to the question of the extent of the injury and determine whether damages are warranted under such circumstances. By dividing the conduct of this matter into two parts, the court may save itself time by avoiding having to hear the proofs of the damages where none will be awarded.

iii. What can be considered in assessing damages

aa. In general

Repairing the damage done to an injured reputation is the final goal of the process if a right has been unlawfully injured. As the right to a good reputation is the possession of an individual in relation to the community, the goal of an award of damages is to repair that reputation within the community as much as possible. Because of the nature of the right to reputation in canon law, money damages awarded in U.S. civil law, will most likely be the last item of consideration in a damage award. Rather, the judge is likely to prefer other forms of compensation, if available, before resorting to that type of award.

The judge should consider the extent to which the injurious statement was made. If it was made to three acquaintances of the plaintiff who did not believe the statement, there would be less damage than if in one where the plaintiff made the statement over national television or through a national newspaper to millions of people. While not following the U.S. civil law distinction between libel and slander, the decision-maker should consider the permanence of the statement.

In attempting to determine what is appropriate in any given situation, the judge should ask the parties to present

evidence regarding the matter. For the plaintiff, evidence of any personal, spiritual, or financial losses should be made plain through testimony, affidavit, or other evidence. Any proof of the extent of the injury within the community should also be made available. The judge may, of course, seek out this evidence personally if necessary.

bb. Available remedies for repair of reputation

Alternative remedies for injury to reputation might be a public apology to those persons to whom the original injurious statement was made. For example, if a priest made a statement unlawfully injuring the reputation of another during the homily at two masses on Sunday, the judge might require that the priest read an approved statement during that same time, at the same parish church at the same two masses. In that way, the judge would be attempting to repair the injured reputation with that part of the community that was most involved.

A private apology to those persons to whom the damaging statement about the plaintiff was made is also an option. Again, this could be done at the direction of the Court, or even in the presence of the judge and plaintiff.

In a situation involving the unlawful injury of a reputation by a written statement in the local diocesan newspaper, the judge could require that the paper print an

approved retraction in the same area where it made the original statement. In this way, those persons who were most likely to have read the original damaging statement would be likely to read the latter one.

The types of alternative remedies for damage to reputation are limited only by the creativity of the Court. In other words, the overriding principle should always be that the action required of the injuring party do as much as possible to restore the reputation of the one injured.

cc. Monetary damages³²

In considering the awarding of damages, the judge may wish to consider the three civil law categories of damages. It should be noted, though, that in the case of the award of monetary damages, when sought by the plaintiff, the latter should be required to prove the extent of any damages suffered. While the actual application of the three categories is not necessary, what is considered as part of each may be of assistance.

Thus, at civil law money damages are called general damages. These are the natural result of the injurious statement made by the respondent and may include injury to

³² This is an option when there was economic harm to the person's reputation. Money could be awarded when other reparations (or restitution) were incomplete. Such an award would be based on "moral damage" done. P. CIPROTTI, De iniuria ac diffamatione in iure poenali canonico, Rome, Apud Custodiam Librariam Pont. Instituti Utriusque Iuris, 1937, pp. 135-136.

one's relationship with others, "including business, social, religious, and family"³³ contacts. Under a common law application of this set of damages, the jury made a rough estimate of the monetary damages necessary to compensate the plaintiff for the wrong done.³⁴ Considering the canonical circumstances, we would suggest that this kind of approach could be applied within the canonical system without making reference, however, to the involvement of a jury.

There may be situations where the judge may wish to require proof of actual losses in more detail before making an award. For example, a person began picketing a small business believing that the owner was in favor of abortion on demand. The picketer was incorrect; in fact, the business owner was on the pro-life committee of the local parish. The picketing lasted for one week before the protester was convinced of the truth. By that time, much of the local Catholic population had begun avoiding the business. The business owner then came to church court for vindication of the right to reputation. In that situation, if money damages were to be awarded, based on the loss of customers to the business, the judge would be wise to require actual proof of the amount of business loss from the plaintiff. This could be demonstrated by a review of the business records both before

³³ Prosser and Keeton, p. 843.

³⁴ Ibid.

and after the picketing began.

The second category, nominal damages, does not require any proof from the plaintiff in civil law. In those cases in canon law where the injury has not resulted in money damages that are easily proven or where a token exchange of funds is necessary to indicate that the reputation has indeed been unlawfully injured, this kind of damage award would be appropriate. It would also be appropriate when a plaintiff has tried, and failed, to provide proof of the damages or when the judge feels that the right has been unlawfully injured, but what is sought is simple vindication of the right rather than some type of monetary recovery.

