

**DUE PROCESS TO BE FOLLOWED IN THE ADMINISTRATION
OF DISCIPLINE IN RELIGIOUS INSTITUTES
ACCORDING TO *THE CODE OF CANON LAW***

by
Michael F. ROSINSKI, SJ

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ABSTRACT

The need for just and fair procedures for responding to accusations of misconduct is a sad but necessary part of governance in religious institutes. Many institutes, or parts of institutes, have established protocols for addressing accusations of sexual misconduct by their members. Not all forms of misconduct, however, are sexual in nature, nor does the law (proper or universal) anticipate every imaginable form of misconduct. Superiors in religious institutes rightly have discretionary authority to address matters, including disciplinary matters, about which the law is silent. Rarely, however, do superiors in religious life have adequate experience or training to address complex disciplinary cases in ways that follow the relevant law, respect the rights of all parties, and ensure the safety of potential new victims.

The thesis begins with an examination of the Church's magisterial documents that have bearing on the administration of discipline in religious institutes from the time of the Second Vatican Council until the present. It looks at the nature of power exercised by religious superiors and the place of rights and other legal parameters in structuring all disciplinary procedures, even when the misconduct in question is not defined in law as a delict. The thesis uses the disciplinary procedures that exist in *Book II* and *Book VI* of *The Code of Canon Law* as the basis for developing guidelines for non-penal disciplinary cases, that is, cases of misconduct which violate some divine, ecclesiastical, or proper law, but which are not defined in the law as a delict.

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ABBREVIATIONS

AAS	<i>Acta Apostolicae Sedis</i>
c.	canon
cc.	canons
CCEO	<i>Codex canonum Ecclesiarum orientalium</i>
CCLA	CAPARROS, E. et al. (eds.), <i>Code of Canon Law Annotated</i>
CDF	Congregation for the Doctrine of the Faith
CIC/17	<i>Codex iuris canonici Pii X Pontificis Maximi iussu digestus</i>
CIC	<i>Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus</i>
CICLSAL	Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
CLSA	Canon Law Society of America
CLSA Comm1	CORIDEN, J., T.J. GREEN, and D.E. HEINTSCHEL (eds.), <i>The Code of Canon Law: A Text and Commentary</i>
CLSA Comm2	BEAL, J.P., J.A. CORIDEN, and T.J. GREEN (eds.), <i>New Commentary on the Code of Canon Law</i>
CLSAD	CLSA, <i>Discussions on the Motu Proprio Ecclesiae Sanctae</i>
CLSAP	CLSA, <i>Canon Law Society of America Proceedings</i>
ES	POPE PAUL VI, <i>motu proprio Ecclesiae sanctae</i>
ET	POPE PAUL VI, apostolic exhortation <i>Evangelica testificatio</i>
<i>Exegetical Comm</i>	MARZOA, A., J. MIRAS, R. RODRÍGUEZ-OCAÑA (eds.) and E. CAPARROS (gen. ed. of English translation), <i>Exegetical Commentary</i>
FLC	CICLSAL, document <i>Fraternal Life in Community</i>

LG	SECOND VATICAN COUNCIL, dogmatic constitution <i>Lumen gentium</i>
Norms	CDF, Revised Norms on Dealing with Clerical Sex Abuse of Minors and Other Grave Offences
PC	SECOND VATICAN COUNCIL, decree <i>Perfectae caritatis</i>
PI	CICLSAL, instruction <i>Potissimum institutioni</i>
SAFC	CICLSAL, instruction <i>Starting Afresh From Christ</i>
SAO	CICLSAL, instruction <i>The Service of Authority and Obedience</i>
TANNER2	N.P. TANNER (ed.), <i>Decrees of the Ecumenical Councils</i> , vol. 2
VC	POPE JOHN PAUL II, apostolic exhortation <i>Vita consecrata</i>

GENERAL INTRODUCTION

Although religious institutes are communities of Christian faithful who have come together "through profession of the evangelical counsels in a stable form of living... [to] follow Christ more closely under the action of the Holy Spirit, and are totally dedicated to God" (c. 573, §1), this does not mean that the existence of disciplinary procedures for addressing the misdeeds of members is superfluous. Inevitably, some members will commit misdeeds whether because of human frailty or because of sincere disagreements regarding how they believe members should live the charism of the institute. However, although all members are equal in dignity, they are not all equal in authority and the bond of obedience – an essential element in all religious institutes – which means that one member, namely the one designated as "superior,"¹ has the right and the duty to correct members who do not behave in accordance with the proper law of the institute, the deposit of faith, or the law of the Church. Although *Book VI* of the *CIC* provides sanctions for those who would violate the laws of the Church and *Book II* addresses members of religious institutes who fail to meet the fundamental obligations to which they have committed themselves, in practice, these procedures (e.g., imposed

¹ Although for the sake of simplicity of expression, we will regularly use the term 'superior,' it is important to note that although they have the principal responsibility to administer discipline, at times, according to universal and proper law, superiors may be obliged to hear the opinions of some or all members of the council or to act collegially with them. Furthermore, some institutes substitute other titles for those generically described here as 'superiors.'

exclusion, dismissal, penal precepts, warnings and corrections, etc.) are only rarely followed. Most disciplinary procedures in religious life are required to address not the grave misdeeds anticipated by the law but the broad middle part of the spectrum of misdeeds that range from the quite serious to the relatively minor.² In most of such cases, superiors address these situations in a spontaneous or informal way. In cases where the member accepts responsibility for the misconduct, a formal, highly developed procedure may not be necessary. If the superior is able to propose some sort of remedy that will "repair the scandal, restore justice [and] reform the member,"³ and the member willingly accepts the remedy, that is usually sufficient to consider the matter resolved.⁴

Another less tangible factor, however, that influences a superior's willingness to follow a disciplinary procedure is his or her general attitude toward canon law and penal law in particular. Many religious superiors are reticent to make use of formal disciplinary procedures for two related

² It is possible that certain types of misconduct, which are not expressly proscribed by the law, could be addressed under c. 1399. In this way, an action not explicitly forbidden by the law could be addressed according to the relevant penal norms. Within the context of religious life, however, this option would be available only to those superiors who are also ordinaries (cf. c. 134 §1). Religious superiors who were not ordinaries, and who thought it advisable to apply c. 1399, would need to denounce the accused to the appropriate authority. While exercising the option to invoke c. 1399 might be appropriate in some circumstances, our presumption is that members and superiors alike would prefer means of addressing misconduct which kept such matters outside the ambit of penal law whenever possible.

³ C. 1341.

⁴ We would caution, however, that even in such cases, superiors would do well to keep in mind the principles summarized in the non-penal disciplinary procedure developed here, so as to help ensure that every remedy is in accordance with the law and justice. Furthermore, greater care will be needed when addressing cases that involve the public good.

reasons: the anti-juridical mentality that arose following the Second Vatican Council and the consequent lack of familiarity with penal procedures, especially after the promulgation of the new *Code of Canon Law* in 1983.⁵ Only since the sexual abuse crisis began to affect the Church in many western countries has there been a renewed appreciation for the rightful place of penal procedures in the life of the Church. Although, presumably, many religious superiors today would acknowledge the need for penal and other formal disciplinary procedures in the Church, not many are adequately trained to follow them.

The law itself provides the mechanisms, or procedures, for how those in authority are to address the apparent commission of delicts. What about other forms of misconduct, however, that do not meet the criteria of a delict but which are still a grave violation of some divine, ecclesiastical, or proper law? Furthermore, how are superiors to proceed when they are faced with an accusation of serious misconduct against one of their subjects, but which the subject categorically denies? Recent years have seen religious institutes, as well as many other ecclesial entities, develop and implement procedures for responding to accusations of sexual misconduct by their members. The main question this study proposes to address is: What elements are essential to

⁵ Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, Historical Introduction for the Revised Norms on Dealing with Clerical Sex Abuse of Minors and Other Grave Offences, in *Communicationes*, 42 (2010), 349-353, English translation in *Origins*, 40 (2010-2011), 152-154; J.P. BEAL, "The 1962 Instruction *Crimen sollicitationis*: Caught Red-Handed or Handed a Red Herring?," in *Studia canonica*, 41 (2007), 199-236; J.J. COUGHLIN, "The Clergy Sexual Abuse Crisis and the Spirit of Canon Law," in *Boston College Law Review*, 44 (2003), 977-997.

ensure a fair procedure in the application of discipline in non-penal cases of misconduct in institutes of religious life?

The term "discipline" in religious life is a vast topic that includes everything from the manner of dress and time for prayer to correcting the most serious transgressions. This thesis will address the elements that should form part of the procedure that a superior uses in order to address the actions of a subject that appear to be gravely sinful or contrary to the laws of the Church or contrary to the proper law of the institute and which are not explicitly addressed in the *CIC*. Therefore, at the end of the spectrum regarding the least serious offences, our study would exclude a discussion of disciplining members when daily or ordinary matters of community life that are not matters of grave sin, or contrary to ecclesiastical law, or offensive to the nature of the institute, are involved. At the other end of the spectrum, it would exclude the most serious matters that are explicitly governed by the *CIC* either in *Book II* or *Book VI* or other universal laws such as the norms of *Sacramentorum sanctitatis tutela*. It is by means of a discussion of the procedures that exist in the *CIC* for addressing the more serious offences, however, that, by analogy,⁶ we will be able to indicate the elements that

⁶ Cf. c. 19. While c. 19 expressly forbids supplying for lacunae in the law in regards to penal matters, we believe the purpose of our thesis is consistent with the law because it is not our intention to extend the application of penal law to matters it does not address, but rather to glean from penal law the wise measures it establishes to ensure justice and the protection of rights even in cases outside its scope. It is our hope that, even if they are not legally bound to do so, those in authority would respect the procedural wisdom of penal law, even in non-penal misconduct cases, in order to ensure a just procedure and a just outcome.

should be included in the non-penal disciplinary procedure. Of course, given the considerably broad range of misconduct in which the procedure would apply, the precise elements would need appropriate adaptation relative to the particular circumstances.

Our interest in this topic has arisen from the experience of many religious who have questioned the manner of proceeding of their superiors in non-penal disciplinary cases. In some cases, superiors would seem to have reacted too harshly, in other cases too leniently, and in still other cases they would seem to have done nothing at all. In almost every case there is no established law, statute, or policy for how to discipline religious who would seem to have committed a misdeed in this "middle range" of seriousness that we are keen to address. Furthermore, it is not uncommon for religious superiors to have little or no experience with the penal law of the Church; therefore, when faced with a complex disciplinary case, they are not always familiar with the principles that govern the administration of justice in the Church.

Our principal question will be answered in four logically inter-related chapters. The first chapter will address Church teachings related to discipline in religious life since Vatican II, in particular, the magisterial documents. It will describe the vision the Church expresses for religious institutes found within these documents and will attempt to draw out of them the principles that are meant to guide the administration of discipline.

The second chapter will address the nature and scope of the authority of superiors in religious institutes, examining, in particular, the differences between clerical and non-clerical institutes. Since the language of "dominative power" was not renewed in the *CIC*, what, if anything, has changed in our understanding of the nature of the power exercised by clerical and non-clerical superiors? Chapter two will also look at the role of rights in the administration of justice in religious institutes. What are the rights and obligations of subjects and superiors? How can superiors be sure to act with equity in delicate cases where the law is silent? It will also examine the limits on the authority of superiors to administer discipline in light of their own authority, the persons involved, the misconduct in question, and the punishments under consideration.

Chapter three will analyse the canons that outline the formal disciplinary procedures that can apply to religious. Some of them are in *Book II* and, therefore, can be followed by superiors of all religious institutes: imposed excommunication (c. 686 §3), dismissal from the institute (cc. 694-701) and expulsion (c. 703). Others of these are in *Book VI* and can be followed only by religious superiors who are recognized in law as ordinaries:⁷ penal

⁷ Canon 134 §1: In addition to the Roman Pontiff, by the title of ordinary are understood in the law diocesan bishops and others who, even if only temporarily, are placed over some particular church or a community equivalent to it according to the norm of c. 368 as well as those who possess general ordinary executive power in them, namely, vicars general and episcopal vicars; likewise, for their own members, major superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right who at least possess ordinary executive power.

precepts (c. 1319), warnings and rebukes (c. 1339), penances (c. 1340), and the imposition or declaration of penalties by administrative penal procedure (cc. 1341-1353; 1717-1728).⁸

Building on the findings of the previous chapters, the fourth and final chapter will propose the essential elements for a non-penal disciplinary procedure. It will describe the elements in detail, as well as the circumstances in which the procedure may need to be modified. It will also respond to some of the challenges that one may face when applying the procedure.

In order to circumscribe well the subject matter of our study, we will ascribe certain limitations to it. First, we will consider only the administration of discipline in religious institutes of the Latin Church that are under the *CIC*. Both the forms of religious life present in the Eastern Churches, and the provisions of penal law in the *CCEO*, are so different in comparison with their counterparts in the Latin Church, that any attempt to compare the two systems, in these two regards, would be unwieldy. Second, the study will not address the following areas: procedures for disciplining members available in the proper law or customs of individual institutes; discipline of religious by authority outside the institute; the declaration of irregularities for the exercise of Holy Orders; and lawful customs. It will focus exclusively on religious institutes, leaving aside the procedure for disciplining in other types of

⁸ Although we are not addressing the role of proper law in non-penal disciplinary procedures, in actual practice, of course, their proper law might provide religious superiors with additional disciplinary procedures, as well as additional procedural obligations.

institutes (such as, secular institutes or societies of apostolic life), as well as those individuals who, although recognized as consecrated persons, profess the evangelical counsels outside a particular institute. Other types of institutes will not be considered because an important part of our discussion will be the role of the vow of obedience in matters of discipline, and the other types of institutes have varied relationships to the evangelical counsel of obedience that make it difficult to compare how those in authority would follow a non-penal disciplinary procedure. The disciplining of individual consecrated persons will be excluded from our study, because our concern is how discipline is addressed within an institute and an individual consecrated person does not belong to an institute.⁹

Those whose duty it is to administer discipline in religious institutes enjoy broad discretion to do what they believe to be right in particular situations. That discretion, however, has limits. At times, the universal law of the Church requires specific procedures or actions; at other times, it allows for various possibilities; and at yet other times – indeed with most types of misconduct – it says nothing at all. This thesis intends to describe the essential elements of a non-penal disciplinary procedure so as to assure that every novel, challenging, or complex accusation of misconduct will be treated fairly and addressed with an equitable procedure that will ensure the protection of the rights of everyone involved.

⁹ Cf. cc. 603 and 604.

CHAPTER I

DISCIPLINE IN RELIGIOUS INSTITUTES ACCORDING TO CONCILIAR AND POST-CONCILIAR DOCUMENTS

Introduction

This chapter will examine select magisterial documents and determine how they help to shape the administration of discipline in religious institutes. For the most part, what they say will relate to this issue only in broad or fundamental ways. Indeed, references to one of the most important developments in the understanding of how the administration of discipline is to be carried out today will appear rarely in these sources: namely, the increased attention given to individual rights. How the rights and obligations of institutes, superiors, and members interact in the area of the administration of discipline will be examined in the second chapter.

1.1 – Conciliar and Related Documents

In this section we will examine documents arising from the Second Vatican Council: the Dogmatic Constitution on the Church, the Decree on the Sensitive Renewal of Religious Life, and the Motu Proprio *Ecclesiae sanctae* on the Implementation of the Decrees *Christus Dominus*, *Presbyterorum ordinis*, and *Perfectae caritatis*. The first two are the work of the council itself and the last was issued by Pope Paul VI.

1.1.1 – *Lumen gentium*,¹ 1964

The Dogmatic Constitution on the Church is of central importance among all the documents of the Second Vatican Council. Philips writes that it is "the vitally important centre to which the other decrees must be referred, and they must all be read in the light of the mystery of the Church."² In describing the constitution, Fahey writes:

The final text on the Church differs from many Roman documents published between 1870 and 1960 that were legalistic and condemnatory. Its opening sections are marked with a strong biblical flavour and most chapters are pastorally sensitive. The constitution stresses the mystery dimension of the Church, which is described neither as an institution nor a "perfect society" with charter, rules and infra-structures. It is rather a pilgrim people, a sojourning Church moving toward fulfilment in the future.³

Given the pastoral and encouraging outlook that Pope John XXIII desired for the council, it is not surprising that *LG* does not directly address our concern regarding the maintenance of discipline in religious institutes. The entire council was meant to be conciliatory in tone and to avoid condemnations altogether. In particular, *LG* was not interested to examine the internal structures or discipline of religious life but to examine the *relationship* of

¹ VATICAN COUNCIL II, Dogmatic Constitution on the Church *Lumen gentium*, 21 November 1964, in AAS, 57 (1965), 5-75, English translation in TANNER², 849-900 (= *LG*).

² G. PHILIPS, "Dogmatic Constitution on the Church: History of the Constitution," in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, New York, Herder and Herder, 1967, vol. 1, 105 (= PHILIPS, "Dogmatic Constitution").

³ M. FAHEY, "Commentary on the Dogmatic Constitution on the Church *Lumen gentium*," in G.P. SCHNER (ed.), *The Church Renewed: The Documents of Vatican II Reconsidered*, Lanham, MD, University Press of America, 1986, 13.

religious life to the wider Church.⁴ As we will see in the next sub-section, it is the decree *Perfectae caritatis* that addresses the identity, and especially the renewal, of religious life, which the council desired to promote. Still, *LG* has a number of fundamental indications that have bearing on the administration of discipline in religious life.

For instance, the very fact that a chapter is dedicated to religious⁵ in *LG* speaks to its centrality in the life of the Church. Castellano Cervera writes:

The ecclesial nature of consecrated life is basic to the theology of Vatican II. The explicit presence of a chapter from the dogmatic constitution *Lumen gentium* devoted to religious clearly confirms that consecrated life belongs to the mystery of the Church as to unity, mission outreach, her charismatic nature, and her holiness.⁶

Indeed, Wulf notes that *LG*'s sixth chapter on religious is closely related to the previous chapter on the universal call to holiness, and that there was much discussion over how to describe the universal call to holiness relative to the call of religious life.⁷ The dogmatic constitution itself states:

the religious state imitates more closely and shows forth in the church unceasingly the form of life that the Son of God took on when he came into the world to do the will of the Father and which he proposed to the disciples

⁴ See F. WULF, "Dogmatic Constitution on the Church: Chapter VI: Religious" in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, New York, Herder and Herder, 1967, vol. 1, 277 (= WULF, "Dogmatic Constitution").

⁵ Wulf states: "The word [religious] is used in a broad sense here so as to include the members of secular institutes" (ibid., 273, footnote 1). See also P. MOLINARI and P. GUMPEL, *Chapter VI of the Dogmatic Constitution "Lumen gentium" on Religious Life: The Doctrinal Content in the Light of the Official Documents*, English translation by M.P. EWEN, Rome, Tipografia Poliglotta della Pontificia Università Gregoriana, 1987, 131.

⁶ J. CASTELLANO CERVERA, "Lumen Gentium - Perfectae Caritatis - Vita Consecrata: Dynamic Accord and Innovations in Three Texts of the Magisterium on Consecrated Life," in *Consecrated Life*, 22 (1999), 170 (= CASTELLANO CERVERA, "LG - PC - VC").

⁷ Cf. WULF, "Dogmatic Constitution," 273; PHILIPS, "Dogmatic Constitution," 121-122.

who followed him. And it makes clear in a particular way how the kingdom of God surpasses all earthly things and how high are its requirements. It demonstrates to all people the incomparable grandeur of the power of Christ the king and the infinite power of his Spirit which is wonderfully active in the church.⁸

In this way we see that religious life points to the future, it points to the full realization of the kingdom of God, that is, the perfect fulfillment of Jesus Christ's plan for creation. It is a unique feature in the Church whereby individual Christians dedicate themselves to follow the same principles that all Christians are called to embrace, but in a more radical, structured and public way.

Related to this idea, and also of fundamental importance to understanding religious life, is the fact that the evangelical counsels are gifts of divine origin and not merely human constructs. The council states:

The evangelical counsels of chastity consecrated to God, poverty and obedience constitute a divine gift which the church has received from its Lord and maintains always with the help of his grace. For they have their foundation in the words and example of the Lord and are recommended by the apostles and fathers, by the doctors of the church and its pastors. The authority of the church, under the guidance of the holy Spirit, has taken on the task of interpreting these counsels and regulating their practice as well as establishing stable forms of living according to them. And so it has come about that, like a tree growing from a seed planted by God and spreading out its branches in a wonderful and varied way in the field of the Lord, there has grown up a variety of forms of solitary or community life and different families which increase their resources both for the progress of their members and the good of the whole body of Christ.⁹

In this way we see that the varied forms of religious life all have their origin in the divine "seed" of the evangelical counsels, and that the responsibility falls to the competent ecclesiastical authority to interpret and regulate their

⁸ LG, n. 44, 885-886.

⁹ Ibid., n. 43, 884.

expression. How the evangelical counsels are expressed in particular institutes and are overseen by the hierarchy is made more explicit in the first paragraph of n. 45 where it is indicated:

Since it is the duty of the ecclesiastical hierarchy to feed the people of God and lead them to the richest of pastures (see Ez 34, 14), it is the task of the same hierarchy wisely to regulate by law the practice of the evangelical counsels by which perfect charity towards God and one's neighbour is encouraged in a special way.¹⁰

It is also important to note that the second paragraph of n. 45 touches on the canonical institution of exemption, whereby certain religious institutes are removed from the authority of the local bishop and must answer only to the pope, or in the case of certain institutes of the eastern Churches, to the patriarch. While this arrangement is particularly helpful for specialized types of outreach over a broad geographic area, for instance, certain types of missionary efforts, it can be a cause of tension within a diocese if one group is seen to be operating apart from the concerted apostolic effort of the rest of the diocese.¹¹ Although this question was the focus of a certain amount of discussion at the council, the constitution did not change official teaching on the matter. After recognizing the importance of the institution of exemption, the constitution exhorts religious to "reverence and obedience, in accordance with the canon laws, toward the bishops because of their authority in the particular churches and because of the need for unity and harmony in

¹⁰ Ibid., n. 45, 886.

¹¹ Cf. PHILIPS, "Dogmatic Constitution," 124-125.

apostolic work."¹² In relation to our topic, exemption is important since it relates to the authority of superiors to handle cases of misconduct that in other cases would fall under the jurisdiction of the local diocesan bishop. This question will be examined in greater detail in the coming chapters.¹³

Lastly, the constitution reminds everyone of the importance of religious life, something highlighted by the fact that religious consecration itself is celebrated in the context of the eucharist:

not only does the church by its authority raise religious profession to the dignity of a canonical status, it also shows through its liturgical action that it is a state consecrated to God. For it is the church, through the authority committed to it by God, which receives the vows of persons making profession, by its public prayer asks of God help and grace for them, commends them to God, imparts to them its spiritual blessings and links their self-oblation to the eucharistic sacrifice.¹⁴

In these ways we see how religious life is thoroughly integrated into the life and holiness of the Church and why the Church seeks to safeguard this precious gift with such care. This close relationship between the various religious institutes and the supreme authority will be of fundamental importance to our analysis later in this thesis regarding how existing disciplinary procedures in the Church ought to serve as a model for the

¹² *LG*, n. 45, 886. See also, VATICAN COUNCIL II, Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*, 28 October 1965, in *AAS*, 58 (1966), 673-701, in Tanner2, n. 35, 3^o-4^o, 935.

¹³ Although certain institutes retain the privilege of exemption, it is less significant since the promulgation of the *CIC*. Today, the *CIC* protects the "just autonomy" of all institutes (c. 586) regarding the internal governance of the institute, while at the same time protecting the authority of the local bishop regarding "care of souls, the public exercise of divine worship, and other works of the apostolate" (c. 678).

¹⁴ *LG*, n. 45, 886.

administration of discipline in every grave situation, including those not foreseen by the law.

1.1.2 – *Perfectae caritatis*,¹⁵ 1965

The first article of *PC* begins by looking back to *LG* and then briefly overviewing the history of religious life and the many diverse forms it has taken through the centuries. The first article concludes by noting that, with appropriate adaptations, the decree also pertains to secular institutes and societies of common life without vows and that "[c]ompetent authority will, when the council is over, enact detailed regulations for proper interpretation and practice [of the decree]."¹⁶ This is an implicit reference to what is now known as *Ecclesiae sanctae*, which will be examined in the next sub-section.

Brennan notes, "The *Decree on the Appropriate Renewal of Religious Life* does not add new insights to chapter 6 of *Lumen gentium*, but instead spells out more clearly the pastoral and theological implications within such a renewed understanding."¹⁷ The primary goal of the decree is to provide the principles meant to guide the necessary renewal, which should include the renewal and modernization of the way of life, the rule books, and

¹⁵ VATICAN COUNCIL II, Decree on the Sensitive Renewal of Religious Life *Perfectae caritatis*, 28 October 1965, in AAS, 58 (1966), 702-712, in TANNER2, 939-947 (= *PC*).