The third category, punitive damages, is awarded at civil law as a punishment and deterrent to those who were particularly malicious in the manner in which they defamed another's reputation. Canon law does not have any specific reference to this type of award. It would appear that the judge could award damages for this motive and under the same circumstances if the demands of justice and equity demanded it. This type of damage would not require the same kind of proof as damages directly related to the initial injury. We would suggest that there would be few cases when these types of damages would be appropriate.

dd. Mitigation of damages

For the respondent, any efforts to mitigate the damage

done either personally to the plaintiff, or within the community, should be presented.³⁵ Perhaps the respondent has already been admitting her or his error to members of the community where the original reputation was damaged. Perhaps a written statement retracting the original injurious statement has been prepared and distributed toward this end. Whatever has been done to reduce the damage of the original statement should be brought forward.

Another fact that may mitigate damages is a showing that the reputation of the petitioner was unassailable within the community. If that was the case, despite an actual violation of the right, the amount of damages would be lessened considerably to a token level.

e. Enforcement of decision

Enforcement of the decision made within the proceeding will be important. Of course, the parties will be bound by the moral authority they feel for the system itself, but beyond that there is little available for enforcement of a Church judgment.

One course of action suggested earlier, that of publishing the results of a judicial action within the community to ensure compliance, is certainly an option, but its prudence might be in doubt considering the fact that it

³⁵ This kind of mitigation, although not referred to as such, was viewed as a possibility by Ciprotti, pp. 135-136.

might further injure reputations needlessly. Nevertheless, the argument can properly be made that such an action by the Court, after other avenues have been attempted without success, might be considered lawful when seen in the context of canon 220.

f. Avenues of appeal

The proper avenues of appeal are simple. A decision made at first instance is to be appealed to the usual court of second instance for that diocese. This may be a metropolitan court³⁶ or an interdiocesan court.³⁷ It would be important in such instances to distinguish between an appeal court established solely for matrimonial cases and the ordinary appeal tribunal.

g. Special concerns involving more than one defendant

While the most frequent case that will arise for the vindication of the right to reputation will be between two human persons only, cases could arise where a combination of juridic and human persons has injured the reputation of another.³⁸ The logistics of such cases would be difficult at

³⁶ C. 1448 §1.

³⁷ C. 1439.

³⁸ One example of this would be the publication of a personal column in a diocesan newspaper. The writer of the column, the newspaper itself (if it is a separate juridic person), and the

best. Each party may well have a separate advocate and may argue innocence since it was the wrongdoing of a fellow defendant that actually caused the damage in the first place. As has often been the case in U.S. civil law, having a group of defendants usually means they will be just as interested in proving that the blame is with another defendant as to show that they are not responsible for the injury to the plaintiff.

In this type of process the judge will be responsible for determining the culpability of each defendant individually and the amount of actual damage that should be attached to that culpability.

In this type of case, any one of the defendants would be able to appeal the entire sentence since all of the claims could be consolidated and heard at once if that is deemed prudent by the judge in the matter.³⁹ Still, the types of proceedings envisioned by the processes of the code pit one person against another, even if one of those persons is a juridic person. There is, to date, little canonical experience with groups of individual plaintiffs or defendants. Judges will have to rely on their own understandings of equity and justice, and try to apply these in each individual case.

editor of the paper personally could all be the object of a rights claim by the person whose reputation is allegedly damaged by the article.

³⁹ See c. 1414.

2. The oral contentious procedure

The standards and burdens of proof to be applied in the oral contentious process are the same as those within the ordinary judicial process. The areas mentioned above as applicable to the settlement of a dispute regarding an injury to reputation may be applied by the judge in this process too. The standards of proof, burden of proof, damages, enforcement mechanisms, and appeal processes are the same. The same suggestions for application of U.S. civil law concepts would apply in this process.