¹⁶ *Ibid.*, n. 1, 940.

¹⁷ M. BRENNAN, "Commentary on the Decree on the Appropriate Renewal of the Religious Life *Perfectae Caritatis*," in G.P. SCHNER (ed.), *The Church Renewed: The Documents of Vatican II Reconsidered*, Lanham, MD, University Press of America, 1986, 65 (= BRENNAN, "Commentary").

constitutions so that religious life will "more perfectly [express] the dedication already implicit in baptism."¹⁸

The second article of the decree gives more specific indications regarding the renewal of religious life, namely, "the constant return to the sources of Christian life in general, and the original genius of religious foundations in particular."¹⁹ This expression encapsulates the council's desire for the renewal of religious life: that the institutes return to their two original inspirations, the one generic and the other specific, namely the Gospel of Jesus Christ and the distinctive founding charism of their institute. It was hoped that this twin-renewal, this double-return to the sources, would both revivify religious life and bring it back closer to the heart of the Church. In the perspective of some, religious life had set itself apart by an overemphasis on its separation from the world and even from the rest of the Church, to the point of becoming a "Church within the Church."²⁰ This call for a twin-renewal is significant for our thesis because it can be interpreted as calling for a re-balancing between each institute's right to follow its own particular traditions and the duty of the institutes to adhere to the wider Church's law and praxis, in our case, regarding the administration of discipline. This is in

¹⁸ PC, n. 5, 941.

¹⁹ Ibid., n. 2, 940.

²⁰ F. WULF, "Decree on the Appropriate Renewal of the Religious Life," in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, Montreal, Palm Publishers, 1968, vol. 2, 338-339 (= WULF, "Decree on the Appropriate Renewal").

keeping with one of the fundamental goals of our thesis, which is to balance the rightful autonomy of the institutes with the precepts of universal law and human rights.

The decree then goes on to give further specific guidance in the form of principles for how this renewal is to be accomplished as well as what this will mean for the various types of institutes: contemplative, active, clerical, lay, monastic, religious, and secular.²¹

The decree also discusses the living out of the evangelical counsels. Regarding obedience it says that "[o]bedience, therefore, increases the freedom of God's children; it is not destructive of human dignity, but actually realises personality more fully."²² This emphasis on "increasing freedom" and "realising personality more fully" is important since one of the hopes of the council was to foster the shared responsibility of all members for the life and direction of the institute²³ and to put an end to all paternalism that in the past was thought to have stunted the growth in maturity of some members by infantilizing them.²⁴ The principle of subsidiarity which had become so important at the macro level of Catholic social teaching was beginning to be

²¹ PC, nn. 6-11, 941-943.

²² Ibid., n. 14, 944.

²³ Cf. *ibid.*, n. 14, 945 where it states: "Chapters and councils must meticulously play their allotted part in government; it is to the advantage of the whole community that they really represent all members and their views."

²⁴ Cf. WULF, "Decree on the Appropriate Renewal," 340-341.

applied at the micro level, namely, the relationship of superior and subject in institutes of consecrated life.²⁵

Article 14, which discusses obedience, is relevant to our topic since it is in light of the vow of obedience that superiors are able to impose their will upon subjects.²⁶ Wulf comments that, while article 14 does not make many new impositions on subjects, it does so regarding superiors,²⁷ requiring them to consult and discuss more broadly with their subjects, while still preserving their own responsibility for making any final decisions. Article 14 asserts:

[superiors] must govern as the servants of their communities, reflecting the kindness that God himself offers them. They should treat their communities as daughters and sons of God, persons to be revered; they should elicit obedience in freedom.... They must so lead their communities that a vital, conscientious obedience creates partnership in initiating and maintaining apostolic work. Superiors must, therefore, listen to their subjects, and invite their co-operation as something good for the religious foundation and the church; they must, nevertheless, retain the right of final decision on the action to be taken.²⁸

Wulf points out that Article 14 also seeks to lessen, as has already been mentioned, any hint of paternalism,²⁹ which would exclude anyone outside the ranks of superiors from making a contribution to leadership or decision

²⁵ See the discussion below regarding *ES* n. 18.

²⁶ The nature of the power exercised by religious superiors will be discussed in greater depth in the next chapter. Although the power of superiors arises in part from the vow of obedience, it is also true that their power comes from the Church itself. Since the responsibilities and powers of the various grades of superiors are determined in canon law and in the proper law of the institute, which is approved by the hierarchy, and because the institutes themselves are approved and sanctioned by the hierarchy, it must be acknowledged that their power also derives from the Church and does not arise exclusively from the vows of the members.

²⁷ WULF, "Decree on the Appropriate Renewal," 364.

²⁸ *PC*, n. 14, 944-945.

²⁹ Cf. WULF, "Decree on the Appropriate Renewal," 362.

making. He also notes that the decree avoids any direct identification of superiors with God, a way of thinking of superiors and obedience with a long tradition, but which Wulf says, “has never been precisely analysed theologically.”³⁰

It is beyond the scope of this chapter to examine in detail the nuances behind each expression and the discussions that surrounded the various drafts that produced the decree. In this subsection we have indicated some of the fundamental shifts included in the decree *PC*, especially those relevant to our thesis. But, like all the decrees and documents of the council, *PC* is the result of many compromises between different points of view and different hopes for the future of religious life and, like the council as a whole, it did not seek to provide a blueprint to be rigidly followed but rather fundamental indications for future development. Reflecting many different points of view and the contributions of numerous individuals, the decree bears some of the marks and inconsistencies of a document written by committee.

Let us now turn our attention to the document that was intended to bring about the practical application of this decree.

³⁰ Ibid., 363.

1.1.3 – *Ecclesiae sanctae*,³¹ 1966

Ecclesiae sanctae is different from the preceding two documents not only because it is a *motu proprio* of Paul VI and not a document of the Second Vatican Council, but also because it was a transitional document intended to assist with the implementation of certain decrees³² of the council until such time as their juridical implications were made more precise in a revised code of canon law. In the *motu proprio* itself, before the norms are given, Paul VI refers to the "experimental" nature of the norms when he writes: "We command that they be observed on an experimental basis, that is, until the new *Code of Canon Law* is promulgated, unless some other provision should be made in the meantime by the Apostolic See."³³ In this way we see that their observance was obligatory and not merely recommended, but they were not expected to be permanent. In this same introduction to the norms, Paul VI invites the comments, observations, and recommendations of the conferences of bishops regarding the implementation of these new norms.³⁴

Since the second section of *ES* is intended to implement *PC*, it is not surprising that it is focused tightly on how the renewal of religious life should

³¹ PAUL VI, *Motu Proprio Norms Implementing Four Decrees of Vatican II Ecclesiae Sanctae*, 6 August 1966, in *AAS*, 58 (1966), 757-787, English translation in *The Pope Speaks*, 11 (1966), 376-400 (= *ES*).

³² In addition to *PC*, *ES* was also meant to assist with the implementation of *Christus Dominus* (Decree on the Pastoral Office of Bishops in the Church), *Presbyterorum ordinis* (Decree on the Ministry and Life of Priests) and *Ad gentes* (Decree on the Missionary Activity of the Church).

³³ *ES II* [unnumbered], 376-377.

³⁴ *Ibid.*, 376.

proceed. Section II of *ES*, which is entitled "Norms for Implementing the Decree of the Second Vatican Council on the Adaptation and Renewal of the Religious Life," is further divided into two parts: "The Manner of Promoting the Adaptation and Renewal of Religious Life" and "Certain Things that Need Adaptation and Renewal in Religious Life." The first part is concerned with general principles and procedures to be followed, and the second part with particular issues that the process of renewal must be certain to address.

The first part begins by noting: "The most important role in the renewal and adaptation of religious life belongs to the institutes themselves, and they should accomplish it principally through general chapters or, in the Eastern Churches, through *synaxes*."³⁵ *ES* notes that, "[t]he cooperation of all superiors and members is needed for the renewal of religious life within themselves, for generating the proper spirit in chapters, for carrying out the work of the latter, and for a faithful observance of the laws and regulations laid down by the chapters." Besides the fact that the Church is calling upon religious institutes to renew themselves at all and to respond to the changed circumstances of the modern world, these two statements reflect two remarkable and fundamental shifts in what the Church desires for religious: one, it desires that institutes take responsibility for renewing themselves and, two, that all members participate in the renewal, not simply the superiors. Although *ES* does not use the word, commentators observe that the decree

³⁵ *Ibid.*, II, Part 1, I, n. 1, 391.

reflects the desire of the Church to see the principle of *subsidiarity* applied to religious life, a concept that before Vatican II was thought to be applicable solely to civil society. Hill sees this same fact reflected in n. 18 of *Ecclesiae sanctae* when he writes:

Ever since Popes John and Paul and the Second Vatican Council introduced the principle of subsidiarity into the mainstream of the life of the Church, putting to rest the objections of those who maintained that this principle could only apply to civil society, the sharing of responsibility at every level and in every dimension of the Church's life has become impressive. No. 18 of *Ecclesiae sanctae* spells this out expressly. Authority in religious life is never to be exercised at a level higher than is truly necessary for the common good of the institute. This must become the object of continual re-examination on the part of all, because the tendency toward centralization seems to be characteristic of the human situation.³⁶

It is hard to overstate the significance of this shift. As we noted in the previous sub-section, paternalistic attitudes on the part of most superiors toward their subjects were the norm. Typically, even routine, everyday matters required the permission of one's superior. To try to shift religious institutes so that all members would play an active and engaged role in the life of the institute and would not be mere passive recipients of the commands of superiors is a significant shift indeed.³⁷

³⁶ R.A. HILL, "Shared Responsibility and Subsidiarity," in *CLSAD*, 139. See also, K. MÖRSDORF, "Decree on the Bishops' Pastoral Office in the Church," in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, Montreal, Palm Publishers, 1968, vol. II, 171, where he describes the discussion of applying the principle of subsidiarity to the ministry of bishops.

³⁷ At the council itself, Cardinal Suenens stated, "We should give up the habit of treating nuns as minors, an attitude so typical of the 19th century, which is still found in many religious congregations today. This emphasis on infantilism is matched by another disgraceful trait: the exhibition of maternalism on the part of mother superiors. Let us abandon these customs which perpetuate a feeling of inferiority among women religious. They are based not on consideration for the requirements of the religious life, but on

Another indication of this new way of thinking that is noted by commentators on *ES* is the shift away from the use of the word "subject" in favour of the word "member." In a commentary on *ES* Benko writes:

Now, in the Post Conciliar church there is a change. The concept of authority is more the role of service; the personal dignity and responsible freedom are stressed more. In the document *Perfectae caritatis* the word "subject" does not occur as often as the term "sodales" -- members....

The Council documents lessen the dichotomy, the polarity between the General Chapter and the "sodales," by making all the sodales responsible for the adaptation and renewal. It is to start at the bottom, go up to the General Chapter, and then descend again upon the sodales, not unsuspecting, not unwilling sodales.³⁸

Although *ES* does not say much that can be regarded as having direct bearing on the administration of discipline in religious institutes, it was a major contributor to the seismic changes that effected many religious institutes in the 1960s and 1970s, the most fundamental of which was the active participation of every member in the ongoing life and direction of the institute. Another indirect result of these changes was the rise of a certain "anti-juridic" mentality that would reject as part of the reform of the institutes anything that seemed formal, legalistic, or authoritarian on the part of superiors or proper law.³⁹

outmoded ideas about society." Translated and quoted in M. LEONARD, "Meaningful Adaptation: Indices of Relevance," in *Review for Religious*, 25 (1966), 687.

³⁸ M.A. BENKO, "Preparation for General Chapter," in *CLSAD*, 11-12.

³⁹ A bit of this debate can be witnessed in the pages of the *CLSAD*, which was a published collection of talks given at regional meetings of the CLSA in 1967 specifically to address *ES*. In his talk, "The Juridical Content of Revised Constitutions" (pp. 74-79), Francis Orsini argues for stripping juridical language out of constitutions and proper law, whereas Thomas P. Swift takes a more nuanced approach in his talk, "Supplementary Codes - Custom Books - Directories." Swift makes the case that juridic norms are not ipso facto contrary to the Gospel and that a certain proportion of juridic norms will always be necessary, in conjunction with more theological and biblically inspired norms, to give a clearly defined identity to the

Brennan summarizes the overall impact of *ES* well when she writes:

The renewal chapters [called for by *Ecclesiae sanctae*] invited the religious to a serious study of the Council documents, together with sustained and intense reflection on the experience of religious life. No other group of persons in the Church took more seriously the mandate of the Council, and having courageously implemented its principles, no other group has experienced its effects more dramatically.⁴⁰

Although many still debate the outcomes and the wisdom of certain reforms, it is undeniable that Vatican II brought about profound changes to religious life, many of which are still unfolding fifty years after the close of the council.

1.2 – Apostolic Exhortations

Apostolic exhortations are not instruments by which popes establish new laws. Rather, as their name implies, they encourage the People of God, in whole or in part, to be aware of certain realities, and to embrace certain values and ways of acting. In recent years, they have for the most part followed synods of bishops and have related to the Church at large the fruit of these gatherings.⁴¹ In this section we will examine two apostolic exhortations that have been issued regarding religious life since Vatican II.

institute and to provide a minimum standard for the behavior of members and for defining essential procedures like admission and dismissal.

⁴⁰ BRENNAN, "Commentary," 67.

⁴¹ Cf. F.G. MORRISSEY, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the Code of Canon Law*, 2nd ed., revised and updated by M. THÉRIAULT, Ottawa, Faculty of Canon Law, Saint Paul University, 2001, 13 (= MORRISSEY, *Papal and Curial Pronouncements*).

1.2.1 – *Evangelica testificatio*,⁴² 1971

Paul VI's Apostolic Exhortation on the Renewal of the Religious Life According to the Teaching of the Second Vatican Council was the first major document on religious life since *ES* in 1966. Furthermore, it remains one of the most significant of all documents regarding religious life from the time of the council until the present.⁴³ Many religious communities had experienced great change in the immediate aftermath of the council. We have already seen in the previous section what sorts of changes were desired by the council and it was with great alacrity that numerous communities embraced the project of renewal. But "the Spirit blows where it will" and it would seem that Paul VI was not entirely at ease with all the reports he received about how the renewal of religious life was unfolding. He took great interest in the renewal of religious life and addressed that matter not only in *ET* but also through the relevant dicasteries of the Roman curia as well as through other speeches and letters to particular groups.⁴⁴

Cunningham considers it significant that Paul VI chose an apostolic exhortation as the means for communicating his hopes for religious life:

During the years immediately following the Second Council of the Vatican, Paul VI became increasingly aware of the necessity of a statement on

⁴² PAUL VI, Apostolic Exhortation on the Evangelical Witness of the Religious Life *Evangelica testificatio*, 29 June 1971, in *AAS*, 63 (1971), 497-526, English translation in *The Pope Speaks*, 16 (1971), 108-128 (= *ET*).

⁴³ J. SCHAEFER, *The Evolution of a Vow: Obedience as Decision Making in Communion*, Piscataway, NJ, Transaction Publishers, 2008, 49-50 (= SCHAEFER, *The Evolution of a Vow*).

⁴⁴ *Ibid.*, 50.

the renewal of religious life in the Church.... In its final format, the Holy Father moved from the idea of a pontifical or encyclical letter, and chose to address the religious of the Catholic world in a simple, cordial, informal exhortation. Thus, *Evangelica Testificatio* comes as an earnest admonition, urging religious to be and to do all that is implied in their "special consecration" which, rooted in baptism, expresses that prior dedication with greater fullness. In having chosen the form of an apostolic exhortation to convey his thoughts to religious men and women, Paul VI chose to speak as a father and a brother in the apostolic community; as an "overseer" and collaborator in the building of the Kingdom.⁴⁵

While the hortatory nature of *ET* was appreciated, there was no avoiding the fact that some of its recommendations were quite pointed and caused consternation in certain quarters.⁴⁶

Paul VI begins by telling religious of his desire "to assist you to continue in your path of following Christ's faithfulness to the Council's teaching."⁴⁷ He goes on to say that, "We wish to respond to the anxiety, uncertainty and instability shown by some," while at the same time "to encourage those who are seeking the true renewal of religious life."⁴⁸ Although his language is measured and conciliatory, Paul VI also makes clear from the start that some of the efforts at "renewal" in religious life are misguided. He writes:

The boldness of certain arbitrary transformations, an exaggerated distrust of the past — even when it witnesses to the wisdom and vigour of ecclesial traditions — and a mentality excessively preoccupied with hastily

⁴⁵ A. CUNNINGHAM, "Evangelica Testificatio: Toward a Theology of Renewal," in LEADERSHIP CONFERENCE OF WOMEN RELIGIOUS (ed.), *Widening the Dialogue: Reflection on Evangelica Testificatio*, Ottawa, Canadian Religious Conference, 1974, 36-37.

⁴⁶ A. CAREY, *Sisters in Crisis, Revisited: From Unraveling to Reform and Renewal*, San Francisco, Ignatius Press, 2013, 56-57.

⁴⁷ *ET*, n. 1, 108.

⁴⁸ *Ibid.*, n. 2, 108.

conforming to the profound changes which disturb our times have succeeded in leading some to consider as outmoded the specific forms of religious life.⁴⁹

He makes clear that nothing the council had said about the renewal of religious life was intended to undermine it or to call into question its validity and worth. He goes on to trace briefly the fruitfulness of religious life down the ages and the esteem in which it is held even until the present.⁵⁰ It is in section 5 that Paul VI most clearly identifies why he is writing the current exhortation:

Certainly many exterior elements, recommended by founders of orders or religious congregations are seen today to be outmoded. Various encumbrances or rigid forms accumulated over the centuries need to be curtailed. Adaptations must be made. New forms can even be sought and instituted with the approval of the Church. For some years now the greater part of religious institutes have been generously dedicating themselves to the attainment of this goal, experimenting — sometimes too hardily — with new types of constitutions and rules. We know well and We are following with attention this effort at renewal which was desired by the Council.⁵¹

He goes on to explain that it is with a view to assisting the necessary discernment around the renewal of religious life that he is writing the current document.⁵² Next he reviews what the council taught regarding religious life, including the role of the hierarchy in overseeing and approving the various forms of religious life.⁵³ After reviewing the differing challenges facing contemplative and apostolic life,⁵⁴ he cautions that the key to authentic

⁴⁹ Ibid.

⁵⁰ Cf. *ibid.*, nn. 3-4, 109-110.

⁵¹ Ibid., n. 5, 110.

⁵² Cf. *ibid.*, n. 6, 110-111.

⁵³ Cf. *ibid.*, n. 7, 111-112.

⁵⁴ Cf. *ibid.*, nn. 8-10, 112.

renewal is rediscovering the suitable expression of the original charism of the founders in the current age, without at the same time being completely beholden to the trends of the present moment. He writes:

while the call of God renews itself and expresses itself in different ways according to changing circumstances of place and time, it nevertheless requires a certain constancy of orientation. The interior impulse which is the response to God's call stirs up in the depth of one's being certain fundamental options. Fidelity to the exigencies of these fundamental options is the touchstone of authenticity in religious life.⁵⁵

He then goes on to reflect in detail on the centrality of the vows in the renewal of religious life.

One of the great challenges Paul VI saw in how religious life was being renewed focused around the reality of individual religious working outside the community. Schaefer describes his preoccupation in the following way:

Paul VI was also concerned that religious would lose the focus of their unique calling when immersed in the demands of apostolic ministry, especially with regard to the practice of obedience. In *Evangelica Testificatio*, he asks rhetorically: "Does not the danger which is imminent in such situations (tasks outside of religious houses) advise that the sense of obedience be strengthened and more diligently cultivated?" (*ET*, n. 26). For Paul VI, the answer could be found in specifically defining the different spheres of appropriate action and in safeguarding the essentials of a proper and true religious life.

While essentially affirming and promoting renewal within religious life, Paul VI also struggled to defend and protect authority and papal primacy as intrinsically essential elements of the Church. Obedience was central to his vision of religious life, and it functioned explicitly within the paradigm of Christ's sacrificial obedience to the will of God.⁵⁶

For Paul VI, obedience was central to religious life and, while not totally excluding the possibility, he believed that a religious life built around an

⁵⁵ Ibid., n. 12, 113.

⁵⁶ SCHAEFER, *The Evolution of a Vow*, 51.

apostolate outside the community presented a grave threat to religious identity and had to be handled with the utmost care.

Paul VI then goes on in the third section to address matters of lifestyle. Amongst others, he comments on the need for prayer to balance apostolic work:

If you truly do the work of God, you will of your own accord feel the need for times of retreat which, together with your brothers and sisters in religion, you will transform into times of fullness.

In view of the hectic pace and tensions of modern life it is appropriate to give particular importance—over and above the daily rhythm of prayer—to those more prolonged moments of prayer, which can be variously spread out in the different periods of the day, according to the possibilities and the nature of your vocation.⁵⁷

He then goes on to devote all of the fourth section of the document to "Renewal and Spiritual Growth" which, not surprisingly, also approaches the question of prayer from different angles including: the desire for God, the spirit of prayer permeating fraternal life, the interior life, silence, the liturgical life, and the eucharist.⁵⁸

In the concluding section Paul VI is both strongly encouraging and pointed in his recommendations. He writes encouragingly:

Seeing you and the life you lead, the young will be able to understand well the appeal that Jesus never ceases to make among them.

The Council, in fact, brings this to mind: "The example of your life constitutes the finest recommendation of the institute and the most effective invitation to embrace the religious life." There is no doubt, moreover, that by showing you profound esteem and great affection, bishops, priests, parents and Christian educators will awaken in many the desire to follow in your

⁵⁷ *ET*, n. 35, 121.

⁵⁸ Cf. *ibid.*, nn. 42-48, 123-125.

footsteps, in response to that call of Jesus which never ceases to be heard among His followers.⁵⁹

And yet he also writes bluntly:

Open to this divine joy, live generously the demands of your vocation, renewing the affirmation of the realities of faith and in its light interpreting in a Christian way the needs of the world. The moment has come, in all seriousness, to bring about a rectification, if need be, of your consciences, and also a transformation of your whole lives, in order to attain greater fidelity.⁶⁰

The call for a "rectification" of consciences and a transformation of whole lives leading to greater fidelity is a clear indication that Paul VI believes a significant correction is necessary, at least in certain sectors, to have religious life focused on the renewal that the council desired.

How does *ET* bear on our larger topic of discipline in religious institutes? Its significance is essentially its emphasis on greater fidelity to the vows, especially obedience, as the institutes experimented with new forms of living out their charisms. Paul VI was alarmed at some new expressions of religious life that seemed to him completely detached from their rich history and given over completely to the winds of change that prevailed in that moment. For the most part, Paul VI reiterated the call of the council that the renewal of religious life was meant to be two-pronged, returning to the roots of the common vocation of all the baptised and returning to the initial inspiration of one's respective institute. He calls for a stronger relationship between members and superiors and between institutes and the hierarchy,

⁵⁹ Ibid., n. 55, 128.

⁶⁰ Ibid., n. 53, 127.

motivated by a sense that the hierarchy has a necessary role in assisting institutes to discern the correct expression of their charisms.⁶¹ This has bearing on our topic in that it is calling religious back to a closer relationship with the wider Church, to greater interior discipline, and to greater fidelity to the vows themselves. Misconduct, whether intentional or unintentional, whether it is handled well by superiors or mishandled, is often related to a lack of clarity. What is *expected* of a religious in a given situation? Of a superior? What is *required* of a religious? Of a superior? What do the People of God have a right to expect from religious? In the attempts of many institutes to be "open and led by the Spirit," a significant distrust of "institutions" and "formal procedures" arose. Paul VI is essentially saying that, in spite of their attitudes the renewal of religious life can still be authentic and genuine and bound intimately to the Church, including its institutional expression.

1.2.2 – *Vita consecrata*,⁶² 1996

John Paul II's Apostolic Exhortation on the Consecrated Life and its Mission in the Church and in the World was the fruit of the 1994 synod of bishops on the same topic. The exhortation is extensive, comprising 112

⁶¹ Cf. *LG*, n. 45, 886.

⁶² JOHN PAUL II, Apostolic Exhortation on the Consecrated Life and its Mission in the Church and in the World *Vita consecrata*, 25 March 1996, in *AAS*, 88 (1996), 377-486, English translation in *Origins*, 25 (1995-1996), 681, 683-719 (= VC).

numbered sections and over 40,000 words. Yet, in the assessment of McDermott:

Those who have studied the preparatory documents and followed the synod interventions and discussions will find no great surprises in the apostolic exhortation. Rather, it is a fine synthesis of the church's teaching on consecrated life and its lived realities in the various parts of the world.⁶³

Schaefer makes the point that one of the most significant things about the exhortation is its title: *consecrated life*. She makes that point that the designation, which gained official status with its use in the *CIC* where it was used to refer to all the ways of life which involve the profession of the evangelical counsels,⁶⁴ is much more than just a terminological nicety. The term "consecrated life" reflects John Paul II's preferred theological understanding of what distinguishes the lives of those who publicly profess the vows: their consecration. Schaefer notes that the use of the term is "an attempt to promote an understanding of consecrated life as the profession of the evangelical counsels that demands a permanent commitment of one's total life and being."⁶⁵ For John Paul II it is the permanent, radical nature of the

⁶³ R.M. MCDERMOTT, "Vita consecrata: A Vocation for the Third Millennium," in *Review for Religious*, 55 (1996), 454.

⁶⁴ By "consecrated life" is meant those who are members of religious institutes, secular institutes and those persons who profess the vows poverty, chastity, and obedience individually such as consecrated virgins, hermits, and anchorites.

⁶⁵ SCHAEFER, *The Evolution of a Vow*, 52. In her analysis here Schaefer is also building on the work of Sharon Holland in her commentary on c. 573. Cf. S. HOLLAND, "Commentary on Canon 573," in *CLSA Comm1*, 454-455.

consecration that conforms the person more closely to Christ that distinguishes those who profess the vows.⁶⁶

We will now turn our attention to the elements of VC that have bearing on our thesis. The issue of the renewal of religious life that was called for by Vatican II is touched on in only one paragraph.

During these years of renewal, the consecrated life, like other ways of life in the Church, has gone through a difficult and trying period. It has been a period full of hopes, new experiments and proposals aimed at giving fresh vigour to the profession of the evangelical counsels. But it has also been a time of tension and struggle, in which well-meaning endeavours have not always met with positive results.

The difficulties however must not lead to discouragement. Rather, we need to commit ourselves with fresh enthusiasm, for the Church needs the spiritual and apostolic contribution of a renewed and revitalized consecrated life.⁶⁷

One cannot fail to notice that this assessment has a negative tone. Gottemoeller notes that in such an extensive document this seems like cursory treatment for what the council considered to be the major project of religious life in the immediate future.⁶⁸ Castellano Cervera, however, counters this observation by pointing out that the topic of the renewal of religious life had already been thoroughly treated in 1994 instruction *Fraternal Life in Community* and in the *Lineamenta* and *Instrumentum laboris* which preceded

⁶⁶ The use of title *Vita consecrata* is also noteworthy given that the synod and the exhortation included discussions related to societies of apostolic life and other new forms of common life that are not technically speaking types of consecrated life.

⁶⁷ VC, n. 13, 685.

⁶⁸ D. GOTTEMOELLER, "Vita consecrata: The Post-Synodal Exhortation on Consecrated Life," *CLSAP*, 58 (1996), 186.

the synod.⁶⁹ In any case, it is clear that VC is much more focused on a vision of consecrated life for the future than on an analysis of the past. Furthermore, the negative tone of what it does say, and John Paul II's professed desire to write something positive and encouraging,⁷⁰ may help to explain why the matter was touched on only briefly.

In section 43, VC touches on the role of superiors, which is central to our thesis. It states:

In the consecrated life *the role of Superiors*, including local Superiors, has always been of great importance for the spiritual life and for mission. In these years of change and experimentation, the need to revise this office has sometimes been felt. But it should be recognized that those who exercise authority *cannot renounce their obligation as those first responsible* for the community, as guides of their brothers and sisters in the spiritual and apostolic life.

In an atmosphere strongly affected by individualism, it is not an easy thing to foster recognition and acceptance of the role which authority plays, for the benefit of all. Nevertheless, its importance must be reaffirmed as essential for strengthening fraternal communion and in order not to render vain the obedience professed. While authority must be above all fraternal and spiritual, and while those entrusted with it must know how to involve their brothers and sisters in the decision-making process, it should still be remembered that *the final word belongs to authority* and, consequently, that authority has the right to see that decisions taken are respected.⁷¹

For the promotion of appropriate discipline in religious life it is essential that the rights and responsibilities of superiors and members alike are clearly delineated and known by everyone. Certainly, leadership in religious life should be marked by consultation and a spirit of discernment, but "discernment" is never done unilaterally by one member; it is always done in

⁶⁹ CASTELLANO CERVERA, "LG - PC - VC," 165.

⁷⁰ Cf. VC, n. 13, 685-686.

⁷¹ Ibid., n. 43, 695.

concert with the representative of the institute who has the duty to confirm or reject what was decided upon by the member. There is a certain amount of confusion that exists today around the administration of discipline, and no doubt this is in part because of the confusion in some parts about the role of superiors.

Section 61 looks at "Mixed Institutes," that is, institutes that were founded as having priests and lay brothers as equal members with equal possibilities of serving as superiors. Today, with few exceptions, a priest must lead such institutes whereas this was not always the case at the time such institutes were founded. In light of the council's invitation to the institutes to renew more faithfully their original charisms, not a few mixed institutes have requested to return to their original organization whereby superiors could be chosen from either the lay brothers or the priests. It is this question of jurisdiction, which we will examine in greater detail in chapter 2, that this section proposes a commission to investigate.

The last section of VC which we will examine is entitled, "Freedom in Obedience." The question of obedience is central to our thesis and the vow of obedience is central to all forms of consecrated life, especially in the eyes of John Paul II, who sees consecration by means of the vows as the distinguishing characteristic of consecrated life. In the exhortation, John Paul II holds up the obedience of consecrated persons as the model by which Creation can be reconciled to the Father. He writes:

An effective response to this situation [i.e., the fallen state of the world] is the obedience which marks the consecrated life. In an especially vigorous way this obedience repropose the obedience of Christ to the Father and, taking this mystery as its point of departure, testifies that there is no contradiction between obedience and freedom. Indeed, the Son's attitude discloses the mystery of human freedom as the path of obedience to the Father's will, and the mystery of obedience as the path to the gradual conquest of true freedom. It is precisely this mystery which consecrated persons wish to acknowledge by this particular vow. By obedience they intend to show their awareness of being children of the Father, as a result of which they wish to take the Father's will as their daily bread (cf. Jn 4:34), as their rock, their joy, their shield and their fortress (cf. Ps 18:2). Thus they show that they are growing in the full truth about themselves, remaining in touch with the source of their existence and therefore offering this most consoling message: "The lovers of your law have great peace; they never stumble" (Ps 118:165).⁷²

Obviously, this is a very exalted understanding of the vow of obedience which can best be understood as an invitation of the part of John Paul II for religious to see the cosmic aspect and profound significance of their vow of obedience. The spirit of individualism, which marks modern day society, is well known and is referenced repeatedly in the exhortation.⁷³ John Paul II sees the obedience of consecrated persons, who are themselves imitating Christ, as a model for all humanity both to grow in freedom and to be reconciled with the Creator. Obedience is part of the central question of our thesis in two ways: one, many forms of misconduct are a form of disobedience, that is, a failure to uphold an obligation that religious are bound to uphold. Two, because of the vow of obedience, members are bound to accept the correction a superior imposes in response to any misconduct committed.

⁷² Ibid., n. 91, 711.

⁷³ Cf. *ibid.*, nn. 4, 5, 12, 25, 32, 39, 42, and 52.

The connections between VC and our thesis are not often readily apparent. This is because in VC John Paul II adopts a very positive outlook and is exhorting consecrated persons to embrace the highest of ideals, and our topic is concerned with religious who have failed to meet even the minimum standard of conduct.

At the end of this section on exhortations, it is helpful to look at the differing approaches of the Paul VI and John Paul II. Schaefer summarizes the differing contributions in the following way:

The papacy of John Paul II came at a critical moment in the renewal of religious life. The changes and adaptations initiated by Vatican II and affirmed and encouraged by Paul VI had created an ecclesiological and sociological context filled with shifting paradigms, uncertainty, changing roles, and expanding apostolic initiatives. John Paul II attempted to insert definition, clarity, and stability into the process of renewal in ways that, for some religious, have felt reactive, restrictive, and hierarchical. The overall effects of John Paul II's legislation and articulation of the essentials of religious life remain to be fully understood.⁷⁴

With these words, Schaefer helps to bring into focus the contrasting approaches of the two popes. John Paul II through his numerous writings attempted to articulate a beautiful, lofty vision of religious life but one which some religious could not relate to their lived experience. Paul VI shared many of the concerns of John Paul II, but was more measured in his demands and expectations.

⁷⁴ SCHAEFER, *The Evolution of a Vow*, 55.

1.3 – Instructions

In this section we will examine four instructions written by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life during the pontificates of John Paul II and Benedict XVI. In contrast to apostolic exhortations, instructions are of a more juridical nature. Canon 34, which addresses the matter of instructions, says the following:

§1. Instructions clarify the prescripts of laws and elaborate on and determine the methods to be observed in fulfilling them. They are given for the use of those whose duty it is to see that laws are executed and oblige them in the execution of the laws. Those who possess executive power legitimately issue such instructions within the limits of their competence.

§2. The ordinances of instructions do not derogate from laws. If these ordinances cannot be reconciled with the prescripts of laws, they lack all force.

§3. Instructions cease to have force not only by explicit or implicit revocation of the competent authority who issued them or of the superior of that authority but also by the cessation of the law for whose clarification or execution they were given.⁷⁵

Instructions further elaborate and specify what is stated in the law on a certain topic but never derogate or change what is fixed there. Writing about the place of instructions in the teachings of the Church, Morrissey indicates:

It is this form of document, along with the declaration, that has given rise to the greatest difficulty in interpretation in the postconciliar era. Since the texts are not strictly speaking legislative -- at least according to their nature -- their application certainly allows for more leeway than would a decree.⁷⁶

We see that, although instructions elaborate on what is in the law, they do not carry the same force as the law itself.

⁷⁵ CIC, c. 34.

⁷⁶ MORRISSEY, *Papal and Curial Pronouncements*, 29.

1.3.1 – *Potissimum institutioni*,⁷⁷ 1990

Directives on Formation in Religious Institutes⁷⁸ was the fruit of many years of work. In 1969 the Congregation for Religious and Secular Institutes began to consult religious congregations on the possibility of an instruction on the topic of formation. A proposed document was completed by 1979 but by then it was decided to wait until after the promulgation of the new code. Consultation began again in 1986 with the new draft completed in 1989 and published in 1990.⁷⁹ Castellano Cervera, however, tells us that the draft of the 1980s has little in common with the draft generated in the 1970s.⁸⁰ Furthermore, he tells us that the document was not created with the intention of saying something new about formation in religious institutes, but rather as a sort of collection of official teachings on the matter combined with the relevant new law.⁸¹ Certainly, what is said in the *CIC* calls for further

⁷⁷ CICLSAL, instruction Directives on Formation in Religious Institutes *Potissimum institutioni*, 2 February 1990, in *AAS*, 82 (1990), 470-532, English translation in *Origins*, 19 (1989-1990), 677, 679-699 (= *PI*).

⁷⁸ Although this document includes the word "Directives" in its title, the official Vatican website link to this document states, immediately after the title: "The Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, which publishes this document, gives it the weight of an Instruction according to can. 34 of the *Code of Canon Law*." Evidently there was some initial confusion about what was intended by the designation of "Directives" but, in any case, this document is now authoritatively identified as an instruction. Cf. MORRISEY, *Papal and Curial Pronouncements*, 28.

⁷⁹ E. McDONOUGH, "Directives on Religious Formation: *Potissimum Institutioni*," in *Review for Religious*, 54 (1995), 143.

⁸⁰ J. CASTELLANO CERVERA, "Directives on Formation in Religious Institutes: Some Suggestions for a First Reading of the Document *Potissimum Institutioni*," in *UISG Bulletin*, 84 (1990), 32-51 (= CASTELLANO CERVERA, "Directives on Formation").

⁸¹ *Ibid.*, 33.

development, given that the article in the *CIC* entitled "The Formation of Religious" contains a mere three canons.

Although the *PI* is comprehensive, not much in the document relates directly to our thesis. Nevertheless, sections 17 and 18 speak of "A Life Unified in the Holy Spirit:"

[T]he personal life of a religious must not become dichotomized between the generic end of religious life and the specific end of the institute; between consecration to God and mission in the world; nor between religious life itself on the one hand, and apostolic activities on the other. There is no religious life existing concretely "by itself" upon which is grafted the specific and the particular charism of each institute as subordinate additions. In institutes dedicated to the apostolate there is no pursuit of sanctity, profession of the evangelical counsels, or life dedicated to God and to his service which is not intrinsically connected with the service of the Church and of the world....

The proof of a unity of life will be opportunely made in terms of the four great fidelities: fidelity to Christ and the Gospel, fidelity to the Church and to its mission in the world, fidelity to religious life and to the charism of one's own institute, and fidelity to humanity and to our times.⁸²

In a sense, misconduct, where there are no other underlying psychological or emotional issues, often arises when a religious has "drifted" from one of the above mentioned "four great fidelities:" the Gospel, the Church, religious life, and the charism of one's institute or the needs of others. Misconduct can often be an expression of a lack of integration with one of the four essential "fidelities." Helping religious in formation to deepen their appreciation for the importance of these fidelities is almost certain to help with their overall stability and happiness in religious life and, by extension, to reduce disharmony and misconduct.

⁸² *PI*, nn. 17 & 18, 683.

In a similar way, the matter of "The On-Going Formation of the Perpetually Professed"⁸³ is also important for continued integration in the institute. *PI* notes that "[t]o follow Christ means that one is always on the road, that one is on one's guard against sclerosis and ossification, in order to be able to give a living and true witness to the Kingdom of God in this world."⁸⁴ It goes on to note five moments of transition at which even the professed need accompaniment which often involves a component of re-connecting with the heart of one's vocation. The five moments are: the transition out of initial formation into life as a "regular" professed; the completion of ten years of profession which is often accompanied by a waning of enthusiasm; so-called "full maturity" when one is at the high point of their ministry or responsibilities, with its attendant temptation to individualism; times of crisis whether because of difficulty in ministry, health, or the spiritual life; lastly, the years of declining health and withdrawal from a more active way of life. It would seem that a certain amount of misconduct happens when people's lives are in turmoil or transition, and that helping members at such sensitive times would also help to lessen the danger of disharmony and misconduct.

⁸³ Cf. *ibid.*, nn. 66-71, 691-693.

⁸⁴ *Ibid.*, n. 67, 692.

In this subsection we have seen some of the ways *PI* sheds light on how a thoughtful and well-ordered formation, integrated with the life and teachings of the Church, can help lessen the danger of misconduct.

1.3.2 – *Congregavit nos in unum Christi amor*,⁸⁵ 1994

Although the precise nature of the document *Fraternal Life in Community* is not explicitly identified, we will treat it in this section on instructions. It seems prudent to treat *FLC* with the instructions since that is the type of document it mostly closely resembles, seeing as it gives specific, authoritative guidance from the competent dicastery of the Holy See on a matter that the *CIC* treats only very briefly.⁸⁶

Like other documents of the CICALSAL, *FLC* was the fruit of many years of consultation, and although it was published the same year that the Synod on Consecrated Life was held, it was not prepared in conjunction with

⁸⁵ CICALSAL, document *Fraternal Life in Community Congregavit nos in unum Christi amor*, 2 February 1994, in *Enchiridion Vaticanum*, 14 (1994-1995), 220-283, English translation in *Origins*, 38 (1993-1994), 693, 695-712 (= *FLC*).

⁸⁶ Fraternal life is discussed only in c. 619: "Superiors are to devote themselves diligently to their office and together with the members entrusted to them are to strive to build a community of brothers or sisters in Christ, in which God is sought and loved before all things. Therefore, they are to nourish the members regularly with the food of the word of God and are to draw them to the celebration of the sacred liturgy. They are to be an example to them in cultivating virtues and in the observance of the laws and traditions of their own institute; they are to meet the personal needs of the members appropriately, solicitously to care for and visit the sick, to correct the restless, to console the faint of heart, and to be patient toward all."

the synod.⁸⁷ McDonough describes the document as "rather long and highly compact."⁸⁸

FLC opens with a clear assessment of the *status quaestionis*:

The subject of this document is considered in light of this fact: the character which "fraternal life in common" manifests in numerous countries reveals many transformations of what was lived in the past. These transformations, as well as the hopes and disappointments which have accompanied them, and continue to do so, require reflection in light of the Second Vatican Council. The transformations have led to positive results, but also to results which are questionable. They have put into a clearer light not a few Gospel values, thus giving new vitality to religious community, but they have also given rise to questions by obscuring some elements characteristic of this same fraternal life lived in community. In some places, it seems that religious community has lost its relevance in the eyes of women and men religious and is, perhaps, no longer an ideal to be pursued.⁸⁹

This passage is reflective of the document's overall style of being both positive and realistic about the matter under consideration. Before beginning its systematic analysis of the various aspects of living fraternal life today, *FLC* briefly examines the factors that have brought fraternal life to the current moment. It looks at the areas of theological development, canonical development, development within society, and changes in religious life. Of these four areas, the one most important to our thesis is "development within society." In this section of the document we find the following words:

⁸⁷ Cf. E. McDONOUGH, "The Document on Community Life: *Congregavit Nos in Unum Christi Amor*," in *Review for Religious*, 54 (1995), 301 (= McDONOUGH, "The Document on Community Life"). It may be that its publication so close to the synod is why it was not designated an instruction, lest the more juridical status of an instruction be seen as trying to preempt the work of the synod.

⁸⁸ *Ibid.*, 301.

⁸⁹ *FLC*, n. 1, 695.

Demands for personal freedom and human rights have been at the root of a broad process of democratisation, which has favoured economic development and the growth of civil society.

In the immediate wake of the Council, this process, especially in the west, quickened and was marked by moments of calling meetings about everything and rejection of authority.

The Church and religious life were not immune from such questioning of authority, with significant repercussions for community life as well.

A one-sided and exasperated stress on freedom contributed to the spread of a culture of individualism throughout the west, thus weakening the ideal of life in common and commitment to community projects.⁹⁰

These four short paragraphs touch on a number of ways in which changes in the wider culture have created a climate in which at least certain types of misconduct (e.g., forms of disobedience or actions contrary to the charism of the institute or magisterium of the Church) are more likely to occur. Certainly, the rise in the awareness of and promotion of human rights in the last sixty-five years has led to increased freedom for many, but it has also fed a culture of individualism. Of great importance to our topic, when an accusation of misconduct is leveled, it has also increased the expectation that such matters are handled with *due process*⁹¹ and not the simple fiat of a superior who decides the matter with little or no transparency. Furthermore, "the argument from authority" is ever less convincing. Superiors must explain and justify their decisions, showing that they are reasonable, based on

⁹⁰ Ibid., n. 4, 696.

⁹¹ Although the term *due process* is a technical legal term in certain legal systems we use it here in the generic sense of a fair procedure, a just procedure, for addressing accusations of misconduct while simultaneously protecting the rights of the accused. For a discussion of the usefulness of the concept of due process in canon law see, R.T. KENNEDY, "Address on Due Process to National Conference of Catholic Bishops," in *CLASP*, 31 (1969), 10-17.

objective facts, and acting within their authority and the law.⁹² Rising living standards around the world have also changed the expectations of religious regarding their standard of living, especially as those they live among and minister to become more affluent. Beyond a doubt, changes to society since the Second World War have created a new context that has influenced both the commission of acts of misconduct and the expectations of how such acts should be addressed.

Numerous other themes addressed in the document have at least indirect bearing on our topic. In the section "Personal Freedom and the Building of Community" we find the following words:

This path of liberation which leads to full communion and to the freedom of the children of God demands, however, the courage of self-denial in accepting and welcoming the other with his or her limitations, starting with the acceptance of authority.

Many have noted that this has constituted one of the weak points of the recent period of renewal. There has been an increase of knowledge and various aspects of communal life have been studied. Much less attention has been paid, however, to the ascetic commitment which is necessary and irreplaceable for any liberation capable of transforming a group of people into a Christian fraternity.

Communion is a gift offered which also requires a response, a patient learning experience and struggle, in order to overcome the excesses of spontaneity and the fickleness of desires. The highest ideal of community necessarily brings with it conversion from every attitude contrary to communion.

Community that is not mystical has no soul, but community that is not ascetic has no body.⁹³

This is perhaps one of the most succinct expressions of a truth the document attempts to communicate at various points: community takes effort, personal

⁹² Cf. c. 51.

⁹³ Ibid., n. 23, 700.

commitment, and sacrifice. "Community" does not just refer to the brothers or sisters with whom one lives in this particular building, but to all of one's companions throughout the institute. Again, certain types of misconduct are born of a spirit of willfulness that will not allow one to submit to authority or to put aside his or her desires or dreams for the sake of the institute.

In the section on "Identity" we find the following words:

The process of maturing takes place through one's own identifying with the call of God. A weak sense of identity can lead to a misconceived idea of self-actualisation, especially in times of difficulty, with an excessive need for positive results and approval from others, an exaggerated fear of inadequacy, and depression brought on by failure.⁹⁴

The true identity of every religious lies in his or her willingness to be identified with the person of Jesus Christ. If a particular member is unwilling or unable to allow himself or herself to be identified with Christ in this intimate yet public manner, other expressions of disequilibrium are bound to emerge.

Section 38 looks at the issue of "difficulties" in living community life, such as living with others who themselves are suffering greatly or are disturbing the common life for some other reason. Undoubtedly, learning to live with difficult persons is an opportunity for one to grow in Christian maturity. Members must be helped with the appropriate means, but at the

⁹⁴ Ibid., n. 36, 702.

same time the healthy members must learn to accept the limitations of others, even if this can be a form of "grave penance"⁹⁵ for all concerned.

Section 39 looks at the transition "From Me to Us." As had already been mentioned, a culture of individualism is not uncommon in many of the regions where the Church finds herself today. It can take various forms, such as:

the need to take centre stage; an exaggerated insistence on personal well-being, whether physical, psychological or professional; a preference for individual work or for prestigious and "signed" work; the absolute priority of one's personal aspirations and one's own individual path, regardless of others and with no reference to the community.⁹⁶

There is a perpetual search for balance, a perpetual project of deeper integration with the community and with Christ. There is a constant deepening of the movement outwards. "Religious community is the place where the daily and patient passage from 'me' to 'us' takes place, from my commitment to a commitment entrusted to the community, from seeking 'my things' to seeking 'the things of Christ'."⁹⁷

In section 50 we see a highlighting of the spiritual authority of the superior. It affirms:

Authority has as its main task building in unity the brothers and sisters of "a fraternal community, in which God is sought and loved above all." (c. 619) A superior must therefore be, above all, a spiritual person, convinced of the primacy of the spiritual, both with respect to personal life and for the development of fraternal life; in other words, he or she must know that the

⁹⁵ Cf. *ibid.*, n. 38, 703.

⁹⁶ *Ibid.*, n. 39, 703.

⁹⁷ *Ibid.*

more the love of God increases in each individual heart, the more unity there will be between hearts.⁹⁸

Even the heavy task of disciplining a member who has committed some form of misconduct is itself a spiritual task. The widely held bias against disciplinary procedures is predicated on the notion that the task of formal discipline is administrative in nature and therefore ipso facto unspiritual. Of course, the spiritual nature of the superior's office does not go into abeyance when he or she must face the solemn duty of administering discipline or, indeed, of carrying out any type of administrative duty. The purpose of discipline is spiritual and not retribution or humiliation. Of course, the ultimate purpose of a disciplinary procedure is the salvation of souls, but its more immediate purpose is the same as for every penal procedure: "repair the scandal, restore justice [and] reform the offender."⁹⁹

Section 51 speaks about the importance of clarity around the different roles in a community, especially, "the respective competence of the community, the various councils, departmental co-ordinators and the superior."¹⁰⁰ A simple way to help avoid a certain type of misconduct is to make clear everyone's responsibilities.

The last section we will consider of *FLC* is section 53 on the importance of obedience. It affirms:

⁹⁸ Ibid., n. 50, 706.

⁹⁹ C. 1341.

¹⁰⁰ *FLC*, n. 53, 706.

Finally, we must never forget in this delicate, complex and often painful issue that faith plays a decisive role which allows us to understand the saving mystery of obedience. (Cf. *PC*, n. 14; "Essential Elements," n. 49) Just as from the disobedience of one man came the disintegration of the human family and from the obedience of the New Man began its reconstitution (cf. Rom. 5:19), so an obedient attitude will always be an essential force for all family life.¹⁰¹

To describe obedience as "delicate, complex and often painful" is a sober and truthful admission. Religious obedience is predicated on faith in Christ. No set of norms, procedures, or constitutions can ever supply for what is lacking in a subject or a superior who lacks true charity. Our concern for disciplinary procedures within religious communities is essentially a concern for times when charity runs thin and our purpose is motivated by a desire to help superiors respond to such difficult situations in ways that are imbued with charity and the values of the Gospel. But acting with charity, of course, does not necessarily mean letting everything members have done or desire to do, go unchallenged. True charity can involve the heavy duty of holding subjects responsible for their misconduct, however they may have perceived or intended their actions.