3. The penal process

In a penal process there are three ways whereby the right to reputation may become involved as an issue. The first is when the person on whom a penalty is inflicted, after a penal trial, has his or her reputation injured in some way. The second way involves the person whose reputation was damaged by the accused within the penal process. The third is the application of the sanctions foreseen in canon 1390, §2 for unlawful harm to a person's reputation.

a. The infliction of a penalty on an accused person

When a penalty is to be inflicted on an accused person, the penal process has particular norms that establish the burden of proof, the standard of proof, and other aspects of

the procedure involving the accused. This type of process would be most likely to injure the reputation of another. Like the other processes examined here, the question of whether the proper procedures were followed would be paramount to determining if the injury was lawfully done to the accused. If the procedures had not been properly followed, then the reputation would have been unlawfully injured.

b. The action to compensate for harm

The action to compensate for harm that is auxiliary to a penal process,⁴⁰ is the second way whereby the vindication of a right to reputation may be involved in a penal process. In this type of action, the person seeking damages for the injury to the reputation must present the claim at the time of the first instance process.⁴¹ The same judge who is hearing the penal trial will determine the final outcome of this auxiliary claim.⁴²

The judge in such a matter will wish to hear the injured party regarding the nature of the damage, the amount of damages, and any other pertinent information the person alleging the harm may wish to present. In fairness, the judge should also hear the accused regarding the same matter.

⁴⁰ Cc. 1729-1731.

⁴¹ C. 1729 §2.

⁴² C. 1730 §1 and §2.

The diverse elements of the definition of injury to reputation will be helpful in establishing whether there was actual harm to the petitioner caused by the accused. The specific elements listed earlier for the ordinary contentious process could also be applied here.

C. Alternative Dispute Resolution (ADR)

1. In general

The current process of alternative dispute resolution in the United States is epitomized by the NCCB approved document On Due Process.⁴³ This document has yet to take firm root in the vast majority of dioceses in the United States.⁴⁴ While the viability of the principles epitomized in the use of ADR procedures is not in doubt, the commitment to make use of them in a regular, coherent manner has failed to emerge. Much has been put forward in favor of this type of approach, but actions have not always followed words to bring this method of conflict resolution within reach of all the faithful.

⁴³ NATIONAL CONFERENCE OF CATHOLIC BISHOPS (NCCB), On Due Process (=Due Process), Washington, D.C. USCC, 1972, 48p.

⁴⁴ Canon Law Society of America, Due Process in Dioceses in the United States 1970-1985 - Report on A Survey Task Force to Survey Due Process Experience (=CLSA, Due Process Survey), J. Provost, ed., Washington, D.C., Canon Law Society of America, 1987, 251p.

2. Conciliation

Conciliation is an area of first defense against any kind of litigation in the Church. If an injury to reputation can be handled at this level, the law prefers this. Any conciliation process could use the definition of injury to reputation within the context of the process to assist the parties in coming to some kind of agreement on the issue. The information noted above regarding damages might also be applied in assisting the parties to determine how best to settle the matter themselves. Alternative damage remedies could serve as an example so the parties could fashion a particular solution to their own problem with the only limitation being their own creativity.

3. Arbitration

Arbitration is a process that is fully available to handle this type of dispute. Since this is a more formal process, the same questions of burden of proof, standards of proof, damages, and enforcement arise as with judicial decisions.

In a case involving reputation the parties' agreement to arbitration means that the arbiter must look for evidence and standards of proof by which to measure the evidence. While the overriding theme continues to be justice in that particular instance, the arbiter may wish to look generally to the same

standards that are applied to the administrative and judicial processes mentioned above.

The definition of injury to reputation could be easily applied. The canonical limitation of the right in cases involving the common good could also be applied in a manner similar to that listed above.

4. Recent developments

The recent document by the Canon Law Society of America entitled Protection of Rights of Persons in the Church⁴⁵ is a major step toward another approach to this area. It is designed to work in concert with the recent code of canon law, but it too is still in the development phases.⁴⁶ The document has sections that envision both the mediation and arbitration approaches to disputes involving actions by diocesan officials.⁴⁷ But it also proposes that dioceses establish administrative tribunals to handle disputes that would otherwise be the subject of administrative recourse.⁴⁸ As such tribunals were envisioned throughout the various stages of the

⁴⁵ CANON LAW SOCIETY OF AMERICA, Protection of Rights of Persons in the Church (=CLSA, Protection of Rights), Washington, D.C., Canon Law Society of America, 1991, 54p.

⁴⁶ The Canon Law Society of America recently held an "open hearing" on this document to receive additional comments, at its national convention in Cambridge, MA, October 12-15, 1992.

⁴⁷ CLSA, Protection of Rights, pp. 13-22.

⁴⁸ Cc. 1732-1739.

development of the recent code, the fact that they were deleted from the final draft leaves this proposal somewhat in doubt. Nevertheless, the Code still provides for them in canons 1446, §2 and §3; and 1732-1739.