In closing, *FLC* is a well balanced document that assesses fraternal life in community realistically and calls it to something greater, but acknowledging that religious life is still within the grasp of everyone who professes the evangelical counsels.

¹⁰¹ Ibid.

1.3.3 – *Starting Afresh from Christ*,¹⁰² 2002

The opening paragraphs of the instruction explain the intentions of the authors. They state plainly that "[t]heir intention was not to produce another doctrinal document but rather to help consecrated life enter into the great pastoral guidelines of the Holy Father,"¹⁰³ in particular the apostolic exhortation *Vita consecrata* and the apostolic letter regarding the new millennium, *Novo millennio ineunte*. The majority of the quotations in the instruction come from one of these two documents.

Smith discusses the designation of *SAFC* as an instruction given that at no point does it refer to either the *CIC* or the *CCEO*.¹⁰⁴ As we have already noted in the introduction to this section, canon 34 states: "Instructions clarify the prescripts of laws and elaborate on and determine the methods to be observed in fulfilling them." The language of *SAFC* is decidedly non-juridical but most certainly is theological and, of course, the Church's theological magisterium underlies and structures all of the law. In discussing the place of *SAFC* as part of the *ius vigens* of religious life, she concludes the following:

It is obvious that the document highlights the spirit that underpins the law. It breaks open the possibilities and expands the horizons inherent in law, as do

¹⁰² CICLSAL, Instruction *Starting Afresh from Christ: A Renewed Commitment to Consecrated Life in the Third Millennium*, 19 May 2002, Vatican City, Libreria editrice Vaticana, 2002, English translation in *Origins*, 32 (2002-2003), 129, 131-148 (= *SAFC*).

¹⁰³ *Ibid.*, n. 4, 132.

¹⁰⁴ P. SMITH, "Religious Law: Present Reality; Future Implications," in *CLSAP*, 65 (2003), 210 (= SMITH, "Religious Law").

the documents on which it is based. Yet, that is also the purpose of some other documents that have not been included among the *ius vigens*.¹⁰⁵

Let us now examine the sections of *SAFC* that relate to our topic.

As we have seen in our earlier discussion of *VC*, John Paul II holds consecrated life in the highest regard. In the opening paragraphs of *SAFC* the document indicates:

Consecrated life, in its continuous development and experience of new forms, is already in itself an eloquent expression of this very presence, *almost a kind of Gospel* spread out through the centuries. It appears in fact as a "prolongation in history of a special presence of the Risen Lord" (*VC*, 19).¹⁰⁶

That is high praise and it is also a demanding call that consecrated life continue to embody the highest of Christian values. In relation to our topic, it is only reasonable to argue that some of the highest Christian values religious must uphold are those connected to justice, due process, and the right of defense. It makes little sense for religious institutes to call upon others to respect human rights and the rule of law if they are not willing to model what they preach.

In the section "Rediscovering the Meaning and Quality of Consecrated Life," we find the following insightful words:

In addition to the life giving thrust, capable of witness and self-sacrifice to the point of martyrdom, consecrated life also experiences the insidiousness of mediocrity in the spiritual life, of the progressive taking on of middle class values and of a consumer mentality. The complex management of works, while required by new social demands and norms of the State, together with the temptations presented by efficiency and activism, run the risk of obscuring Gospel originality and of weakening spiritual motivations. The

¹⁰⁵ *Ibid.*, 211.

¹⁰⁶ *SAFC*, n. 2, 131. Italics mine.

prevalence of personal projects over community endeavours can deeply corrode the communion of brotherly and sisterly love.

These are real problems which should not be taken lightly. Consecrated persons are not alone in living the tension between secularism and an authentic life of faith, between the fragility of humanity itself and the power of grace; this is the experience of all members of the Church.¹⁰⁷

With prophetic clarity, *SAFC* identifies some of the essential challenges faced by consecrated persons and indeed by all Christians: to evangelize and to convert the modern world to the ways of Christ without being "converted" to the ways of the world in the process itself. It goes without saying that the challenge of being immersed in the modern world so as to be better able to sway others to Christ carries with it the inherent danger of being seduced by the values of the world. The challenges this passage enumerates (mediocrity in the spiritual life, a consumerist mentality, overemphasis on efficiency, activism, and personal projects) can set the stage for actions which cross the line into misconduct.

In the section "The Task of Superiors" we find the following words:

In rediscovering the meaning and quality of consecrated life a fundamental task is that of superiors, to whom the service of authority has been entrusted, a demanding and at times disputed task. It requires a constant presence which is able to animate and propose, to recall the *raison d'être* of consecrated life, and to help those entrusted to them to live in a constantly renewed fidelity to the call of the Spirit. A superior cannot renounce the mission of animation, of brotherly/sisterly support, of proposing, of listening and of dialogue. Only in this way can the entire community find itself united in full communion and in apostolic and ministerial service. The directives offered in our Congregation's document *Fraternal Life in Community* remain a topic of great interest, when, in speaking of the aspects of authority which should be evaluated today, recalls the task of spiritual authority, of authority conducive to unity and an authority capable of making final decisions and assuring their implementation. (*FLC*, n. 50)

¹⁰⁷ Ibid., n. 12, 135.

A personal and confident participation in the community's life and mission is required of all its members. Even if, in the end, according to proper law, it is the task of authority to make choices and decisions, daily living in community requires a participation which allows for the exercise of dialogue and discernment. Each individual, then, and the whole community can work out their own life with the plan of God, together carrying out God's will. (*VC*, n. 92)¹⁰⁸

The superior is the linchpin of unity for every community, yet no superior can exercise his or her ministry without the willing participation of the members. The members must cooperate and assist the superior, but they must also allow the superior to lead, not resisting or interfering with his or her lawful decisions. The superior's ministry is twofold: encouraging the members to live up to the highest standards of religious life and ensuring that they meet the basic expectations. They lead the discernment of the community around the necessary aspects of their life in common but they have the duty of making the final decision and of caring for the members who are most in need. The assistance superiors owe to members in need can take countless forms, one of which is a formal disciplinary procedure.

The section "The Spirituality of Communion" revisits the idea from *VC* that consecrated persons have a unique and special contribution to make to the life of communion shared by all Christians and, indeed, amongst all people of the world. Quoting from *VC*, it says that consecrated persons should be "true experts of communion and to practice its spirituality as

¹⁰⁸ *Ibid.*, n. 14, 135-136.

witnesses and artisans of that plan of communion which stands at the center of history according to God."¹⁰⁹ In concludes this section by stating:

"one of the tasks of consecrated life today is that of spreading the spirituality of communion, first of all in their internal life and then in the Church community, and even beyond its boundaries, by beginning or continuing a dialogue in charity, especially in those places where today's world is torn apart by ethnic hatred or senseless violence." (VC, n. 51) This is a task which requires spiritual persons interiorly shaped by God, by loving and merciful communion and by mature communities where the spirituality of communion is the rule of life.¹¹⁰

It goes without saying that a spirituality of communion begins at home, that religious cannot share with others what they do not truly possess themselves. Furthermore, a life of communion, a spirituality of communion, is predicated on profound charity. While it may seem strange to associate "charity" with the superior's duty of administering discipline, the two are, in fact, one and the same.

Seeing as *SAFC* draws so heavily upon *VC* and *Novo Millennio Ineunte*, two very positive and encouraging documents, it should not be surprising if it says little that has direct bearing on our topic. Still, as we consider what it says about the heights to which consecrated persons are called, simultaneously it implies much regarding the depths to which consecrated person are capable of falling. Even in such encouraging, positive words, *SAFC* still has important things to say regarding the administration of discipline in religious life.

¹⁰⁹ Ibid., n. 28, 142, quoting from *VC*, n. 46.

¹¹⁰ Ibid.

1.3.4 – *Faciem tuam*,¹¹¹ 2008

Besides those of the council itself, of all the documents we have considered in this first chapter, The Service of Authority and Obedience is most directly related to our topic. As we have already seen in other documents and heard in accounts regarding religious life since the council, one of the biggest challenges faced in religious life since the council has been in regards to new ways of understanding the vow of obedience. The council desired a new type of obedience where the members participated more actively in decision-making and were not merely the passive recipients of decisions made by an elite class of superiors. As has been noted in the discussion above, this was part of a movement to apply the principle of subsidiarity to the Church's interior life. To use more contemporary language, we would say that the Church desired to "empower" individual religious to utilize their unique gifts, talents, ideas, initiatives, and inspirations and not simply to wait passively for the superior to recognize some talent in them and then to order them to act upon it under holy obedience. This was an invitation that was overwhelmingly and enthusiastically embraced in most religious communities but which had the natural corollary of weakening the immediate, even blind, practice of obedience that had been common until that time. To be certain, Vatican II did not invent the problem of religious

¹¹¹ CICLSAL, Instruction The Service of Authority and Obedience *Faciem tuam*, 11 May 2008, in *Sequela Christi*, 34 (2008), 321-351, English translation in *Origins*, 38 (2008-2009), 65-83 (= SAO).

disobedience, but it did unsettle the way in which the vow of obedience was lived and expressed. With this period of experimentation and transition came a certain amount of excesses and unsuccessful experiments. *SAO* comes more than forty years after the close of the council and after much reflection at the level of communities and the hierarchy. It is from this vantage point that *SAO* offers a theological reflection that is grounded, practical, and insightful.

In its opening paragraphs, *SAO* admits the difficulty of trying to craft an instruction that will be applicable in such varied circumstances: different charisms and ministerial commitments, different models of governance and approaches to obedience, different cultural contexts, communities of men and of women, different approaches to and levels of cooperation with the laity, and differences between institutes regarding the responsibilities of different types of superiors.¹¹² *SAO* goes on to note, however, that the greatest challenge is the most fundamental: the individual as part of a community. It explains:

[O]ne must recall that the desire for self realization can at times enter into conflict with community projects; the search for personal well-being, be it spiritual or material, can render total dedication to the service of the common mission difficult; visions of the charism and of apostolic service which are too subjective can weaken fraternal sharing and collaboration.... The balance between the individual and community is not an easy one and thus neither is that between authority and obedience.¹¹³

The introductory section of *SAO* concludes by admitting that it cannot address every possible eventuality. It summarises its purpose by stating: "The

¹¹² Ibid., n. 3, 66-68.

¹¹³ Ibid., n. 3, 67.

principal intent of this Instruction is that of reaffirming that obedience and authority, even though practiced in many ways, always have a relation to the Lord Jesus, the obedient Servant."¹¹⁴ It further explains that the document will be structured in three parts: individual consecration, constructing fraternal communities, and participating in a common mission.

The first section that is relevant to our topic is entitled "Obedient to God through Human Mediation." It affirms:

Consecrated persons moreover are called to the following of the obedient Christ within an "evangelical project" or a charismatic one, inspired by the Spirit and authenticated by the Church. Approving a charismatic program that is a religious institute, the Church guarantees that the inspiration that animates it and the norms that regulate it can provide a path for seeking God and holiness. Therefore, the Rule and the other indications concerning the way of life also become means of mediating the will of the Lord: human mediation but still authoritative, imperfect but at the same time binding....¹¹⁵

This demonstrates the fundamental tension of religious obedience: the Church verifies the original inspiration of the founders and approves the ensuing program for how the institute will conduct itself, but the "conductors" -- the superiors -- are themselves, of course, fallible humans. Religious take a vow of obedience to God, but in practice are bound to obey fallible humans, a fact every religious faces when he or she is ordered to do something with which he or she does not agree. Of course, this paradox has been at the heart of obedience since the beginning of the vowed life. It closes

¹¹⁴ Ibid.

¹¹⁵ Ibid., n. 9, 70.

this section with the following words that are a helpful reminder to the superior and subject alike:

It must also be remembered that the authority-obedience relationship is situated in the larger context of the mystery of the Church and constitutes a particular actualization of its function as mediator. In this regard the *Code of Canon Law* recommends that "superiors are to exercise their power, received from God through the ministry of the Church, in a spirit of service." (c. 618)¹¹⁶

The next section, "Learning Obedience in the Day to Day," offers a practical, realistic description of how obedience is often learned:

Therefore, for the consecrated person it might also come to having "to learn obedience" through suffering or from some very specific and difficult situations: when, for example, one is asked to leave certain personal projects or ideas, to give up the pretext of managing one's life and mission by oneself; or all the times in which what is asked (or who asks it) does not seem to be very humanly convincing.

Those who find themselves in such situations now should not forget that mediation by its nature is limited and inferior to that to which it refers, even more so if it deals with human mediation in relation to the divine will; but one should remember that every time one finds oneself faced with a command given legitimately that the Lord requests obedience to the person in authority who, at that moment, represents him (cf. *PC*, n. 14; c. 601) and that Christ also "learned obedience from what he suffered" (Heb 5:8)....

It is precisely in these cases of suffering that the consecrated person learns to obey the Lord (cf. Ps 119:7), to listen to him and to remain devoted only to him, waiting patiently and full of hope for his revealing Word (cf. Ps 118:81), in complete and generous openness to accomplishing his will and not one's own (cf. Lk 22:42).¹¹⁷

These frank words remind religious that there is no pretending that the vow of obedience will always be easy to embrace. All religious are human and at some point they will be asked to do things that they find difficult, displeasing, or with which they do not agree. Even if the superior is in fact mistaken, this can still be an opportunity to learn true obedience by practicing it, and to grow in humility and in faith that even when we are mistaken about the

¹¹⁶ Ibid., n. 9, 71.

¹¹⁷ Ibid., n. 10, 71.

means to be used, God can still bring about salvation and new life. This is relevant to our topic, and indeed most of this instruction is relevant to our topic, because, as we have already noted above, many types of misconduct are related to some kind of failure of obedience: failure to obey the constitutions, divine law, canon law, the magisterium, or lawful authority inside or outside the institute.

A subsequent section "Authority at the Service of Obedience to the Will of God" continues along the same lines as the above by quoting from the inaugural homily of Pope Benedict XVI where he states: "My real program of governance is not to do my own will, not to pursue my own ideas, but to listen, together with the whole Church, to the word and the will of the Lord, to be guided by Him, so that He himself will lead the Church at this hour of our history."¹¹⁸ This section makes the point that superiors too must be obedient to their own lawful superiors and also, of course, to God to whom they must be close in prayer. It also quotes from St. Ignatius of Antioch in the advice he gave to a fellow bishop: "Nothing is done without your agreement, but you do not do anything without God's agreement."¹¹⁹ No doubt, superiors who are known and seen to be models of obedience will effortlessly encourage their subjects to follow their example.

¹¹⁸ BENEDICT XVI, Homily during the Mass for the beginning of his Petrine Ministry (24 April 2005), *AAS*, 97 (2005), 709 quoted in *SAO*, n. 12, 71.

¹¹⁹ ST. IGNATIUS OF ANTIOCH, Letter to Polycarp, 4, 1 quoted in *SAO*, n. 12, 72.

In the next section a number of priorities are outlined for the service of authority. One, which is particularly significant for our topic, is the duty of those in authority to uphold the charism of the institute and to ensure that it is reflected in the life and ministry of the community that the superior serves. Of course, in order to do this, superiors must be intimately familiar with the charism so they can discern its proper expression in different contexts.¹²⁰

The next section reminds the reader that many of the foregoing points made in the instruction are included in the *Code of Canon Law* and therefore are not "facultative."¹²¹ In particular, it makes reference to cc. 601-602 and 617-619. It notes the obligation of superiors to be obedient themselves to higher authority, to promote the voluntary obedience of members, to care for their subjects as a pastor, and to be close to God in prayer especially by means of praying with Sacred Scripture and through the liturgy. It also notes the importance of carrying out their office in a spirit of service, "avoiding, on the one hand, any attitude of domination and, on the other, any form of paternalism or maternalism."¹²²

¹²⁰ *SAO*, n. 13, e, 73.

¹²¹ *Ibid.*, n. 14, 73.

¹²² *Ibid.*

Section 17 highlights the importance of superiors carrying out their ministry in a spirit of service, following in the steps of Jesus who "gave his life in ransom for the many."¹²³ It affirms:

Only if superiors themselves live in obedience to Christ and sincerely observe the Rule can the members of the community understand that their obedience to the superior is not only not contrary to the freedom of the children of God but causes it to mature in conformity with Christ, obedient to the Father.¹²⁴

The section entitled "For a Spirituality of Communion and a Communitarian Holiness" states:

Holiness and mission pass through the community because the risen Lord makes himself present in it and through it (VC, 42), making it holy and sanctifying the relationships....

In today's cultural atmosphere, community holiness is a convincing witness, perhaps even more than that of the individual: this shows the perennial value of unity, a gift left by the Lord Jesus. This becomes particularly evident in international and intercultural communities that demand high levels of welcoming and dialogue.¹²⁵

Indeed, as the so-called "traditional family" becomes increasingly rare, so too does the example of community living become ever more exotic and uncommon. That adults would choose to live together for reasons that are not economical or sexual is beyond the imagination of many people in contemporary society. All the more powerful is the witness to Christ when people living in such countercultural arrangements testify with their whole lives to the joy of living the Gospel radically.

¹²³ Ibid., n. 17, 74, quoting *Gospel of Mark* 10:45.

¹²⁴ Ibid.

¹²⁵ Ibid., n. 19, 75.

The section "The Role of Persons in Authority in the Community's Growth" begins by reiterating the point made in *FLC* that proper law must clearly describe the roles and responsibilities of the various superiors if they are to function effectively and to exercise their ministry with authority.¹²⁶ This extended section makes numerous noteworthy points. It highlights the importance of superiors listening attentively to the members. It states wisely:

Whoever presides must remember that the one who does not listen to his brother or sister does not know how to listen to God either, that an attentive listening allows one to better coordinate the energy and gifts that the Spirit gives to the community and also, when making decisions, to keep in mind the limits and the difficulties of some members.

Time spent in listening is never time wasted, and listening can often prevent crises and difficult times both on the individual and community levels.¹²⁷

It goes on to discuss the importance of creating an atmosphere of dialogue, sharing, and co-responsibility where superiors enhance their ministry by drawing on the wisdom of the community and by ensuring that no member passively draws upon the community without ever making a genuine contribution personally and ministerially. It also discusses the important but delicate task of discernment. While discernment must draw on the prayerful participation of everyone involved, superiors must not renege on their duty to make and enforce the final decision.¹²⁸

In the section entitled "The First Among You Must Be Your Slave (*Mt* 20:27)," we find these sage words:

¹²⁶ Ibid., n. 20, 75.

¹²⁷ Ibid.

¹²⁸ Ibid., n. 20, 75-77.

Obedience even under the best conditions is not easy, but it is made easier when the consecrated person sees persons in authority place themselves at the humble and hardworking service of the community and of the mission: an authority that even with all its human limitations in its acting tries to present again the attitudes and sentiments of the Good Shepherd.¹²⁹

No superior is perfect, but superiors who show themselves to be willing to work hard in their service to the community and the Gospel will win the confidence of the members who see in them sincere, committed, if imperfect, Christians.

In the third part of the instruction, we find a number of points related to our topic. The first section of the third part makes the point that "mission and obedience cannot be separated."¹³⁰ Jesus carried out his mission in perfect obedience to the Father. The instruction states perceptively:

To live the mission always implies being sent.... It is for this reason that, without reference to obedience, the term mission becomes difficult to understand and is exposed to the risk of being reduced to something that refers only to those developing the mission. There is always the danger of reducing the mission to a profession to be done in view of one's own fulfilment, thereby being managed more or less by oneself.¹³¹

In his commentary on *SAO*, Rovira notes that history gives many examples of religious who joined one order but who, upon discovering a new vocation, left to found a new community, a type of departure of which the Church approves. In a similar way, but which is harmful to the initial institute, Rovira notes the phenomena today of religious who discover a new vocation but do

¹²⁹ Ibid., n. 21, 77.

¹³⁰ Ibid., n. 23, 78.

¹³¹ Ibid.

not depart the original institute and instead want to live their "new vocation" in an institute that does not share their new charism.¹³²

The section entitled "Authority and Mission" offers the following sober warning:

Whoever exercises the service of authority will have to be attentive not to give into the temptation of personal self-sufficiency, to believe that everything depends on him or her and that it would not be important and useful to foster community participation; it is better to take one step together than to take two or more alone.¹³³

To be a superior comes with certain risks, one of which is an inflated sense of self-importance. Of course, the surest way to guard against this danger is to stay close to Christ in prayer. Another is also to stay close to one's community, to share responsibility with them, and to be in genuine fraternal communion with them.

The subsection entitled "Persons in Authority Have a Sense of Justice" addresses our topic most directly when it indicates:

If the invitation of St. Francis of Assisi to forgive the brother who sins can be considered a precious general rule, it must be recognized that there can be behaviours in the members of some communities of consecrated persons that seriously harm their neighbour and that imply a responsibility vis-à-vis people outside the community and also within the institutions themselves to which they belong. If it is necessary to have understanding for the wrongdoing of the individual, it is also necessary to have a rigorous sense of responsibility and charity towards those who are eventually damaged by the incorrect behaviour of some consecrated person.¹³⁴

¹³² J. ROVIRA, "Authority and Obedience in Religious Life: On the Instruction 'Faciem Tuam,'" in *UISG Bulletin*, 138 (2008), 19-20.

¹³³ *SAO*, n. 25, 79.

¹³⁴ *Ibid.*, n. 25, e, 80.

Not all acts of misconduct can be resolved within the community, most obviously, of course, when the victim of a member's misdeeds is not also a member of the institute.¹³⁵ In the often quoted words of Pope Benedict from his press conference en route to Portugal in 2010, "[f]orgiveness is not a substitute for justice."¹³⁶ Persons must be held accountable for their actions, and as canon 1341 states, every penal procedure must "repair the scandal, restore justice, [and] reform the offender." However great a superior's compassion may extend to a member who has committed some kind of misconduct, that compassion cannot be grounds to shield the member from the consequences arising from his or her actions. Indeed, in most such cases, the superior should not be satisfied by the simple fact that justice has been served, but should extend, beyond the requirements of justice, what charity dictates is the appropriate response to anyone who has been harmed by a member of the institute. As we will see in future chapters, it is most important that superiors recognize that being loving and compassionate to the member (and any possible victims) is not harmed by following the dictates of the law as required, and even -- and this is precisely our thesis topic -- following the

¹³⁵ In fact, I would argue that where the misconduct committed is defined by law as an offence that, even when the victim is another member of the same institute, such cases cannot be resolved apart from the laws governing such cases. This is even more so when the misconduct in question is one of the more grave delicts reserved to the CDF, in which case that dicastery alone is competent to address the case. The reservation of such delicts will be discussed in 2.3.3.

¹³⁶ R. DONADIO, "Pope Issues His Most Direct Words to Date on Abuse," in *The New York Times*, 11 May 2010, A4.

counsels of the law regarding misconduct even in cases where one is not strictly bound to do so.

In a section entitled "Difficult Obedience" we find these challenging words:

It must be recognized that it is understandable, on the one hand, to have a certain attachment to personal ideas and convictions, fruit of reflection or of experience and matured over time, and it is also a good thing to seek to defend them and to carry them forward, always in the perspective of the Reign of God, in a straightforward and constructive dialogue.

On the other hand, it is not to be forgotten that the model is always Jesus of Nazareth, who even during his Passion asked God that his will, as Father, be done, nor did he pull back from death on the cross (cf. Heb 5:7).¹³⁷

It is almost inevitable that sooner or later a member will think differently about a particular matter than his or her superior, and while the member can and must engage the superior in meaningful dialogue and has every right to "represent" his or her mind on the matter, ultimately, the superior must be obeyed. After all, it is precisely for such difficult times that one takes a vow of obedience. If one expected always to be in perfect accord with superiors, the vow of obedience would be meaningless.

The next section looks at "Obedience and Objections of Conscience." It draws mostly upon the words of Paul VI in *ET* where he taught that members must make every effort to understand and adopt the understanding of the superior, except, of course, in cases which clearly contravene divine law or the charism of the institute. The instruction affirms:

¹³⁷ *SAO*, n. 26, 80-81.

If it is true that conscience is the place where the voice of the Lord resounds, the voice that indicates to us how to behave, it is also true that it is necessary to learn to listen to this voice very attentively in order to know how to recognize it and distinguish it from other voices. In fact, it is necessary not to confuse this voice with those which emerge from a subjectivism that ignores or disregards the sources and criteria that cannot be given up and are mandatory in the formation of judgments of conscience.¹³⁸

These words dovetail with those of Paul VI in *ET*, where he says:

[A]part from an order manifestly contrary to the laws of God or the constitutions of the institute, or one involving a serious and certain evil — in which case there is no obligation to obey — the superior's decisions concern a field in which the calculation of the greater good can vary according to the point of view. To conclude from the fact that a directive seems objectively less good that it is unlawful and contrary to conscience would mean an unrealistic disregard of the obscurity and ambivalence of many human realities.

Besides, refusal to obey involves an often serious loss for the common good. A religious should not easily conclude that there is a contradiction between the judgment of his conscience and that of his superior. This exceptional situation will sometimes involve true interior suffering, after the pattern of Christ himself 'who learned obedience through suffering' (Heb 5:8)".¹³⁹

One would hope that such cases are rare, but it is not difficult to imagine a religious lacking interior freedom explaining his or her disobedience by means of recourse to his or her conscience.

The last section that has bearing on our topic is entitled "Difficult Kinds of Authority" and it discusses superiors whose office becomes a burden and who begin, in common parlance, to "burn out." It states:

But persons in authority can also become discouraged and disillusioned. In the face of the resistance of some members of the community and of certain questions that seem irresolvable, he or she can be tempted to cave in and to consider every effort for improving the situation useless.

What we see here then is the danger of becoming managers of the routine, resigned to mediocrity, restrained from intervening, no longer having the courage to point out the purposes of authentic consecrated life and running

¹³⁸ Ibid., n. 27, 81.

¹³⁹ Ibid. quoting *ET*, n. 28

the risk of losing the love of one's first fervour and the desire to witness to it.¹⁴⁰

It is in such circumstances that a superior himself or herself runs the risk of committing certain types of misconduct, namely, negligence or failure to fulfill their office properly. Certainly, superiors have great freedom in how they carry out their office, but there are definite obligations which they must meet, and failure to do so can be regarded as itself a type of misconduct.

SAO is of great importance to our topic since it touches on numerous neuralgic points regarding the exercise of authority in religious life and our topic is often going to intersect with those same neuralgic points. It is a frank, realistic document that offers guidance which is both practical and spiritual. A practical, yet spiritual, approach to questions of misconduct is precisely what we hope our thesis will accomplish.

Conclusion

The period since Vatican II has been a time of immense change for religious institutes. The council called religious to a twin renewal: a return to the original charism of their institute and to a renewed way of living the evangelical counsels, closer to the heart of the Church and closer to the needs of humanity. The majority of religious institutes embraced this reform wholeheartedly. At the same time, at least in Western culture, it was a period

¹⁴⁰ Ibid., n. 28, 81.

of great cultural change that saw the rise of women's rights, the so-called sexual revolution, and a rise in anti-institutional sentiment. This invitation to religious life to "modernise" at the same time as the wider society was going through such great changes led to new ways of living religious life which would have been unimaginable just ten years earlier. Although before the council some in the hierarchy had complained that certain religious institutes existed as a sort of "Church within the Church" because of their extreme separation from the world and independence from other Church structures, not a few in the hierarchy and elsewhere in the years after the council were concerned that religious life had gone too far in its embrace of modern values. The debate concerning the rightness of the changes to religious life is ongoing and, in any case, is outside the scope of our thesis. Our concern is how the changes in religious life have impacted the administration of discipline and how developing Church teaching in relation to religious life can and should influence the future administration of discipline. The documents we have examined are each of them part "diagnosis" and part "prescription," that is to say, they make appraisals of the situation and then determinations for its improvement. Very little in the documents we have examined directly addresses the administration of discipline, but the vow of obedience and the ministry and duties of superiors are frequent topics and both of these figure heavily in our thesis.

The documents of the first section are focused for the most part on above-mentioned renewal expected of religious life. In *ET*, the only document by Paul VI that we consider from the period when the renewal was underway, we hear him say that he strongly desires that the renewal called for by the council continue but that it be focused more tightly on Gospel values, more open to the guidance of the hierarchy, and more rooted in the traditions of religious life. He makes clear that some of the reports of how the renewal is unfolding are displeasing to him, but he does not back away from the legitimacy of the renewal project itself.

In the documents we considered from the pontificate of John Paul II, the period of renewal called for by the council is considered to be completed and, in fact, little reference is made to it. For the most part, the documents from that pontificate, most especially *VC*, describe religious life in exalted terms that make much of the *consecration* of those who profess the evangelical counsels. Consequently, this lofty vision says little about the difficulties that our thesis is keen to address. *VC* does say much about obedience, however, and *FLC* does provide many realistic indications. While upholding the ideas of the council that all religious must cooperate together to discern and to live out the most appropriate expression of their charism, the documents from the pontificate of John Paul II are also clear that superiors have an essential role that cannot be put aside, minimized, or carried out by a team. This is significant for our topic, given that some superiors would seem to be hesitant

to enact discipline whether because of uncertainty regarding how to proceed, a lack of knowledge regarding their duties and authority, or a unwillingness to confront a member who, presumably, does not see the wrong in what he or she has done. Even if they often do not enter into practical details, the documents from the time of John Paul II shed much light on the concepts of authority and obedience.

SAO is the only document we examined from the pontificate of Pope Benedict and it is the one that is most closely related to our topic because it is focused explicitly on concepts central to our question: obedience and authority. It is very practical and grounded in the current reality, being thoroughly steeped in the more than forty years of experience and reflection that has passed since the council.

In closing, one of the most significant and enduring changes we see in religious life since the Second Vatican Council is the greater application and living out of the principle of subsidiarity. Today, in most institutes, there exists a strong sense of shared responsibility for the charism and a comparably strong sense of the equal dignity of all members. In fact the emphasis on shared responsibility and equality is so strong in many communities that they eschew the title of "superior" in favour of titles that are more neutral or service oriented. Nevertheless, the duties of the superior endure even if the title does not. While superiors can and often do draw upon the talents of their brothers and sisters to support their ministry of leadership,

they alone ultimately carry the burden of office and must make any final decisions. One of these heavy duties is the decision of when and how to proceed with a disciplinary procedure. Therefore it is necessary that superiors have clear guidelines to assist them in these difficult decisions. Such guidelines would help to shed light on the duties of superiors, the rights of the accused, and any obligations incumbent upon the parties. Furthermore such guidelines will indicate the values, principles, and rights that should mark any such disciplinary procedures. These guidelines will be informed by the documents we have considered in this chapter.

CHAPTER II

THE SCOPE OF THE AUTHORITY OF SUPERIORS TO ADMINISTER DISCIPLINE IN RELIGIOUS INSTITUTES

Introduction

In this second chapter we will examine the authority of superiors in religious institutes in relation to their duty to administer discipline. In the first section, we will look at the nature of the power exercised by these superiors. This will involve a discussion of the exercise of the power of governance, something that is expressly recognized for superiors and chapters of clerical religious institutes of pontifical right but not for other religious institutes, despite the fact that they are able to do many of the same administrative tasks that involve the power of governance. The second section will examine the issue of individual rights and how they interact with the administration of discipline in religious institutes. Of course, when members pronounce vows in religious institutes they willingly surrender the exercise of certain freedoms. How does that influence what rights they have and can exercise? How does that impact a superior's administration of discipline? These are important questions given the Church's ever-increasing emphasis on the importance of human rights and human dignity. The third and final section of the chapter will examine limits on the authority of superiors to administer discipline in light of their own authority, the persons involved, the misconduct in question, and the punishments under consideration.

2.1 – Jurisdiction and the Power of Superiors of Religious Institutes in the *CIC*

The debate regarding the nature of power exercised in religious institutes was not resolved by the *CIC*. Canon 596 states:

§1. Superiors and chapters of institutes possess that power over members which is defined in universal law and the constitutions.

§2. In clerical religious institutes of pontifical right, however, they also possess ecclesiastical power of governance for both the external and internal forum.

§3. The prescripts of cc. 131, 133, and 137–144 apply to the power mentioned in §1.

This canon shows that clerical religious institutes of pontifical right are explicitly mentioned as enjoying ecclesiastical power of governance, whereas the power common to all institutes of consecrated life is left unnamed. Nevertheless, §3 tells us that the power described in §1 is governed by the same canons that regulate the power of governance. Canon 501 of the *CIC/17*, on which this canon is based, had expressly described the power common to all religious institutes as *dominative* power, a designation that the *CIC* did not renew. This section will examine the Church's evolving understanding of the nature of the power exercised by superiors and chapters in non-clerical religious institutes. In particular, it will examine the canons related to the exercise of the power of governance. It will conclude with an assessment of the nature of the power common to all religious institutes.

2.1.1 – The Concept of Dominative Power

Although the *CIC/17* did not define dominative power, there was a certain consensus around its meaning.¹ Before the *CIC/17*, the most widespread understanding of the concept of dominative power was the one developed by Francisco Suárez in the 17th century. McDonough summarizes his description of dominative power as:

[A] private power exercised on behalf of both the religious and the institute but that it was a power distinct from jurisdiction and arose from the bilateral contract entered into through the gift of one's self to the institute with the concomitant promise and obligation of obeying its rule.²

This understanding held sway until shortly before the *CIC/17* when Arthur Vermeersch qualified Suárez's definition by clarifying that the power is in fact *public* if the bilateral contract is "made in an institute approved by the Church in order for the power to be operative."³ Writing after the *CIC/17*, Arcadius Larraona held that, "*potestas dominativa* was at least in practice and equivalently a formally public power because, for those entities that were not merely private (i.e., religious institutes), it had a practical juridic import related to their public status."⁴ Larraona went even further by saying that not

¹ E. McDONOUGH, "The *Potestas* of Canon 596," in *Antonianum*, 63 (1988), 557 (= McDONOUGH, "*Potestas*").

² *Ibid.*, 556.

³ *Ibid.*, 557.

⁴ *Ibid.* "Haec potestas sensu strictissimo et absoluto non potest dici supremo gradu et formaliter publica, sed tamen ex iure vigenti *quoad plura* ipsa dicenda est *practice* et *aequivalenter* talis, quia ipsi a iure non pauca adiunguntur pro Religionibus, quae, pro partibus formalibus et immediatis Ecclesiae, ex potestate iurisdictionis promanant, imo etiam *sensu proprio*, etsi latiore, potest dici haec potestas *formaliter publica*, quia ex ea regitur societas iuridica ad statum publicum in Ecclesia constituendum ac exercendum instituta" (A.

without reason could dominative power be called imperfect or inchoate jurisdiction.⁵ This way of thinking about dominative power received official endorsement when, in 1952, in a *motu proprio* for the Eastern Churches, Pope Pius XII included “public ecclesiastical power” along with “the power of orders or of jurisdiction that could be included in an office.”⁶ Furthermore, in 1952, the Commission for Authentic Interpretation of the Code indicated that the canons governing the exercise of jurisdiction should also be applied, all things being equal, to the exercise of dominative power, thereby demonstrating the similarity between dominative power and the power of jurisdiction.⁷

2.1.2 – The Power of Religious Superiors and Chapters in the CIC/17

Canon 118 expressly forbade lay people from possessing the power of jurisdiction. It stated: “*Only* clerics can obtain powers, whether of orders or of

LARRAONA, “Commentarium Codicis: Can. 501 [cont.]” in *Commentarium pro Religiosis*, 7 [1926], 31).

⁵ “Ideo, potestas dominativa quatenus publica est et aliqua ex iurisdictione habet, non immerito dici potest iurisdictio imperfecta seu inchoata” (A. LARRAONA, “De potestate dominativa publica in iure canonico,” in *Acta Congressus Iuridici Internationalis: VII saeculo a decretalibus Gregorii IX et XIV a Codice iustiniano promulgatis: Romae 12-17 novembris 1934*, Rome, Librariam Pont. Instituti Utriusque Iuris, 1937, vol. 4, 167).

⁶ McDONOUGH, “Potestas,” 558. “*Officium ecclesiasticum lato sensu significat quodlibet munus quod in spiritualem finem legitime exercetur; stricto autem sensu est munus ordinatione sive divina sive ecclesiastica stabiliter constitutum, ad normam canonum conferendum, secumferens aut aliquam participationem ecclesiasticae potestatis sive ordinis sive iurisdictionis aut aliam publicam ecclesiasticam potestatem.*” PIUS XII, *motu proprio Postquam Apostolicis litteris*, 9 May 1952, in AAS, 44 (1952), c. 305 §1, 144-145.

⁷ PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, reply, 26 March 1952, in AAS, 44 (1952), 497.

ecclesiastical jurisdiction...."⁸ Although the practice had been stamped out in the decades leading up to the promulgation of the *CIC/17*, the history of the Church provides numerous examples of lay people exercising the power of governance, even in a quasi-episcopal manner.⁹ Celsi gives the example of the mitred abbess of Conversano, an *abbess nullius* who governed a particular territory in southern Italy, having taken possession of the monastery, its territory and *all* its privileges from an ancient community of monks. Although the clergy of the area regularly sought recourse against the jurisdiction of the abbess, the monastery successfully maintained the majority of its prerogatives for over five hundred years. The abbess had the right to: confer minor orders, receive the obedience (*bacimano*) of the local clergy, use the mitre and pastoral staff, appoint a vicar to govern on her behalf, visit her territory, confer ecclesiastical benefices, and operate the monastery prison in complete independence from the local bishop.¹⁰ However, by the 19th century, the few remaining abbesses with such prerogatives had seen the territory over which

⁸ *CIC/17*, c. 118. English translation: E.N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001. This translation is used for all subsequent citations of *CIC/17*. Emphasis added.

⁹ Cf. J.M. HUELS, "The Power of Governance and Its Exercise by Lay Persons: A Juridical Approach," in *Studia canonica*, 35 (2001), 71, footnote 26 (= HUELS, "The Power of Governance").

¹⁰ Cf. F.R. CELSI, "La badessa mitrata di Conversano nel XVII secolo: analisi di un peculiare caso di giurisdizione ecclesiastica in terra di Bari," in *Apollinaris*, 62 (1989), 642. Other comparable examples exist, such as the Abbess of Las Huelgas in Spain. See E. CONNOR, "The Royal Abbey of Las Huelgas and the Jurisdiction of Its Abbesses," in *Cistercian Studies*, 22 (1987), 145-155.

they exercised jurisdiction taken away from them.¹¹ The Church had adopted a perfect society ecclesiological model that left no room for anomalous situations, especially ones that provided examples of lay people exercising jurisdiction over clerics. Beal explains the perfect society model:

While not overlooking entirely the internal and invisible spiritual bonds that united the members of this society, the perfect society model of the Church emphasized its external and visible structures, features the Church had in common with the other perfect society, the State. In fact, the perfect society ecclesiology was developed in large part to provide an apologetic basis to defend the independence of the Church against the encroachments of the liberal State.¹²

The perfect society model had been proposed as part of a preparatory schema for the First Vatican Council but only saw its principles universally enacted for the first time in the *CIC/17*. After the promulgation of the *CIC/17*, the Diocese of Breslau petitioned the Congregation of the Council to continue appointing lay judges despite the new prohibition against lay people exercising jurisdiction since the custom had been in place for some 170 years in the diocese. The diocese was informed, however, that c. 118 had reprobated such customs since the laity were now understood to be incapable of roles that involved spiritual jurisdiction.¹³ Yet other provisions of the *CIC/17* did in fact allow for the exercise of jurisdiction by people who were not ordained. For instance, one became a cleric at the reception of first tonsure (c. 108 §1),

¹¹ Cf. L. ÖRSY, "Lay Persons in Church Governance? A Disputed Question," in *America*, 6 April 1996, 11-12 (= ÖRSY, "Lay Persons").

¹² J.P. BEAL, "The Exercise of the Power of Governance by Lay People: State of the Question," in *The Jurist*, 55 (1995), 2-3 (= BEAL, "Power of Governance").

¹³ BEAL, "Power of Governance," 7; McDONOUGH, "*Potestas*," 560-561.

and therefore according to c. 118 became capable of exercising jurisdiction, although one did not receive the sacrament of holy orders until ordination as a deacon and even then, deacons have never been regarded as pastors of the faithful. Huels writes, describing the ministry of deacons:

There is no power of a deacon, in virtue of his ordination alone, that the Church could not also delegate to a lay person, if it so wished. For centuries, deacons did not even function in a stable manner in the Latin church. Deacons do not participate in the ministerial priesthood but in the common priesthood of the faithful. They are not pastors of a community of the faithful. They cannot preside at the Eucharist, yet governance in the Church, in the full sense, has always been joined with eucharistic presidency.... A deacon is ordained for the ministry of charity and service, not leadership of the community.¹⁴

Pope Benedict XVI formally enacted this distinction in law when in 2009 he added §3 to c. 1009 so that it would read,

§ 3. Those who are constituted in the order of the episcopate or the presbyterate receive the mission and capacity to act in the person of Christ the Head, whereas deacons are empowered to serve the People of God in the ministries of the liturgy, the word and charity.¹⁵

Of course, the minor orders were not of divine institution and even the diaconate, which dates to apostolic times, has never been a position that, in its own right, entitled one to exercise governance over the faithful.¹⁶

¹⁴ HUELS, "The Power of Governance," 61, footnote 3.

¹⁵ BENEDICT XVI, *motu proprio Omnium in mentem*, 26 October 2009, in AAS, 102 (2010), 10, English translation in *Canon Law Society of Great Britain & Ireland Newsletter*, 161/10, 18.

¹⁶ It is worth noting in this context the figure of the *archdeacon*, a term used to denote a cleric whose responsibilities varied considerably from the third century until the present. In the middle ages, when the term was most in use, it was typically associated with the closest collaborator of the bishop who had special responsibility for financial affairs. With time, however, it also came to denote a priest who held a position of oversight over other priests in a particular region of the diocese. While these archdeacons often did enjoy what we describe today as jurisdiction, and with the passing of time were much more likely to be priests than deacons, apropos of our discussion here it is important to note that the power they enjoyed

The *CIC/17* is also seen to be imperfect in its exclusion of laypeople from the exercise of jurisdiction in c. 219 where, upholding the traditional teaching, it does not require that one be a cleric at the time of election as pope to obtain supreme jurisdiction immediately. If a layman can enjoy full jurisdiction over the entire Church and clerics below the rank of priests can enjoy the power of jurisdiction, then the link between the power of jurisdiction and ministry of priests and bishops is not absolute and exclusive and its origin certainly cannot be claimed to be divine law. Therefore, even the *CIC/17* reveals that the regulation of the exercise of the power of jurisdiction is a matter of ecclesiastical and not divine law.¹⁷

2.1.3 – Vatican II and the Power of Governance

A revised approach to the exercise of the power of jurisdiction by the laity was indicated when *Lumen gentium* declared,

This apostolate concerns every one of Christ's faithful, but in addition the laity can also be called in various ways to a more immediate cooperation in the apostolate of the hierarchy They may also be appointed by the hierarchy to carry out certain ecclesiastical offices which have a spiritual aim in view.¹⁸

was the result of a concession from the bishop and did not arise exclusively from their ordination as deacons. See J.W. POKUSA, "The Deaconate: A History of Law Following Practice," in *The Jurist*, 45 (1985), 95-135.

¹⁷ Cf. HUELS, "The Power of Governance," 71.

¹⁸ *LG*, n. 33, 876.

This, of course, stood in stark contrast to the discipline of the *CIC/17* that had all but regarded the laity as incapable of holding ecclesiastical offices,¹⁹ especially those with a spiritual end. Beal notes that, in general, the language of the council was quite different from that of foregoing years.

The term "jurisdiction," which pervaded ecclesiological literature during the period leading up to Second Vatican Council, was found infrequently in the documents of the council itself. Nor did the conciliar documents highlight the traditional distinction between the power of orders and the power of jurisdiction. Instead the conciliar documents used the terms *potestas* and *sacra potestas*, terms that, depending on the context, could denote either the power of orders or the power of jurisdiction or both powers united in the same subject.²⁰

Resolving longstanding debates amongst canonists and theologians was not a priority for the council, whereas describing more completely the role of the laity was. A priority for the council was to complete the description of the Church that had been begun at the First Vatican Council but was left decidedly lopsided by its declaration of papal infallibility without a comprehensive treatment of the rest of the Church, including the college of bishops and the lay faithful. Beal summarizes Vatican II's influence on the question of the exercise of jurisdiction by lay people in the following manner:

Although the documents of Vatican II have become the touchstone for theoretical and practical discussions of the nature and source of jurisdiction or power of governance in the Church, it is remarkable how little the council had to say on the subject. Instead of using the traditional categories of power of orders and power of jurisdiction, the council preferred to employ the tripartite distinction of the sanctifying, teaching, and governing functions of

¹⁹ Cf. McDONOUGH, "*Potestas*," 560. She explains, "...the positive affirmation of c. 118 regarding the ability of clerics to obtain the power of jurisdiction was interpreted not only as recognizing a mere lack of possession by the laity, but rather as a fundamental assertion of an incapacity on their part to possess this power."

²⁰ BEAL, "Power of Governance," 10.

Christ and the Church, which had long been held in disrepute in canonical circles. When the council did address issues of power, it usually spoke generically of (*sacra*) *potestas*....

The narrow focus of the conciliar discussions of power in the Church, the sometimes rancorous debate in the conciliar aula over the content of what eventually became chapter 3 of *Lumen gentium*, the consequent necessity of creating compromise language to insure consensus, and the absence of any explicit attempt to correlate conciliar teaching on *sacra potestas* and traditional doctrine on the distinct powers of orders and jurisdiction, all make efforts to educe from the conciliar documents a coherent doctrine on *sacra potestas* a problematic venture indeed. It is clear that the council sought to ground the role of bishops, both in the episcopal college and as heads of particular churches, in sacramental ordination rather than in papal concession alone. However, the meaning of the distinction between the three *munera* communicated in episcopal consecration and the episcopal *potestas* (or, perhaps, *potestates*) *ad actum expedita(e)* is not immediately transparent. Nor is it clear that the council intended its teaching on the *sacra potestas* of bishops as a radical break from the theologico-canonical doctrine on the powers of orders and jurisdiction that had evolved over nearly a millennium, rather than as a pragmatic, compromise solution to a long festering ecclesiological problem.²¹

Although the council provided broad indications regarding the proper role of the laity in the Church, due to a lack of consensus among the fathers of the council, it was unable to articulate a coherent teaching regarding how and in what circumstances laity might exercise the power of governance. In practice, this meant that little would change regarding the exercise of jurisdiction by lay people until 1971, when Paul VI made explicit provision for lay judges in marriage tribunals in his *motu proprio Causas matrimoniales*.

2.1.4 – The Drafting of the CIC

For the most part, it is beyond the scope of this section to discuss in detail the work of the code commission in formulating the canons of the *CIC*.

²¹ Ibid., 16-17.

We will note here simply that the various canons which touch on the exercise of the power of governance by laity were subject to much debate and revision right up until the very end when John Paul II and select advisors made noteworthy changes to the draft prepared by the code commission. These final changes, coupled with varied treatments of the topic in different parts of the *CIC*, leave its overall description of the exercise of governance by the laity appearing somewhat disjointed. In the next subsection, we will examine the canons of the *CIC* that structure the exercise of the power of governance in religious institutes.

It is worth noting that the word “dominative” faded from drafts of the new code following *Causas matrimoniales*²² when it became clear that laity were no longer explicitly excluded from exercising the power of governance and therefore there was no longer a pressing need to distinguish between the types of power exercised by laity and clergy.²³ Huels writes:

The code does not expressly state that collegial bodies and superiors in lay institutes of consecrated life and societies of apostolic life exercise the power of governance. This caution manifests a spirit of compromise that reflects the different opinions of the members of the *coetus* on institutes of consecrated life. If one looks at the acts that both clerical and lay superiors perform, however, they are identical. To call these acts the power of governance if performed by a clerical superior, but “domestic power,” “dominative power,” “associational power” (*Konsoziativsgewalt*), or merely “administrative power” if performed by a lay superior, is unnecessary and obsolete under the revised code, since the code does not reserve all acts of power of governance to the clergy alone.

If an act is acknowledged as the power of governance when it is performed by a cleric, it follows that the same act, when lawfully performed by a lay person, is also an act of governance. The capability of the lay person

²² Cf. McDONOUGH, “*Potestas*,” 574-575.

²³ Cf. HUELS, “The Power of Governance,” 77, especially footnote 48.

for performing that specific act of governance is granted in that instance by the law itself.²⁴

It would seem it was as a result of interventions by Cardinal Joseph Ratzinger that John Paul II went against the recommendation of the code committee to word c. 274 so that it included "the power of ecclesiastical governance." Although it is not entirely certain how the canon came to be revised in this way, it is known that Cardinal Ratzinger proposed the current wording of c. 274 to the code commission who rejected it and that he was part of the small group of advisors who assisted John Paul II with final revisions to the text proposed by the code commission.²⁵ Canon 274 §1 states: "Only clerics can obtain offices for whose exercise the power of orders or the power of ecclesiastical governance is required." This wording of the canon is problematic since it directly contradicts c. 1421 §2 which permits lay people to serve as judges.