This CLSA document also puts greater limitations on the situations where ADR may be invoked. It limits its application to those situations where one is in conflict with an exercise of administrative authority rather than simply trying to vindicate a right within the Church. It attempts to deal with a number of problems that the Due Process document was not designed to address. These include recognizing the role of civil lawyers in any process,⁴⁹ the limitations of confidentiality on the process,⁵⁰ and the relationship between the processes and civil litigation.⁵¹

This same document has not yet been implemented in any diocese, so data as to its actual usefulness in the settlement of disputes is not available. Without further education of all the faithful regarding the availability of such services, this method of handling disputes with others will be severely underutilized. Without use, the best method to accomplish the goal of reconciliation of the faithful who have a dispute will remain illusive.

⁴⁹ CLSA, Protection of Rights, p. 15.

⁵⁰ Ibid., p. 17.

⁵¹ Ibid., p. 16.

Further attempts to implement this type of conflict resolution are necessary, but will be successful only with a continued change of heart on the part of those who are recognizable for the ministry of justice in the Church.

CONCLUSION

This chapter had two major objectives. The first was to present a specific set of working definitions for the canonical practitioner faced with the challenge of adjudicating an action for vindication of rights within the context of a canonical procedure. The second was to provide the canonical practitioner involved in this process with some suggested approaches to the practical questions that will inevitably arise when these cases begin to appear in the canonical procedural system.

The definitions take much of their content from the manner in which the Code has been written and the historical basis of the right to reputation itself. They emphasize that the bond between the individual and the community is of the essence of the right. This link is apparent in the approach taken in presuming the possession of a good reputation by all the faithful, by juridically defining "injury to reputation", and by looking at the various meanings of "damage" within this context. The objective of this first section was to set out

the universal parameters to be applied throughout the second section of the chapter.

Once these definitions were established, applying them to various canonical processes became important. In the administrative recourse process, the definitions are to be applied in conjunction with a review of the rightness of the procedures followed in each instance. In the judicial process the various aspects of the process have been reviewed in detail. Aspects such as the definition of defamation, burden of proof, standard of proof, damages, enforcement, and avenues of appeal have been explored with special emphasis placed on the practical application of these areas to a dispute involving this particular right. Various references to U.S. civil law have been made, especially in the second portion of the study, to aid in the practical application of canon law in this area.

CONCLUSION

The right to a good reputation assured by the Church has its roots firmly in the past, and yet it presents new challenges to canonists in the present as they attempt to provide proper methods for its vindication within the present law. The right itself is one particular to individuals and yet linked to the community without which it cannot exist.

The existence of the right to reputation has been of particular interest to the Church throughout its history because of its concern for its own reputation. A good reputation has been necessary for its ministers from the earliest days and is tied to the similar concepts that originated in Roman times. Most recently, before the present code, this interest was protected by Church authorities through the imposition of penalties for failure to respect a person's reputation. Those whose reputations had been unlawfully injured were to take their complaint to the proper authority so the one who had committed the crime could be properly punished. The concern of that process was primarily the reform of the offender rather than the restoration of the good name that was damaged.

The contents of canon 220 began to see the light with the Church's recognition of a variety of human rights during the Second Vatican Council. The right to the enjoyment of a good

reputation was considered fundamental to the rights of all believers in general; its canonical formulation occurred primarily during the discussions on the Lex Ecclesiae fundamentalis. The fact that there is little actual record of particular discussion on the right to reputation itself indicates to us that there was little if any controversy at all concerning the inclusion of this right as part of a fundamental listing of the rights of all believers. This was reflected in its placement in Book Two of the current law as it is part of the list of rights and obligations of all faithful.

An interpretation of Canon 220 is more problematic. The three phrases of the canon link two separate rights: the right to reputation and the right to privacy. The reason for the link is unclear, and not pertinent to this study. The individual words that are part of the canon have not been fully defined juridically. One must examine their common definition as well as any parallel listings of such terminology. A study of these still leaves the canonical practitioner with only limited guidance in any attempt to determine the actual meaning of the right in a juridic sense, together with its limitations.

In regard to the questions concerning who or what is involved, it becomes apparent from such our study that some conclusions may be made here. The persons (in conjunction with the "no one") referred to in the canon include both individual

human persons and juridic persons. Both types of persons may injure the reputation of another and both may have their reputation unlawfully injured. The "may" portion of the canon does not imply permission in the sense of some type of positive action by the appropriate authority in the formal sense, although one may assume that certain types of authority exercised properly could injure reputation. The terms "damage", "unlawfully", and "good reputation" are less easily defined since there are few references to them in the code that would assist us in establishing a juridic definition. While there is no clear definition from the canon itself, definitions for all three terms could be gleaned from U.S. civil law. It can rightfully be said that in those instances where reputation is mentioned, it is clear that a good reputation is of value to the Church.