²⁴ Ibid., 78. "A significant difference between the 1983 code and the 1917 code on this issue is that the 1917 code, in c. 118, said that *only* clergy (*solī clerici*) are able to obtain the power of ecclesiastical jurisdiction. The omission of the word *solus* in the revised law implies that, while clergy are indeed capable of the power of governance, they are not the only ones who are capable of exercising it." (HUELS, 80)

²⁵ Ibid., 81, footnote 59; cf. BEAL, "Exercise of the Power of Governance," 66-67.

2.1.5 – The *CIC* and the Exercise of the Power of Governance in Religious Institutes

We will now examine the four canons that pertain most directly to the exercise of the power of governance in religious institutes, namely, cc. 129, 134 §1, 274 §1, and 596.

Canon 129, the first canon in the title “The Power of Governance” in *Book I*, attempts to summarize the knotty issue of exercise of the power of governance in the Church. As we have already seen, the task of summarizing the Church’s approach to this delicate issue is a challenging one. Viana writes:

The problem properly consists in determining in what measure holy orders are necessary or sufficient for the holding and the exercise of the power of governance and, in a parallel manner, what is the scope of the canonical mission, of participation in ecclesiastical authority, in the transmission of power. It is a complex issue because of the diversity and breadth of historical, theological, and canonical aspects that are related to it.²⁶

This canon, which had no counterpart in the *CIC/17*, states that those in holy orders are qualified for the exercise of the power of governance and that “lay members of the Christian faithful can cooperate in the exercise of this same power according to the norm of law.” Viana argues with Lombardía that “according to the norm of law” means not only in accordance with the codes and other laws of the Church but also, of course, with divine law. Therefore, the capital offices of pope and bishop cannot be regarded as equivalent to those established by the Church.²⁷

²⁶ A. VIANA, “Commentary on Canon 129,” in *ExegeticalComm*, vol. I, 820 (= VIANA, “Commentary on Canon 129”).

²⁷ *Ibid.*, 821-822.

Regarding this same issue, and what it means to say that the power of governance “exists in the Church by divine institution,” Huels notes:

[A]ll power in the Church is ultimately of divine origin, since the Church itself is of divine origin. Through the Holy Spirit, Christ gives his Church the necessary power for its mission in the world, both in the external and internal forum. However, the way this divine power is concretized in the Church is determined in canon law. The power of governance exists in the Church by the divine law, but the way that this power is *exercised* is a matter regulated by the ecclesiastical law. It is important not to confuse the powers of the pope and bishops, some of which are rooted in the divine law (e.g., cc. 330, 331, 336, 375), with the powers of governance exercised by lower officials and delegates, all of which are determined by the merely ecclesiastical law. Christ did not establish vicars general, judicial vicars, the dicasteries of the Roman Curia, etc., nor did he lay down rules for the delegation of power. These are all creations of the ecclesiastical law, which has changed over time and may change again. It follows that the Church may allow laity and clergy alike to hold certain offices and exercise certain powers that are of ecclesiastical (human) origin.²⁸

The key distinction of the canon is that those in sacred orders are capable (*habiles sunt*) of the power of governance and that lay members of Christ’s faithful can cooperate (*cooperari possunt*) with the same power. Clearly, the prohibition of c. 118 *CIC/17* is no longer in force, and the meaning of “cooperate” must signify more than a mere “material or bureaucratic cooperation,”²⁹ but the precise nature of that “cooperation,” as is typical in general of the *CIC*, has been left undefined.³⁰

²⁸ HUELS, “The Power of Governance,” 64.

²⁹ J.I. ARRIETA, “Commentary on Title VIII Power of Governance” in *CCLA*, 113.

³⁰ In this context Provost examines other uses of the word “cooperate” in the *CIC*. See J.H. PROVOST, “The Participation of the Laity in the Governance of the Church,” in *Studia canonica*, 17 (1983), 434-435 (= PROVOST, “Participation”). Ladislav Örsy discusses c. 129 in the third chapter of his book *Receiving the Council* as part of a trenchant argument against the exclusion of lay people from acts of governance. He discusses the history and development of the question and concludes, “Such a neat and radical exclusion of the laity from any participation in the power of governance is discontinuous with an immemorial tradition. It is

Canon 134 §1 states that “major superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right” are ordinaries in regards to their own members. Furthermore, it makes explicit that they “at least possess ordinary executive power.” This canon is largely in keeping with the text of c. 198 of the *CIC/17*, with the exception that it reflects the decision of Paul VI in his rescript *Cum admotae* to grant habitual faculties to superiors general of pontifical clerical religious institutes and of abbots president of monastic congregations, such as had already been enjoyed by the superiors general of the exempt religious institutes.³¹ In regards to this canon, Huels writes:

In c. 134, just before the treatment of executive power (cc. 135 §4 – 144 §1), the code details those who are ordinaries in the law. From all of this, one might mistakenly conclude that lay major superiors may not exercise executive power of governance because they are not ordinaries. In fact, anyone can exercise executive power who legitimately has this power by law or delegation. Some of those who are not ordinaries but who have specific executive powers in the law are pastors, local (as well as major) clerical superiors of pontifical right, other priests and deacons, dicasteries of the Roman Curia and conferences of bishops. Among others who have executive power by law are superiors and collegial bodies in institutes of consecrated life and societies of apostolic life, both clerical and lay.³²

This canon, while it does touch on the exercise of the power of governance by certain clerical religious superiors, has limited significance for our broader concern about the exercise of the power of governance by lay religious

an innovation." L. ÖRSY, *Receiving the Council: Theological and Canonical Insights and Debates*, Collegeville, MN, Liturgical Press, 2009, 39.

³¹ PAUL VI, rescript *Cum admotae*, 6 November 1965, in *AAS*, 59 (1967), 374-378, English translation in *Canon Law Digest*, vol. 6, 147-152. See also, McDONOUGH, “*Potestas*,” 559-560.

³² HUELS, “The Power of Governance,” 75.

superiors as, in any case, it would make little sense for superiors of lay institutes to be recognized as ordinaries since incardination and the organization of the ministry of clerics is not a fundamental part of their ministry.³³

We have already discussed above the role Cardinal Ratzinger played in formulating c. 274 §1 and the problems inherent in its wording. Huels calls this canon “the most problematic canon in the code with respect to the power of governance.”³⁴

Huels summarizes the various attempts to resolve the problems raised by c. 274 §1. He notes that some regard “c. 274 §1 as the general rule and c. 1421 §2 as an exception to the rule. The rule does not lose its validity by exceptions to it.”³⁵ He notes that others invoke c. 14, which states that “[l]aws, even invalidating and disqualifying ones, do not oblige when there is a doubt about the law.” Since c. 274 §1 clearly contradicts c. 1421 §2 and is not readily reconcilable with cc. 129 §2 and 228 §1, its meaning is doubtful and therefore it does not bind.³⁶ Still others, Huels points out, hold that the “offices”

³³ McDonough points out that this issue was further complicated by the permission granted in *Perfectae caritatis* for institutes of lay brothers to ordain priests for internal sacramental needs, an option which many institutes exercised. These priests are then incardinated in a lay institute that is governed by lay brothers. See E. McDONOUGH, “Jurisdiction Exercised by Non-Ordained Members in Religious Institutes,” in *CLSAP*, 58 (1996), 297-298.

³⁴ HUELS, “The Power of Governance,” 81.

³⁵ *Ibid.*

³⁶ Cf. *ibid.* In his article “Exercise of the Power of Governance,” Beal makes a similar point when he underlines that the robust debate amongst the experts regarding these issues

referred to are the capital offices of pope, diocesan bishop and parish priest “that require both a *munus pastorale* and the *sacra potestas* that comes from ordination.... While laity cannot have such principal ecclesiastical offices, they may be called by the pastors of the Church to collaborate with them in subordinate offices.”³⁷

His own opinion is that, following c. 17 on the interpretation of laws, one must consider the context of the law in question. “In the context of clerical rights, c. 274, §1 implies that, if a cleric and a lay person are equally competent for an office open to clergy or laity, the cleric should be chosen if the office involves the exercise of the power of governance.”³⁸ He points out that, “c. 1421 §2 ... states that lay judges can function when necessary (*suadente necessitate*). They have no right to be appointed judge, but the bishop may appoint them when this is necessary, namely, when sufficient clerical judges are unavailable to handle the case load of the tribunal.”³⁹ In this way, he argues, c. 274 §1 does not represent an absolute prohibition against naming non-clerics to offices to which is associated the power of governance, but merely asserts the rights of clerics, all things being equal, to be appointed to such office ahead of the laity.

indicates a clear doubt of law; therefore, until the doubt is authoritatively resolved, any doubtful delegation of power to a non-cleric would be valid (p. 91). Cf. also PROVOST, “Participation,” 445.

³⁷ HUELS, “The Power of Governance,” 82.

³⁸ *Ibid.*

³⁹ *Ibid.*, 83.

Although it is not readily apparent what is the nature of the power described in §1 of c. 596, it is clear that a distinction is being made between that power referred to in §1 and the ecclesiastical power of governance mentioned in §2.⁴⁰ At the same time, §2 cannot be seen to exclude totally all other religious from exercising the power of governance in any form since canon 129 §2 explicitly states that, “lay members of the Christian faithful can cooperate in the exercise of this same power [i.e., the power of governance] according to the norm of law.” Furthermore, the *CIC* permits superiors of all religious institutes to perform certain acts which are undeniably acts of the power of governance such as “granting an indult of excommunication (c. 686 §1); granting an indult of departure to members in temporary vows (c. 688 §2); and issuing a decree of dismissal for members in temporary or perpetual vows (c. 699 §1).”⁴¹ In describing what the drafters of c. 596 intended, McDonough writes:

At best it can be said regarding the affirmation of §§ 1 and 3 that the formulators of this canon were both being tremendously cautious and deliberately imprecise. They did not wish to use the modifier *regiminis*, because they did not consider this power as full power of governance. They did not wish to use the modifier *dominativa*, but somehow expected this power to be *subintelligatur* as such. They did not wish to use the modifier *ecclesiastica*, because this word was too akin to the notion of the hierarchical power of governance. They recognized that the *potestas* of all religious superiors was both “ecclesiastical” and “public” and often had the same effects as *potestas regiminis*, but they deliberately avoided dealing concretely with the precise nature of this power.⁴²

⁴⁰ Cf. McDONOUGH, “*Potestas*,” 596-597.

⁴¹ *Ibid.*, 599-600. Huels gives other examples, “The Power of Governance,” 76.

⁴² McDONOUGH, “*Potestas*,” 598-599.

She goes on to contend that, in essence, little has changed since c. 501 of *CIC/17* defined this power as dominative power, except that that power “now constitutes a sharing in and exercise of executive form of *potestas regiminis* which has been granted *de lege* by the supreme authority of the Church....”⁴³

She concludes:

Taken as a whole and in context, then, the ability of supreme moderators of institutes of consecrated life to grant indulgences of excommunication and of departure and to issue decrees of dismissal in virtue of the unmodified *potestas* of c. 596 §1 is – for all practical purposes – a share in the executive form of *potestas regiminis* which has been granted *de lege* by the supreme authority of the Church in this particular case, whether or not this is recognized as such. However, it does seem that non-recognition of this practical reality tends to engender the necessity of developing theoretical arguments which eventually fall prey to internal contradiction or unwarranted legal distinctions or even nominalism.⁴⁴

In this way, we see that c. 596 is an attempt to put into canonical language a doctrine of the Church which, as important as it is, is not yet fully mature. In fact, it would seem that the Church is far from forming a consensus on this delicate issue. Provost summarizes the situation well when he writes:

The 1983 code is a work of compromise, as was the Second Vatican Council it is intended to implement. The code does not present with a fully coherent system, whether in the consistent usage of terms or in the application of a single, well-developed theory of government. More than its predecessor, the new code is a combination of practical decisions, traditional structures, and competing theories, sometimes laid side-by-side without an effort to compose their differences. Even though the code is to express a new way of thinking, that “new habit of mind” which Paul VI charged the code commission to implement, that way of thinking itself is the expression of compromises struck at Vatican II on number of issues.⁴⁵

⁴³ Ibid., 599.

⁴⁴ Ibid., 603.

⁴⁵ PROVOST, “Participation,” 418.

In the past, a limited number of lay people clearly exercised broad jurisdiction in the Church.⁴⁶ This exercise of jurisdiction was stopped for particular historical and theological reasons, which we have discussed above. In tandem with the movement to remove situations where lay people exercised jurisdiction was a theological attempt to deny that this was even possible. Because of such denial, the concept of dominative power arose in order to describe the power which non-clerical religious exercised and which so clearly paralleled the power exercised by certain clerical religious superiors. The limitations of the concept of dominative power were becoming apparent even before Paul VI re-opened the door to lay judges. With Gutiérrez and others, we believe that it makes no sense to argue, in the case of the exercise of power by lay people in religious institutes or any setting, for a *third type* of power. Power is either public or private. Public power in the Church is always the power of governance or the power of order. To say that religious exercise private power makes no sense given that they form institutes that are public juridic persons approved and regulated by Church hierarchy.⁴⁷ As Huels says, the power of governance is divine in origin but

⁴⁶ In addition to the abbesses discussed above, history records that Pope Hadrian V died before his ordination as a priest and that he is known to have performed at least one juridic act before his death, namely revoking the decree of his predecessor regarding conclaves. See J.N.D. KELLY, "Hadrian V," in *The Oxford Dictionary of Popes*, New York, Oxford University Press, 1986, 199. Örsy also gives the example of lay people being able to vote in early ecumenical councils. See ÖRSY, "Lay Persons," 13.

⁴⁷ Cf. J.L. GUTIÉRREZ, "Dalla potestà dominativa alla giurisdizione," in *Ephemerides iuris canonici*, 39 (1983), 99-103.

human in how it is regulated. In regards to the exercise of the power of governance in religious institutes, it would seem that the practice has clarified what the doctrine is still pondering. As shown above, the *CIC* itself in numerous cases allows superiors and chapters in non-clerical religious institutes to exercise the executive power of governance. When the code itself permits this, it becomes untenable to argue that it is not possible.

Beyond a doubt it was Christ's will that the Church would be led by St. Peter and the other apostles, but even in biblical times, it became apparent that the apostles needed helpers, first in the form of the seven deacons (who did not share in governance) and then in the form of priests (who did share in the governance). And so it continues down to the present day that the hierarchy is continuously searching for effective and wise ways to share the burden of their office. In the case of religious, it makes sense that, under the guidance of the hierarchy, they would govern themselves using that necessary part of the power that Christ gave the Church.

2.2 – The Rights and Obligations of Subjects and Superiors

This section will examine the role of rights and obligations in the *CIC* and how they must guide the administration of discipline in religious institutes. As we saw in the first chapter, religious life has developed in numerous ways since Vatican II, one of which has been the greater participation of all members in the life of the institute. Related to this is the

idea that all members have rights and obligations in regards to their life in the institute and that they are not merely passive recipients of the decisions of superiors. Coupled with this development is the increased appreciation in the Church, and around the world, for the place of individual rights. Before Vatican II, the authority of religious superiors was regarded as nearly absolute. Today, there is an ever-increasing appreciation for the role that rights and obligations play in how religious life is lived out. The focus of this section will be about how the growing appreciation for the importance of rights and obligations influences the administration of discipline in religious institutes. In this section we will examine: the development of the current expression of rights and obligations related to religious life, the particular canons that are relevant to the administration of discipline, and the role of canonical equity and discretionary authority in the same.

2.2.1 – Background to Rights in the *CIC*

Although the concept of human rights can be traced back to England's Magna Carta (1215), France's Declaration of the Rights of Man and of the Citizen (1789) and the United States Bill of Rights (1789), it only gained worldwide application when the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948. The precise origin of the concept of human rights and their philosophical underpinnings are vast topics far beyond the scope of this dissertation. We must limit ourselves to

two observations: Pope Leo XIII first endorsed the concept of the rights of workers in his encyclical *Rerum novarum* in 1891,⁴⁸ and Pope John XXIII first endorsed the concept of human rights with his encyclical *Pacem in terris* in 1962.⁴⁹ The Second Vatican Council also endorsed the concept of human rights. The Pastoral Constitution on the Church in the World of Today states:

And so the church is empowered by the gospel entrusted to it to proclaim the rights of humanity and to recognise and value the modern movement to promote these rights everywhere. This movement must, however, be imbued with the spirit of the gospel and be protected from all appearance of mistaken autonomy. We are tempted to consider our personal rights as fully protected only when we are free of every norm of divine law; but following this road leads to destruction rather than to the maintenance of the dignity of the human person.⁵⁰

The challenge then became how best to incorporate the Church's more robust embrace of human rights into its legal system. Certainly, the *CIC/17* was not devoid of references to rights, given that rights of different kinds have been a feature of canon law since the beginning. Provost describes the role of rights in the *CIC/17* in this way:

The 1917 Code did indicate that baptism constituted one a person in the Church with all the rights and duties proper to Christians. It did not list what these rights and duties might be, however, except in a passing reference that lay persons were not to be denied the sacraments without cause (*CIC* 682). Rather, that Code concentrated on the rights and duties of certain special groups within the Church, particularly clerics (*CIC* 118-144), religious (*CIC*

⁴⁸ LEO XIII, encyclical letter *Rerum Novarum*, 15 May 1891, in *Leonis XIII Pontificis Maximi Acta*, Typographia Vaticana, Rome, 1892, vol. XI, 97-144.

⁴⁹ JOHN XXIII, encyclical letter *Pacem in Terris*, 11 April 1963, in *AAS*, 55 (1963), 257-304. Cf also, R. JACQUES, "Les droits et devoirs des fidèles: aperçus historiques," in *Studia canonica*, 38 (2004), 453-459 and F.G. MORRISEY, "The Rights and Duties of the Faithful According to the Code of Canon Law," in *Studies in Church Law*, 1 (2005), 27-33 (= MORRISEY, "The Rights and Duties of the Faithful").

⁵⁰ SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the World of Today *Gaudium et spes*, 7 December 1965, in *AAS*, 58 (1966), 1025-1115, English translation in TANNER2, n. 41, 1095.

592-631), and various officeholders ranging from pastors to cardinals. Intermingled with rights and duties were lists of privileges, a fact that may be a clue to understanding how the 1917 Code viewed rights as such. Under an absolutist monarchical system of government, rights were considered a concession of the sovereign, and in that sense they were privileges granted to certain persons but not to others.⁵¹

Provost goes on to point out that this way of understanding rights within the Church persisted even as in other settings "the magisterium had already begun to adopt a different view of rights — one based on the dignity of the human person."⁵²

In 1967, the synod of bishops approved ten principles meant to guide the revision of the code. No fewer than three of these ten principles include references to rights.⁵³ The first of these ten principles states in part that, "the Code must define and protect the rights and obligations of each person toward others and toward the ecclesiastical society to the extent that these rights and obligations pertain to divine worship and the salvation of souls."⁵⁴ The other two principles refer to the need to ensure the appropriate protection of rights in the Church. Even before these principles were agreed upon, Paul VI had given his approval for the drafting of what later came to be known as the *Lex Ecclesiae Fundamental*, a sort of foundational law or constitution upon which other laws, such as the different codes for the Latin

⁵¹ J.H. PROVOST, "Commentary on Book II: The People of God [cc. 204-746]" in *CLSA Comm1*, 134 (= PROVOST, "Commentary on Book II").

⁵² Ibid. See also, E. McDONOUGH, "The Protection of Rights in Religious Institutes," in *The Jurist*, 46 (1986), 167 (= McDONOUGH, "The Protection of Rights").

⁵³ Nn. 1, 6 and 7. Cf. "Preface to the Latin Edition," *CIC*, xxxvi-xxxvii.

⁵⁴ Ibid., *CIC*, xxxvi.

and Eastern Churches, could be based.⁵⁵ The commission charged with drafting the *Lex Ecclesiae Fundamentalis* met twelve times between 1968 and 1980. The commission consulted very broadly and created a total of nine different drafts. The final draft was submitted to John Paul II in April of 1980, but without explanation, he never promulgated it.⁵⁶ As the final draft of the new Latin code was nearing completion, and the fate of the *Lex Ecclesiae Fundamentalis* was still unknown, it was decided that its essential elements would have to be incorporated into the new code, otherwise, important, constitutional elements of the law would never be promulgated.⁵⁷ As it stands now, various rights and obligations are enumerated in different places in the code corresponding to the persons or subject matter being addressed.⁵⁸

Addressing the section in *Book II* that outlines the rights and obligations of all the Christian faithful, Lombardía writes:

What is involved is a title of a legal body which formally does not distinguish itself from the rest of the code, but which has an unquestionable

⁵⁵ O.G.M. BOELEN, *Synopsis "Lex Ecclesiae Fundamentalis,"* Leuven, Uitgeverij Peeters, 2001, V (= BOELEN, *Synopsis LEF*).

⁵⁶ Cf. *ibid.*, VII-VIII.

⁵⁷ Cf. *ibid.*, V-IX.

⁵⁸ For example, "The Obligations and Rights of All the Christian Faithful" (cc. 208-223), "The Obligations and Rights of the Lay Christian Faithful" (cc. 224-231), "The Obligations and Rights of Clerics" (cc. 273-289), "The Obligation and Rights of Institutes and Their Members" (cc. 662-672), as well as other singular canons that express rights such as c. 843 (the right to receive the sacraments) and c. 1321 (limits on the power to punish).

Other rights are even enumerated outside the *CIC*. Cf. HOLY SEE, *Charter of the Rights of the Family*, 22 October 1983, in *Communicationes*, 15 (1983), 140-152. Regarding the Charter of the Rights of the Family, Morrissey states, "Although this document is not formally a text of law, it was widely distributed. It is not part of the juridical *corpus* as such, even though it contains numerous principles that would be helpful for pastoral work with families." MORRISSEY, "The Rights and Duties of the Faithful," 34.

constitutional content and many of the rights proclaimed here and the duties imposed are rooted in divine law. As a consequence, it ought to be accorded a certain precedence, such that it would lead to interpreting the other norms in a manner coherent with fundamental rights and duties, thereby ensuring their effective application, even in the face of legal precepts in the canon which might possibly be unaware of them.⁵⁹

In this way, we see that although these canons are not formally identified as fundamental legislation, at least those precepts that are of divine law origin are of greater authority than mere ecclesiastical laws and must be interpreted accordingly. Yet not all rights share the same origin and carry the same authority. Hill and Bartolac write:

The sources of rights are legion. They derive from human nature, the natural law, such as the right to be treated with respect; from baptism, initiation into the people of God, such as the right to the sacraments; from one's status in the Church (laity, clergy, membership in a religious or secular institute or in a society of apostolic life); from membership in public associations of the Christian faithful (cc. 298-320); and from ecclesiastical offices, legislation, judicial and administrative decisions, contracts, privileges and the like....

It must be borne in mind, however, that rights are always relative, not absolute, and they are always tempered in their exercise by the common good of civic society and of the Church, which can require that the use of a right be foregone in view of a greater good or be restricted in certain circumstances.⁶⁰

As we shall see in the next subsection, the rights that are most relevant for religious in disciplinary situations are, for the most part, those common to all the Christian faithful and not those that are specifically owed to them as

⁵⁹ P. LOMBARDÍA, *Lecciones de Derecho Canonico*, Madrid, Editorial Tecnos, 1986, 81-82, English translation in *ExegeticalComm*, 38-39. Hervada states, "As the canons of this title pertain to constitutional law, they rank more highly than other non-constitutional canons, i.e., legislation itself must be interpreted in conformity with them, they have precedence over human norms that are not in harmony with them, and judges must solve cases in such a way that these rights are recognized and guaranteed." *CCLA*, 170.

⁶⁰ R.A. HILL and V. BARTOLAC, "Recognition and Protection of Rights in Consecrated Life," in *CLASP*, 53 (1991), 180-181 (= HILL and BARTOLAC, "Recognition and Protection of Rights").

religious. This is because the rights of all the faithful are, for the most part, more fundamental than the rights which specifically belong to religious. The rights of religious always arise from positive law given that religious life itself is not of divine origin.

2.2.2 – Canons Relevant to the Administration of Discipline

In this subsection we will examine the rights that potentially bear on disciplinary cases involving religious. We will examine them in the order they appear in the code.

Canon 18 states: "Laws which establish a penalty, restrict the free exercise of rights, or contain an exception from the law are subject to strict interpretation." This principle of interpretation can be regarded as a right granted by the positive law of the Church to all of those subject to its law, in order that no one may suffer a penalty, or in any way have his or her rights restricted, except in strict accordance with the law. This law clearly intends to keep those with authority from acting arbitrarily, that is, acting in ways that cannot be explicitly justified by the law. This canon is of key importance as we consider the best way to proceed in disciplinary cases not expressly covered by the law. It will be an integral part of the third section of this chapter where we will discuss limits on the authority of superiors. Superiors have broad authority, but that authority is not without limits, and superiors

must use the authority they receive from the Church in accordance with the mind of the Church, that is, in accordance with its law and doctrine.

The next right we will examine is the one expressed in c. 220, namely the right to one's good reputation and to privacy.⁶¹ In handling disciplinary matters superiors have the duty to ensure that the good reputation of the accused is protected throughout the process, and most especially, in the period before the veracity of the accusation has been determined. Yet even after it is certain that misconduct has been committed, the wrongdoer remains entitled to his or her good reputation, although there are exceptions to this principle. The most obvious exceptions are the need to limit scandal among those who are aware of the misconduct and the need to let it be known that justice has been served, lest the credibility and integrity of the Church be harmed.⁶²

The right to privacy is of the utmost importance and some commentators⁶³ point out that a specific expression of this right in the context of religious life is c. 630 §5 which protects members from being forced to manifest their conscience to their superior. In this context, Hill and Bartolac point out that "[p]ersonal privacy protects individuals from unwarranted

⁶¹ For a thorough discussion of the delict of defamation of character, see R. E. JENKINS, "Defamation of Character in Canonical Doctrine and Jurisprudence," in *Studia canonica*, 36 (2002), 419-462.

⁶² Cf. HILL and BARTOLAC, "Recognition and Protection of Rights," 182.

⁶³ Cf. *ibid.*, 183.

intrusion into their interior life, the internal forum of contemplation, imagination, unexpressed feelings and ambitions."⁶⁴ McDonough also makes the point in this context that the authority of superiors extends only to the external forum.⁶⁵

Canon 221 is the key canon regarding the protection of rights in the Church. In regards to it, Cenalmor says:

[The three paragraphs] state the various rights of the faithful in regard to administration of justice in the Church, and they adopt a series of juridical guarantees for protecting the remaining subjective rights, in order to avoid, among other things, possible abuses which originate in the arbitrary conduct of authority.⁶⁶

Furthermore, he explains that these rights are owed not just to the faithful but indeed to all persons "that may need to defend their rights in the Church."⁶⁷

The first paragraph states, "[t]he Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law." In other words, the faithful may always assert their rights and when they perceive that their

⁶⁴ Ibid.

⁶⁵ Cf. E. McDONOUGH, "The Troubling Religious: Further Considerations," in *Review for Religious*, 49 (1990), 620. On exception to this general principle is c. 1047 §4 which grants ordinaries the authority "to dispense from irregularities and impediments not reserved to the Holy See."

⁶⁶ D. CENALMOR, "Commentary on Canon 221," in *ExegeticalComm*, vol. II/1, 134 (= CENALMOR, "221").

⁶⁷ Ibid.

rights have been violated, they may seek redress.⁶⁸ Cenalmor also points out that:

This right entails a series of derived rights: the right to be assisted by an advocate (cc. 1481 and 1482), the guarantee of initiating a procedure (cc. 1504 and 1505), the right to have economic obstacles (for example, by means of effectively instituting free assistance when needed) and those of other kinds removed, etc.⁶⁹

These "derived rights" would be of special importance in disputes involving religious since, in light of their vow of poverty, they lack the means to finance their own defense. Furthermore, it is not impossible to imagine that religious might face illegitimate attempts to limit either the assertion of their rights or their ability to vindicate rights already violated, under the guise of being obedient to religious superiors.

Canon 221 §2 ensures that anyone called to trial has "the right to be judged according to the prescripts of the law applied with equity." Although this paragraph speaks specifically of being called to trial, for the sake of our discussion, it seems reasonable that the same principle should apply *mutatis mutandis* to our discussion of informal disciplinary procedures. That is to say, such procedures should be carried out not only in accordance with the law, but also in accordance with procedures that have been previously established and made known to anyone who might be part of such a procedure. We will examine the principle of equity in detail in the next subsection.

⁶⁸ The rights in question are not only those contained in the *CIC* but also those included in particular law, proper law or other sources of law such as contracts. Cf. *ibid.*, 135.

⁶⁹ *Ibid.*, 137.

Canon 221 §3 states: "The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law." This, of course, is a principle of fundamental importance. Hervada comments:

It sometimes happens that, in secular declarations and pacts on human rights, what are really principles of juridical and social order, but not rights, are presented as rights. The same system is used here to preserve, in the form of a right, the *principle of legality* in penal matters (*nulla poena sine lege*). This principle, moreover, is not of divine or natural law but of human law.⁷⁰

It stands to reason that no one should suffer a punishment outside the law, but at the same time, no legal system can anticipate every form of misconduct, hence the existence of c. 1399.⁷¹ Of course, the application of c. 1399 is, and ought always to be, exceptional, that is, "when the special gravity of the violation demands punishment and there is an urgent need to prevent or repair scandals."⁷² Canon 221 §3 ensures that no authority may attempt to impose a canonical penalty apart from the ways permitted by the law.⁷³

The next canon that has bearing on our topic is c. 223 regarding legitimate limits on the expression of rights. The first paragraph refers to the subjective self-regulation of those asserting their rights either singly or in groups. It states: "In exercising their rights, the Christian faithful, both as individuals and gathered together in associations, must take into account the

⁷⁰ J. HERVADA, "Commentary on Canon 221" in *CCLA*, 177-178.

⁷¹ We observe, however, that the *CCEO* has no equivalent to *CIC* c. 1399.

⁷² C. 1399. Cf. also CENALMOR, "221," 139-140. We have already discussed in the Introduction how, theoretically, many of the instances of misconduct we propose to be addressed by the non-penal disciplinary procedure could also be addressed under c. 1399. See Introduction, footnote 2.

⁷³ The canonical penalties are described in cc. 1312, 1331-1333, and 1336.

common good of the Church, the rights of others, and their own duties toward others." The second paragraph refers to the right of ecclesiastical authority to "direct the exercise of rights which are proper to the Christian faithful" in light of the common good. As has already been established, no right is absolute. Furthermore, the Church, more so than the majority of Western democracies with their emphasis on individual rights, has a natural readiness to accept that individual members may have to make sacrifices for the good of the wider community. This may be especially true in religious life where individual members may realise that their assertion of a particular right may be to the detriment of the rest of their community. Cenalmor describes this delicate balance well when he writes:

If ecclesiastical authority has the power to regulate the exercise of rights inherent to and shared by the baptized, it is to keep in mind that this rule finds an inviolable limit in divine law, and that the same common good of the Church demands respect for, and the advancement of, the fundamental rights of the faithful within their just measure. For this reason, any subsequent limitation on those rights should be of an exceptional nature and should be justified on the basis of grave and adequate reasons.⁷⁴

Certainly, individuals in asserting their rights must be mindful of the common good, but at the same time, those in authority must be careful not to limit unfairly the rights of others by exaggerated claims to be protecting the common good.

On December 8, 2010, the Pontifical Council for Legislative Texts issued an explanatory note regarding c. 223 §2 in which it stated:

⁷⁴ D. CENALMOR, "Commentary on Canon 223," in *ExegeticalComm*, vol. II/1, 151 (= CENALMOR, "223").

The norm, therefore, should not be invoked to limit in individual cases the exercise of rights, since for this purpose the canonical order foresees the need to follow other procedures, which involve specific requirements and the help of firm guarantees.

The task of general regulation will be then followed in the sees in which the Authority carries out their proper governance and with the respect to the internal and external limits that meet with its action: first of all, the limits of divine law (it could not deny the fundamental rights of the faithful or of man), but also the limits derived from a superior authority or placed by the legislative act of governance of a see, in order to give certainty to the safeguarding of the rights of the faithful.

Can. 223 §2 of *CIC*, which confers on ecclesiastical authority the task of regulating the exercise of the rights of the faithful having regard for the common good, cannot be interpreted as meaning that the provision has removed the detailed limits and procedures that the Legislator himself has established to legitimize the provisions mentioned earlier.⁷⁵

In this way, we see that this canon can only be invoked as a means for creating general provisions regarding the exercise of rights and not as the basis for limiting rights in individual cases.

Canon 586 preserves the autonomy -- "especially of governance" -- for each institute. In the context of our broader discussion, we believe this includes the right of institutes to administer their own discipline, albeit within the limits of the law of the universal Church. Certainly, it is within the right of

⁷⁵ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, explanatory note *Chiarimenti circa l'applicazione del can. 223 §2 CIC*, 8 December 2010, in *Communicationes*, 42 (2010), 281. Translation mine.

"La norma, perciò, non va invocata per limitare nei singoli casi l'esercizio dei diritti, poiché a tale scopo l'ordinamento canonico prevede la necessità di seguire altre procedure, in presenza di specifici requisiti e con il concorso di precise garanzie.

Il compito di regolazione generale sarà poi perseguito nelle sedi in cui l'Autorità esplicherà il proprio governo e con il rispetto dei limiti interni ed esterni che essa incontrerà nella sua azione: innanzitutto, limiti di diritto divino (non potrebbe disconoscere diritti fondamentali del fedele o dell'uomo), ma anche limiti derivanti da un'Autorità superiore o posti in sede legislativa all'attività di governo, proprio per dare certezza del diritto a tutela della persona del fedele.

Il can. 223 §2 *CIC*, che riconosce all'Autorità ecclesiastica il compito di regolare l'esercizio dei diritti dei fedeli avendo riguardo al bene comune, non può essere interpretato nel senso che tale norma abbia rimosso i limiti circostanziali e procedurali che il Legislatore stesso ha statuito per legittimare i provvedimenti prima ricordati."

institutes to establish mechanisms or protocols to administer discipline, resolve disputes, and ensure the protection of rights, but to our knowledge no institute has established such things. Rather, the only means of challenging a decision of a superior is to approach the higher superior (or superiors) and ultimately the CICLSAL. In the next section we will examine the limits on the authority of superiors. This examination will include enumerating the circumstances in which superiors lose the prerogative to administer the discipline of their members as well as the disciplinary actions which they lack the authority to undertake.

Canon 654 states that "[b]y religious profession members ... are consecrated to God and incorporated into the institute with the rights and duties defined by law." This canon describes the fact that by profession a Christian becomes a member of a particular institute and gains the associated rights and duties established in law. The most important right proper to religious is implied in this canon, but not stated explicitly, namely, that once one becomes a member of an institute, the person has the right to remain a member of that institute. Indeed, the only right proper to religious that is protected by specific juridic procedures is the right not to be dismissed arbitrarily. McDonough writes: "Procedures specifically directed to protecting the rights of religious are practically non-existent in the code except for those relating to the right of a professed member to continue as a member of one's

institute."⁷⁶ This is a fact of fundamental importance to our wider discussion because dismissal is the only means for disciplining members available in the *CIC* that can be enacted by superiors of all institutes.⁷⁷ One might assume that, if other canonical means for administering discipline (that is to say, structured means of administering discipline that ensure the protection of rights) were available, such procedures might reduce the need to resort to dismissal. The canons governing dismissal will be examined in the next chapter.

In the twelve-canon section on the rights and obligations of religious institutes and their members, c. 670 is the only canon that states a right of individual religious and even that right is stated indirectly.⁷⁸ The canon reads: "An institute must supply the members with all those things which are necessary to achieve the purpose of their vocation, according to the norm of the constitutions." In regards to this canon, McDonough remarks:

This requirement includes adequate means to meet both physical and psychological health care needs. However, no institute is required to meet a member's needs only in the manner that is agreed upon or acceptable to that particular member, because individual needs must always be addressed in

⁷⁶ MCDONOUGH, "The Protection of Rights," 203.

⁷⁷ At the time of writing (February 2016), a proposed revision of *Book VI* and a few other related canons is being circulated by the Pontifical Council for Legislative Texts. The proposal includes enhanced provisions, and commensurate safeguards, for the imposition of penalties by means of extra-judicial or administrative decrees. At least as concerns the religious superiors who enjoy the power of governance, this would augment their ability to apply penalties. Cf. PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Schema recognitionis Libri VI Codicis Iuris Canonici*, Typis Vaticanis, 2011, esp. cc. 1391 §1, 1333 §2, 1342, and 1720 §2.

⁷⁸ Cf. G. DI MATTIA, "Commentary on Canon 670" in *ExegeticalComm*, vol. II/2, 1792. See also, MCDONOUGH, "The Protection of Rights", 165. All other canons in this section either impose obligations or exhort religious to certain behaviors.

relation to all the other members of the institute as well as in relation to the institute's material resources.⁷⁹

When we consider this canon in conjunction with c. 216, the right of all the faithful to promote and support apostolic action, we see a significant grant of rights to individual religious. Rinere points out, however, that the right to participate in the apostolate does not necessarily imply the right to a *particular* apostolate.⁸⁰ When one considers c. 216 in conjunction with c. 18, it becomes clear that religious cannot be denied their rights to apostolic action and to the necessities of their vocation except in strict agreement with the law. Of course, institutes must act to promote the common good and preserve the institute itself, but in doing so the institute cannot presume to limit the ministry and religious life of the member except in accordance with the law. To participate in the apostolate is a basic right of all religious and, indeed, of all the faithful, and it may not be limited arbitrarily.⁸¹

⁷⁹ E. McDONOUGH, "The Troubling Religious: Further Considerations," in *Review for Religious*, 49 (1990), 624.

⁸⁰ E.A. RINERE and A.J. ESPELAGE, "The Disruptive Religious," in *CLASP*, 66 (2004), 186.

⁸¹ One can imagine many scenarios, not related to misconduct per se, in which a superior might decide to limit the external exercise of the apostolate by a member because his or her ministry has become ineffective or potentially harmful. The most common example would be a member who has lost his or her sound judgment due to dementia or some other degradation of natural abilities. Such cases are outside the scope of this thesis, but one could imagine in such scenarios that the member might be still be assigned to an apostolate internal to the institute or simply to an apostolate of prayer. In any case, the superior would need to be able to point to objective reasons for limiting the normal exercise of the apostolate, in the event the member challenged the decision.

2.2.3 – Canonical Equity and Discretionary Authority

As c. 619 makes clear, the duties of a superior encompass much more than just governing, and governing involves much more than simply executing the law. The law cannot anticipate every eventuality and many aspects of life happily require little or no legal oversight. Our topic is in the decidedly grey area wherein people, who have committed themselves to a life of perfection by following in the path of the evangelical counsels, are considered to have violated a law or moral precept, but have not crossed the line into the area where penal law is operative. In such cases, superiors have a duty to act whether for the good of the member, the institute, the Church, or the common good. Superiors do so in light of their discretionary authority and are assisted by the concept of canonical equity. These concepts are highly relevant to the expression and protection of rights in religious life.

As important as discretionary authority is in the life of the Church, it is a topic about which little has been written.⁸² In describing administrative discretion, Beal states the following:

⁸² Beal states, "Canonists acknowledge the distinction between law and discretion but devote most of their time to analysis of law. Canonists have produced a considerable body of literature about administrative tribunals and other institutes for remedying injustices resulting from ecclesiastical administration, but they have produced no comparable body of literature about methods for preventing injustices arising from the exercise of discretionary authority by church officials. Nonetheless, there is great need and great promise for improvement of the quality of justice rendered to individuals in the administrative process of the Church by systematic attention to those areas where decisions are largely dependent on discretion and judicial remedies are largely irrelevant." J.P. BEAL, "Confining and Structuring Administrative Discretion," in *The Jurist*, 46 (1986), 70 (= BEAL, "Administrative Discretion").

Administrators, both civil and ecclesiastical, have discretion whenever the effective limits on their authority leave them "free to make a choice among possible courses of action or inaction" [Kenneth C. Davis, *Discretionary Justice*]. The authority to execute the law and, where necessary, to interpret and complete the law that is enjoyed by diocesan bishops and those who exercise authority under their supervision (as well as by competent authorities in religious institutes and at the supradiocesan level), of necessity leaves office holders with broad discretion. For example, officials at all levels of church governance make countless decisions about hiring, firing and supervising employees; administering church property; granting and denying access to the sacraments, to Catholic education, and to other helps to salvation; and setting institutional policies that affect the lives of those they serve. All of these decisions of church officials are, in large measure, discretionary. As Gunther Raab has observed: "Empowerment for acting according to discretion is probably more important in canon law than in civil law."⁸³

Discretionary authority is rightly understood as the broad, undefined authority that a superior has to carry out his or her office.⁸⁴ It is delimited not so much by what powers it includes as by its limits.⁸⁵ This "undefined authority" is necessary to allow superiors to handle the non-contentious or everyday matters of governance expeditiously. Even if it were possible for a legal system to anticipate every imaginable eventuality, it would then almost certainly prove to be so complex that it would be unwieldy. Discretionary authority is essential for almost any type of organization.⁸⁶ Beal observes wisely:

Discretionary authority is indispensable and not necessarily injurious to the rights of persons, but it is not without its dangers. Both in the Church and in civil society, broad discretionary authority may be a threat to justice if it is not adequately controlled. Although discretionary authority is necessary to adapt decisions to unique facts and circumstances, there is no guarantee that administrative discretion will always be guided by facts and circumstances

⁸³ Ibid., 70-71.

⁸⁴ Canon 596 §1 states simply, "Superiors and chapters of institutes possess that power over members which is defined in universal law and the constitutions."

⁸⁵ We will discuss these limits in detail in the next section.

⁸⁶ Cf. BEAL, "Administrative Discretion," 71.

truly relevant and significant to a case. Although discretionary authority is necessary to deal with unforeseen and unforeseeable situations, there is no guarantee that discretion will be exercised consistently, predictably, impartially and fairly when dealing with the foreseen and foreseeable. Although discretionary authority is necessary for dealing with changes in times, consciousness and institutions, there is no guarantee that discretion will be exercised in an evenhanded way. Although discretionary authority is necessary for dealing with cases for which available law, policies and precedents offer little meaningful guidance or in which applicable principles are in conflict, there is no guarantee that administrators will remain within the bounds of law, policies and precedents when these do offer meaningful guidance and are not in conflict. If fundamental fairness can be provided through nonjudicial channels, there is no guarantee that it will be so provided.⁸⁷

While most of the literature regarding the exercise of discretionary authority concerns ways of seeking redress once that authority has been misused,⁸⁸ our hope in this thesis is to ask how we can help to ensure that such authority is used appropriately from the start.

For the sake of justice and the credibility and integrity of religious institutes, the exercise of discretionary authority must be careful, wise, and discerning, especially where the exercise of rights is concerned. Beal cautions:

A fundamental requirement of fair, decent treatment of persons is that individuals have some opportunity for meaningful participation in decisions that affect their status or interests. Such participation is an expression of "the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one." [L.R. Tribe, *American Constitutional Law*]

⁸⁷ Ibid., 72.

⁸⁸ Much as been written regarding the possibility of establishing tribunals or other means in which the laity especially can vindicate their rights which may have been violated by acts of administration. See CANON LAW SOCIETY OF AMERICA, *Protection of Rights of Persons in the Church*, Washington, CLSA, Washington, 1991; K. MARTENS, "Protection of Rights: Experiences with Hierarchical Recourse and Possibilities for the Future," in *The Jurist*, 69 (2009), 646-702; J.P. BEAL, "Protecting the Rights of Lay Catholics," in *The Jurist*, 47 (1987), 129-164; J.N. PERRY, "The Accessibility of Due Process for the Laity," *CLASP*, 51 (1989), 65-82; J.H. PROVOST, "Promoting and Protecting the Rights of Christians: Some Implications for Church Structure," in *The Jurist*, 46 (1986), 289-342.

Both in civil society and in the Church, broad discretionary authority can create the climate in which officials can, in fact, be unjust as well as the climate in which their actions can be *perceived* as unjust. The perception of injustice can easily erode legitimacy of the authority of civil and ecclesiastical officials and the moral authority of their decisions. When church authorities exercise their discretion in a manner that is, in fact, unjust or when affected individuals and the faithful at large perceive their discretionary decisions as unjust, the consequences of real or perceived injustice reach far beyond the individual case. The very credibility of the Church as a herald of the gospel is called into question.⁸⁹

While it is easy to imagine that disciplinary cases typically need to be handled with some degree of confidentiality, it is important that those involved, whether they be the ones making the complaint or being accused, are involved in, or at least informed about, the process that is being followed. Ideally, as a further aid to transparency and the overall credibility of the institute, the procedures to be followed in such cases would be a matter of public record even before a complaint was made.

Clear, just, and rational disciplinary procedures serve to respect the equality of the all the faithful.⁹⁰ A superior who acts arbitrarily, or who even simply gives the impression of acting arbitrarily, acts with disregard for the dignity of his or her subjects. Beal addresses this question wisely when he writes:

One purpose of administrative procedure is to accord respect to the inalienable dignity of individuals in their encounters with authority by treating them as persons rather than dealing with them as things. Thus, in assessing the procedure to be followed in a given case, church officials have to consider not only the value of the procedure for insuring accurate decisions, but its value for promoting the dignity of the individual....

⁸⁹ BEAL, "Administrative Discretion," 73-74.

⁹⁰ Cf. c. 208

Like the revised code, all of canon law has as its aim "to create such order in ecclesial society that, assigning primacy to love, grace and charisms, it at the same time renders more active their organic development in the life both of the ecclesial society and of the individuals belonging to it." (*Sacrae disciplinae leges*, xi.) Administrative procedures that alienate affected persons and damage their sense of dignity do not promote but squelch the organic development of love, grace and charisms in the life of the Church. Fair procedure is required not only for accurate decision-making but also for preservation and promotion of ecclesial communion. Nevertheless, the highly unstructured discretionary authority of many ecclesiastical officials at all levels of church governance creates a danger that discretion will be unintentionally abused and ecclesial communion will be disrupted.⁹¹

Precisely how such a disciplinary procedures might be structured will be the focus of the fourth chapter.

Associated with the concept of discretionary authority is the concept of canonical equity. If discretionary authority is that loosely defined authority that a superior has to carry out his or her duties, canonical equity is a concept that can help to guide how that undefined authority should be used.

Coughlin observes that both the *CIC/17* and the *CIC* use the three terms "equity," "natural equity," and "canonical equity" without defining them but obviously with the implication that they are distinct concepts.⁹² According to Coughlin, "canonical equity includes the characteristics of natural equity, evangelical compassion and historical consciousness."⁹³ The concept of natural equity, however, "would be limited to the characteristics of natural

⁹¹ BEAL, "Administrative Discretion," 97-98.

⁹² J.J. COUGHLIN, "Canonical Equity," in *Studia canonica*, 30 (1996), 423 (= COUGHLIN, "Canonical Equity").

⁹³ *Ibid.*, 423.

justice."⁹⁴ He notes however that "[o]ne would be hard pressed ... to explain the precise distinction between equity and natural equity."⁹⁵

In 1973, Pope Paul VI chose canonical equity as the topic of his annual address to the Roman Rota. In the address, he states:

From its beginning the Church absorbed into its life all that was true, noble, just and beautiful in societal life and in man's aspirations. In this way it made God's charity shine forth in the humanity divinized by the Spirit of love. Equity represents one of man's loftiest aspirations. If societal life requires the determinations of human law, nevertheless the norms of this law, inevitably general and abstract, cannot foresee the concrete circumstances in which the laws will later be applied. Faced with this problem, jurisprudence has sought to amend, to rectify, to correct the "rigor of the law." This is done through the operation of equity, which somehow embodies man's aspirations for a better kind of justice.⁹⁶

In this way we see that Paul VI sees equity as an essential part of the law and as a quintessentially Christian part of its practice.

Coughlin traces the development of the concept of equity from ancient Roman law to the *CIC*. He observes:

Given its somewhat elusive meaning, equity has proved a concept susceptible to abuse. In the long history of ecclesiastical law, its meaning has on occasion been so misunderstood that it has been used unfortunately to defeat justice rather than serve it. Consequently, there has been a tendency to consider it an extraordinary facet of canonical science. It has sometimes been limited to very difficult cases and even forgotten completely.⁹⁷

Drawing upon the *Dictionnaire de droit canonique*, Coughlin describes equity in the follow manner:

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ PAUL VI, address to the Sacred Roman Rota, 8 February 1973, in *AAS*, 65 (1973), 99, English translation in *The Pope Speaks*, 18 (1973), 79.

⁹⁷ COUGHLIN, "Canonical Equity," 404-405.