Since the terminology used in the canon itself is not conclusive in establishing juridic definitions to be applied in canonical procedures, one must look at the procedures themselves to see whether it is apparent how the concepts will be applied in that arena.

The three methods for vindication of rights mentioned in the Code present both different and similar demands when one speaks of defining a particular right. The definitions of reputation, injury, and lawfulness all have an impact on portions of these individual procedures.

Administrative recourse is the most developed of the procedures. There have been no publicly recorded cases involving the right to reputation since the present code was promulgated. Administrative recourse, as a way to vindicate a right to reputation, is limited to those administrative actions performed in an unlawful way. That is to say, one may have recourse against an administrative action that unlawfully injures reputation. The questions to be answered in such an action are whether there was actual injury, whether it was caused by the administrative action, whether the administrative action was unlawful, and, if the action was not lawful, what damages should be awarded.

In a judicial process the questions put forward are similar to those in an administrative procedure, but different in other ways. The judicial process of the present law does not define the parameters of the burden of proof, the standard of proof, how injury should be defined, nor a number of other important questions regarding the manner of computing damages or their mitigating factors. While the penal legislation of the former law is of some interest here, it is not clear if the same standards that would have been applied to the imposition of a penalty would be applied in a process to vindicate a right.

Alternative dispute resolution (ADR) in the United States has been available, at least theoretically, since 1972. While the processes of mediation and arbitration can be instrumental

in settling disputes, they leave no legacy to evaluate their success or the basis on which they were concluded. Even in these processes, there are no working definitions for reputation, damage to reputation, unlawfulness, or damages to restore an injured reputation. Since canon law does not provide the more essential tools for the vindication of the right to reputation, one must look elsewhere for assistance.

The civil law of defamation is well developed in the United States. While its legal system is substantially different in many ways from that of canon law, both systems have their roots in Roman law. Canon law has evolved within the civil code tradition while U.S. law has followed the British common law tradition. While we do not advocate putting all aspects of the U.S. treatment of injury to reputation into practice, there is value in reviewing the methods and definitions used by a system that has litigated hundreds of thousands of cases on the subject.

The four elements contained in the U.S. civil law definition of defamation present us with a very specific, and yet very flexible, definition of the manner in which reputation may be injured. U.S. law also deals specifically with the manner in which damages should be considered, the link between the action and the injury, as well as mitigating factors that either reduce or exclude liability. These definitions also consider the impact of the mass media on such

actions. The reasoning behind the individual definitions is clear.

Canon law, in its attempts to vindicate the right to a good reputation, could take on a number of U.S. civil law concepts that would offer greater protection of equity and justice in its process. By presuming that everyone has a good reputation until it is proven otherwise, flexibility is available at the same time as the basic concepts of the canon are assured. By defining injury to reputation in a manner similar to that of U.S. civil law, four very clear elements are presented for consideration by any decision-maker in a canonical process. They include proof:

1. that a false and unfavorable statement has been made about another;
2. that the statement made is not privileged and was made to a person other than the plaintiff;
3. that the person making the statement did so with neglect of the facts; and
4. that actual injury resulted from the statement made.

The four elements of the definition allow for a variety of fact situations. They also permit different defenses, including truth, and a showing of factors that would influence the award of damages. Damages are also dealt with separately in an attempt to provide the canonical practitioner with the wide variety of facts that may be considered before any damage award is made. The challenge of restoring reputation often takes far more than a simple award of money.

It is our contention in this work that much remains to be done before the right to reputation may be properly

vindicated in a canonical process. Those faced with the task of walking an unchartered course in the area of rights vindication still have many individual decisions to make during any type of procedure. Much remains in the hands of canonical decision-makers who have little experience, exposure, or time to consider the deeper ramifications of their work in that area. This study has been an attempt to present a number of practical suggestions to aid those faced with such a case. By beginning with a juridic definition, the untravelled path to justice in a rights vindication procedure may be a little less rocky. It is hoped that with time, and the expanded exercise of the rights of the faithful, what is still somewhat mysterious now will some day become more certain.

While this work serves as a broad foundation for this portion of canon 220, much remains for further study. The exact definitions of "good reputation", "damage", and "unlawfully" could be the subjects of future works in this area. Each of the processes mentioned here could be studied more specifically to establish their effectiveness in protecting rights as well as their practicality in implementation at the local level.

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