Equity is "the application of objective justice to a concrete case." It arises because "the rules that a society imposes on its members, in order to protect the common good and promote justice, figure as too general in conception to deal with all the particular instances that fall under their scope." "Justice is the ideal," and "equity serves as the means for the realization of the ideal in practice." Equity is constituted from "the benevolent interpretation of written law by judges, administrators and superiors." It is "a relative notion which reckons a superior principle of justice or of moderation in the application of law."⁹⁸

Yet is this concept even reconcilable with the purpose of our thesis? Equity is, in general, understood to supply for situations where there is a lacuna in the law and also in other cases to soften the application of a law that is seen as overly severe in a given case. Our purpose is to generate procedures that will be suitable for addressing cases where the law is silent, but such procedures, if it is reasonably foreseen, would often conclude with the imposition of some correction or punishment. Can the concept of canonical equity be invoked as part of the imposition of a correction in regards to a type of misconduct about which the law is silent? Or can equity only relax the application of the law not augment it? Canon 19, which addresses cases in which there is a lacuna in the law, expressly forbids that the mechanisms described in the canon, which include canonical equity, be applied to penal matters. However, we are also aware that c. 1399 allows for the application of a "just penalty ... when the special gravity of the violation requires it and necessity demands that scandals be prevented or repaired." Are these canons relevant to our broader discussion? I would argue that they are not, at least not directly. The purpose

⁹⁸ Ibid., 404.

of this thesis is not to suggest a new collection of delicts that would be incorporated into the penal law of the Church. Rather, the purpose of this thesis is to determine whether guidelines could be developed for how religious superiors might handle cases of misconduct that involve gravely immoral behaviour, or other actions which are contrary to the law, but which are not themselves penal matters. As we will see in the next section, we would expressly exclude from our consideration offences that fall within the ambit of penal law, or the application of penalties for which the law requires the use of a penal procedure. In this “grey area,” close to the ambit of penal law, but not overlapping with it, we do believe that the concepts of equity and canonical equity have a relevant contribution to make.⁹⁹

In understanding the role of canonical equity, it will be helpful to take a brief look at its origins and development. In discussing the development of the concept “canonical equity,” Coughlin recognizes the “sundry shifts in the meaning and application of the notion.”¹⁰⁰ He observes that the concept emerged in the legal renaissance of the eleventh and twelfth centuries following the rediscovery of Justinian’s *Digest*. He goes on to note, however,

⁹⁹ Coughlin holds that one of the most important applications of the concept of canonical equity is whenever a case involves what he calls “equitable discretion.” He writes: “One who exercises executive or judicial power is vested with the discretion to choose between alternative courses of action. Discretion is an indispensable tool for the individualization of justice, since rules alone cannot cope with the complexities of individual cases. Those vested with the sacred power of governance should be attentive so that the exercise of discretion in a particular case comports with the tradition of canonical equity.” *Ibid.*, 431.

¹⁰⁰ *Ibid.*, 406.

that ancient Roman sources were not the only influence on this legal renaissance, but that medieval canonists also drew upon “scriptural texts, canons of ecumenical and local councils, decrees of the popes, rules contained in various penitentials and virtually any other source that pertained to some aspect of ecclesiastical law.”¹⁰¹ Included in these developments was Gratian’s distinction between divine law, natural law, positive law, and customary law.

Coughlin notes:

On the basis of these distinctions, Gratian distinguished between immutable principles of eternal validity and elements of law which had been suggested by the particular circumstances of time, place and persons.... The content of equity then consisted in part of those universal and unchanging values known as the natural law. This superior justice corrected the positive law.... Gratian eschewed the rigour of a strictly natural justice as incomparable with the Gospel. The insight that evangelical justice tended to be synonymous with love, compassion and mercy may be said to adumbrate canonical equity as a distinct concept.¹⁰²

Gratian’s insights were built upon and enlarged by Hostiensis who “envisioned canonical equity as critical to the legislative, judicial and executive functions of ecclesiastical law.”¹⁰³ Coughlin concludes his examination of this period by commenting:

Both Gratian and Hostiensis rejected the stringent character of Roman law as in conflict with the unique aims of canon law. Roman law was considered by its practitioners and adherents to be fixed, immutable and finished.... In contrast, the notion of canonical equity in the thought of Hostiensis reflected the characteristic of organic development. While the canonists shared the classicists’ deep respect for tradition, they continually attempted to incorporate into the juridical structure of the law the ecclesiological perspective of the Church as mystical communion founded upon evangelical precepts. Moreover, the canonists’ task was necessarily an ongoing one as it

¹⁰¹ Ibid., 408.

¹⁰² Ibid., 410-411.

¹⁰³ Ibid., 411.

was open to the dynamic action of divine grace in human history. The ability of the medieval canonists to assimilate both immutable principles and historical circumstances into the corpus of law yielded the concept of canonical equity.¹⁰⁴

St. Thomas Aquinas further helped the development of the concept of equity. For St. Thomas, equity was "an aspect ... of justice, by which the overly stringent application or interpretation of some positive law might be measured and, if necessary, corrected."¹⁰⁵ But equity was an exception to the law, not an abrogation of the law, and only those with the authority to do so could invoke it. In cases where that authority could not be approached within the available time, however, equity applied automatically.¹⁰⁶ St. Thomas also held that equity could be invoked "for the common good, and not for the sake

¹⁰⁴ Ibid., 412-413.

¹⁰⁵ Ibid., 414. Cf. ST. THOMAS AQUINAS, *Summa Theologiae: Latin Text and English Translation, Introductions, Notes, Appendices, and Glossaries*, Cambridge, Cambridge University Press, 1966, 1a-2ae, q. 96, a. 6, pp. 136-141 and 2a-2ae, q. 120, a. 1, pp. 276-279 (= ST).

¹⁰⁶ At this point some might notice certain similarities between the concept of equity and the eastern Christian concept of *oikonomia*. Coughlin rejects such comparisons entirely, describing *oikonomia* as "a nonlegal device employed by a bishop or synod of bishops to resolve an inextricable legal conundrum" (COUGHLIN, "Canonical Equity," p. 404). Wijlens admits there are certain similarities, but strongly cautions against a "simplistic" comparison, given the distinctness of the two legal traditions and their "different ecclesiological foundations." She notes, however, that, "both are deeply linked with the authentic purpose of ecclesial legal action to serve the *salus animarum*.... Both institutions are concerned with concrete and particular cases; they do not create precedence. Both allow for taking into account those circumstances in a case which do not belong to the strict juridical level. They make it possible to uphold different values that the law alone could not do. They can create a good balance between legal certitude and justice." But on the other hand, she notes three differences: first, "Orthodox theologians use an inductive method to describe *oikonomia*," whereas Latin theorists typically discuss equity in the abstract, without any reference at all to specific examples. Second, *oikonomia* is exercised exclusively by a bishop or synod of bishops, whereas canonical equity "is within the task of all who apply the law, including bishops as well. The third difference is that *oikonomia* does not create a precedent. Therefore it is not an instrument for legal development; it cannot touch upon the dignity and continuous validity of the old canons, while *aequitas canonica* can be instrumental in the dynamics of legal development." See M. WIJLENS, "Salus Animarum Suprema Lex: Mercy as a Legal Principle in the Application of Canon Law?" in *The Jurist*, 54 (1994), 581-582.

of an individual alone.”¹⁰⁷ Since St. Thomas considered equity as an aspect of justice, a principle of natural law, he did not explicitly associate it with any evangelical precepts and did not distinguish equity from canonical equity. It goes without saying, however, that all of St. Thomas’s thought was undergirded by a Christian anthropology and not a classicist worldview. St. Thomas saw the world and everything in it as constantly unfolding and being shaped by divine grace.¹⁰⁸

In this brief sketch we see the origins of the above-mentioned characteristics of canonical equity, namely, natural equity, evangelical compassion, and historical consciousness. Such values, deeply rooted and long-valued in our canonical tradition, can only serve to support and guide the administration of discipline in religious institutes.

In this section we have examined the role of rights in the administration of discipline in non-penal cases. As we have noted above, this is an area in which the Church's praxis is becoming increasingly refined. For many decades now, the hierarchical Church, as well as many religious institutes and the apostolates they operate, have been calling for greater respect for human rights globally. Gradually, the Church and its many institutions are improving the example they set regarding how institutions of all levels, and in all aspects, must embody their commitment to those same

¹⁰⁷ COUGHLIN, "Canonical Equity," 414. Cf. *ST*, 2a-2ae, q. 120, a. 1, pp. 276-279.

¹⁰⁸ Cf. COUGHLIN, "Canonical Equity," 418-419.

rights. As De Paolis states, "[t]o proclaim rights without being concerned about their effective protection and safeguard would be a useless assertion lacking in credibility."¹⁰⁹ Many religious institutes would also seem to be facing the additional challenge of correcting the false notion that, due to the vows of obedience of their subjects, religious superiors enjoy absolute authority. We will now turn our attention to an examination of the limits on the authority of religious superiors.

2.3 – Limits on the Power of Superiors

In the previous section we discussed discretionary authority and we noted that it is not defined by a specific grant of powers, but rather, it is a general power circumscribed by certain limits. In this section, at least in regards to the discretionary authority relevant in cases of non-penal misconduct, we will discuss some of those limits.

2.3.1 – Limits in Virtue of the Authority of Superiors

It is interesting to note that only c. 601 describes the practice of the vow of obedience from the standpoint of subjects, whereas numerous canons

¹⁰⁹ V. DE PAOLIS, "Administrative Recourses and Recourses within Religious Institutes," in *Consecrated Life*, 18/2 (1993), 93 (= DE PAOLIS, "Administrative Recourses").

describe how superiors must carry out their office.¹¹⁰ The vow of obedience, of course, is central to the living out of religious life. The development of how the vow of obedience has been understood in religious life is a vast topic that we are unable to examine in great depth in this study.¹¹¹ We note simply that, as we have already discussed above, in the beginning, the rules and laws governing religious life were "private law." In other words, although the various communities were recognized as part of the Church, they governed themselves and created and changed their own statutes without the approval of outside authorities. With the passing of time, however, ecclesiastical authorities became increasingly involved in formally establishing such communities, approving their statutes, and exercising varying degrees of oversight in regards to them. Once the Church began to approve the various rules and constitutions of the institutes, what was private law became public law, and the authority that superiors had heretofore enjoyed in light of the vow of obedience, became authority that they held on behalf of the Church.¹¹²

¹¹⁰ Cf. cc. 617-619, and 626-630. See also A. KAPTIJN, "Submission of the Will and Violation of the Vow of Obedience: Contributions to the Discussion of Canon 601," in *The Jurist*, 56 (1996), 319.

¹¹¹ See N. BAUER, "Three Perspectives on Obedience: Benedict of Nursia, Ignatius of Loyola, and the 1983 Code of Canon Law," in *The Jurist*, 65 (2005), 55-97; D. KNOWLES, *From Pachomius to Ignatius: A Study in the Constitutional History of the Religious Orders*, Oxford, Clarendon Press, 1966; J.M. LOZANO, *Discipleship: Towards an Understanding of Religious Life*, 2nd ed., Chicago, Claret Center for Resources in Spirituality, 1983; J. SCHAEFER, *The Evolution of a Vow: Obedience as Decision Making in Communion*, Piscataway, NJ, Transaction Publishers, 2008.

¹¹² Hill writes, "The authority to decide in concrete instances is found in the religious superior. It derives from the constitutions approved and guaranteed by the hierarchical authority of the Church. It does not derive from the consent of the governed. The informed

Therefore, the most fundamental of all limits on the authority of superiors is that expressed in c. 617:

Superiors are to fulfill their function and exercise their power according to the norm of universal and proper law.

In truth, all of the other limitations on the authority of superiors that we will discuss in the remainder of this section are but subspecies of this single limitation: superiors must exercise their authority in accordance with the law. Of course, the *CIC* includes divine and natural laws, not all the tenets of which are expressly mentioned in the *CIC* or promulgated in other legislation of the Church.

Individuals become members of institutes by professing the evangelical counsels, but those vows are not professed to the institute itself, or to any ecclesiastical authority, but to God, mediated through the law of the Church and of the institute in question.¹¹³ Therefore, it makes sense that superiors can invoke the obedience of their subjects only in ways that are in harmony with the pertinent law. The vow taken to God is absolute, but no superior on earth has the absolute authority to invoke the vow in whatever

and free religious profession of each individual constitutes him or her as a person henceforth subject to the authority of superiors." R.A. HILL, "Authority and Obedience in Consecrated Life," in *CLSAP*, 45 (1983), 224-225.

¹¹³ Cf. c. 618, "Superiors are to exercise their power, received from God through the ministry of the Church, in a spirit of service. Therefore, docile to the will of God in fulfilling their function, they are to govern their subjects as sons or daughters of God and, promoting the voluntary obedience of their subjects with reverence for the human person, they are to listen to them willingly and foster their common endeavour for the good of the institute and the Church, but without prejudice to the authority of superiors to decide and prescribe what must be done."

way he or she pleases, but only in ways that would be in accordance with the will of God. While the precise will of God in a particular situation is often difficult to discern, certain things, such as those that are contrary to divine revelation or Church law, can always be excluded. Even the pope himself, supreme legislator of the Church, must obey divine and natural law.

Regarding the juridical and spiritual elements of the duties of superiors, De Paolis makes the following important distinction:

In their mutual relationship both the strictly juridical elements and the more distinctly spiritual elements are to be kept in mind and highly valued; that which regards the object of obedience by virtue of authority and that which regards instead the counsel, paternal exhortation, and spiritual guidance. If a religious were to consider the role of superior merely in the restricted sphere of the law and the norm, he would bring about an unjust reduction of the superior's role within the community; if the superior were to always act in virtue of his authority as superior, even in what pertains more properly to the field of counsel, exhortation and spiritual guidance, he would bring about a dangerous intrusion into the field of the freedom of conscience of the religious and would manifest a legalistic mentality, which relies more upon the law than on persuasion and fraternal assistance.¹¹⁴

De Paolis's distinction is an important reminder that the ministry of superiors involves much more than simply governance: it also involves the role of spiritual "fatherhood" or "motherhood," which harkens all the way back to the beginnings of coenobitic monastic life. This distinction leads us to the next limitation on the authority of superiors, which is that their authority pertains only to the external forum. Huels writes:

A religious, like all members of the faithful, has a constitutional right to privacy (c. 220). This fundamental right is upheld in religious law by a specific injunction directed to superiors: "Superiors are forbidden (*vetantur*) to induce their subjects in any way whatever to make a manifestation of conscience to them" (c. 630, §5).

¹¹⁴ DE PAOLIS, "Administrative Recourses," 67.

Under a manifestation of conscience comes all matters of the internal forum, matters such as sins, thoughts, feelings, namely, matters treated in the sacrament of penance, in spiritual direction, and in counseling. These are privileged matters that the member is free to reveal or not reveal to superiors, but superiors are prohibited from using their authority to exact such matters from a subject.¹¹⁵

Certainly, the interior life of individual religious is of central importance and, ideally, one's superior would be one of the companions that should assist a member in a time of difficulty. As Huels explains so clearly, however, the superior's *authority* has no place in such intimate matters. Obedience can be demanded only regarding external forum matters and a charge of disobedience can be leveled only because of a failure to execute some lawful, external forum command. It is also important to recall that c. 1728 §2 states: "The accused is not bound to confess the delict nor can an oath be administered to the accused." Although we are not considering delicts per se in our study, the principle given in the canon would still apply, *mutatis mutandis*.

Another limitation on the power of superiors to command obedience is their duty to respect the rights of their members. The various rights of religious have been discussed earlier in this chapter and will not be reviewed again in detail here. It is worth noting, however, that the rights that need protection may not always be self-evident. Canon 18 reminds us that even in cases where, perhaps, some canon does permit the restriction of rights, such

¹¹⁵ J.M. HUELS, "Unlawful Command by a Major Superior," in K.W. VANN and J.I. DONLON (eds.), *Roman Replies and CLSA Advisory Opinions*, Washington, Canon Law Society of America, 1991, 53.

canons are subject to strict interpretation. Some rights which might potentially be infringed upon in some disciplinary case could be: the right to the sacraments (cc. 213 and 843), the right to live religious life (cf. c. 654), the right to privacy (cc. 220, 630 §5, and 1728 §2), the right to the necessities of religious life (c. 670),¹¹⁶ and the right to participate in the apostolate (c. 216).

A further specification of the duty of superiors to use their authority in accordance with the law would include their obligation to obey any specific procedures or mechanisms required by universal or proper law, such as the need to respect the requirements for issuing singular decrees and precepts (cc. 50 and 51), or proper law requirements to consult certain persons before issuing a command under holy obedience. Whatever proper or universal law requires by way of procedure before issuing a command must be respected (e.g., c. 703).

Lastly, superiors can command the obedience of their own subjects only in matters over which the superior has authority or jurisdiction. The proper law of institutes defines the authority of the various superiors regarding territory, persons, and subject matter (c. 622). In addition to not being able to exceed their authority, superiors cannot withdraw or contradict a permission, faculty, or privilege granted to their subjects by a higher authority or law, except in accordance with the rules or laws governing those

¹¹⁶ Things which are not necessities and which are in fact favours or grants from the institute, such as exclusive access to a car, generous allowances for spending money, permissions for travel, etc., could be withdrawn without any process whatsoever.

grants. Nor, of course, can superiors overrule or cancel a command or order of a higher authority, except in accordance with the provisions of the law.

2.3.2 – Limits in Virtue of Competence

Although our topic is not concerned with penal matters per se, it seems reasonable that in cases where it is not clear which superior would be competent to initiate a non-penal disciplinary procedure, the comparable canons of the Church's penal law be applied, *mutatis mutandis*. We will now examine the canons that we believe would provide appropriate guidelines in cases where competence is not clear.

Canon 1320 states that "[t]he local ordinary can coerce religious with penalties in all those matters in which they are subject to him." Presumably, this would be to the exclusion of the relevant superiors of the institute unless, perhaps, there was some aspect of the misconduct that touched directly on the institute and the procedure of the local ordinary did not address that particular aspect. One can imagine that, where a scandalous action by the member brought disrepute upon the institute, the superiors of the institute would want to make clear that they regret and disapprove of the misconduct of their brother or sister in Christ.

The next canon which we believe may be helpful in clarifying cases of disputed competence would be c. 1401, namely, that the Church reserves the right to judge cases that touch on spiritual matters, as well as violations of

ecclesiastical law and sin. Obviously, a complainant might bring an accusation before civil authorities as well as those of the institute or, perhaps, exclusively before civil authorities. In either case, without attempting to block or interfere with the course of justice in the civil system, one can imagine that authorities of the religious institute might be keen to conduct their own investigation, or non-penal misconduct procedure, with regards to the allegations against the member, even if the one leveling the accusations did not do so directly to them. As in the previous case, the motivation would be to ensure proper discipline in the institute, protect the reputation of the institute, and not to be seen to be indifferent to misconduct committed by its members.

Canon 1407 §3 helps to inform which superior would be competent to undertake the non-penal disciplinary procedure. Applying this canon means that one must approach the current superior of the religious, even if the religious is no longer in the territory where the misconduct is alleged to have happened. Or, if the religious has multiple domiciles, the one making the accusation could choose which superior to approach. One difference, however, relative to penal cases, is that c. 1402 would not be applicable. That is, if a religious were transferred after an incident of misconduct, the complainant would need to approach the current superior of the religious, not the superior of the place where the misconduct occurred. Alternatively,

the complainant could approach the supreme moderator or some other higher superior common to both jurisdictions.

Canon 1417 states the principle that all the faithful may bring cases directly to the Holy See. This would not preclude, however, the relevant superior or superiors within the institute from proceeding with the case, unless the Holy See indicated that it had reserved the case to itself. Of course, the right to bring a case to the Holy See does not imply an obligation on the part of the Holy See to accept that case.

Another principle, which is not expressed explicitly in the *CIC* but which arises from the hierarchical nature of the Church, is that a lower superior would not be competent to initiate a procedure against a higher one. For instance, if someone were to make known an accusation of misconduct against a major superior to a local superior, the local superior would be obliged to refer the matter to the supreme moderator, or some other authority above the major superior, if there was one. In a similar manner, if one were to learn of an accusation against the supreme moderator, the matter would have to be referred to the competent Vatican dicastery (e.g., CICLSAL, Evangelization of Peoples, Oriental Churches).

2.3.3 – Limits in Virtue of the Offence

By definition, the non-penal disciplinary procedure that we are proposing would not be applicable in cases that touch penal matters, that is,

the delicts mentioned in *Book VI*. This should be obvious enough in cases that clearly are concerned with penal matters from the start, but one can imagine the scenario where an accusation at first seems to regard non-penal misconduct, but upon further investigation, is seen to touch upon a penal matter. Any superior who is not an "ordinary" in accordance with c. 134 would no longer be competent to proceed with such a case and would be bound to refer the case to the appropriate ordinary. For a superior who is not also an ordinary to continue to handle such a case would be a violation of c. 617. As we will discuss in greater detail in the next chapter, c. 1341 does allow ordinaries to proceed with penal matters in ways other than by a penal process, but only when those means can also be sure to repair the scandal, restore justice, and reform the offender. No authority, however, other than the relevant ordinary can make this determination and even the relevant ordinary cannot do so outside the parameters laid down in c. 1341.

Besides all offences listed in the *CIC*, which are de facto reserved to the authority of one ordinary or another, there are also certain grave crimes against faith and morals that are reserved exclusively to the authority of the CDF.¹¹⁷ Were a religious superior to become aware of the possible commission

¹¹⁷ Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis*, 21 May 2010, in *AAS*, 102 (2010), 419-434, English translation, "Revised Norms on Dealing with Clerical Sex Abuse of Minors and Other Grave Offences," in *Origins* 40 (2010-2011), 145-152 (= *Norms*). The norms themselves define their areas of competence: "The Congregation for the Doctrine of the Faith, according to art. 52 of the Apostolic Constitution *Pastor Bonus*, judges delicts against the faith, as well as the more grave delicts committed against morals and in the

of one of these offences, and he or she was not an ordinary in accordance with c. 134, he or she would have to inform the appropriate ordinary who would undertake a preliminary investigation in accordance with c. 1717. A religious superior who is both an ordinary and the competent superior of the accused religious, could himself conduct the investigation. At the completion of the investigation, if the ordinary were to determine that there is sufficient reason to believe that one or more of the delicts reserved to the CDF has been committed, he would immediately inform the CDF and present to them the elements he has collected. The CDF would then proceed with the case according to its own procedures. Any religious superior who would attempt to address such a delict on his or her own authority, or who, on the contrary, received a credible allegation regarding one of these offences and did not act upon it, would be in violation of c. 617, and also c. 1389.

celebration of the sacraments..." (art. 1, §1). "The delicts against the faith referred to in art. 1 are heresy, apostasy and schism..." (art. 2, §1). There are five possible delicts related to the celebration of the eucharist (cf. art. 3) and six possible delicts against the celebration of the sacrament of penance (cf. art. 4), as well as the delict of the attempted ordination of a woman (cf. art. 5). Also reserved to the CDF are the delicts of the sexual abuse of a minor or of someone who habitually has the imperfect use of reason, as well as the possession of pornographic images of persons under the age of 14 (cf. art. 6).

2.3.4 – Limits in Virtue of the Penalty

No penal sanction, defined as such in the *CIC*, can be imposed apart from the means outlined in the law itself.¹¹⁸ Penal sanctions are divided into the categories of medicinal penalties, also called censures,¹¹⁹ and expiatory penalties.¹²⁰ Penalties are either *ferendae sententiae* (imposed by lawful authority) or *latae sententiae* (incurred automatically).¹²¹ These provisions have the purpose of protecting the faithful from an authority who would attempt to impose a canonical penalty apart from the ways foreseen in the law. Therefore, in the context of our larger discussion of the non-penal disciplinary procedure, such a procedure could never culminate in the imposition of a penal sanction. Only a penal procedure, that is, a judicial or administrative (extrajudicial) procedure, can culminate in the imposition or declaration of a penal sanction.¹²² This means that the non-penal disciplinary procedure can

¹¹⁸ Cf. c. 221 §3.

¹¹⁹ The medicinal penalties outlined in cc. 1331-1333 are the following: excommunication, interdict, and suspension.

¹²⁰ Paragraph 1 of c. 1336 lists the following as expiatory penalties: "1°, a prohibition or an order concerning residence in a certain place or territory; 2°, privation of a power, office, function, right, privilege, faculty, favour, title, or insignia, even merely honorary; 3°, a prohibition against exercising those things listed under n. 2, or a prohibition against exercising them in a certain place or outside a certain place...; 4°, a penal transfer to another office; 5°, dismissal from the clerical state." Canon 1314 also refers to penal remedies and penances but these are not strictly speaking penalties.

¹²¹ Cf. c. 1314.

¹²² As already noted, penalties can also be applied *latae sententiae* but this does not involve a procedure, per se. *Latae sententiae* penalties are further classified as either undeclared or declared. A *latae sententiae* penalty is considered to be undeclared when the offence is occult, or at least unknown to lawful authority. A *latae sententiae* penalty is declared when legitimate authority declares in a public document that the delict has been committed

culminate only in some sort of punishment or correction that is *not* also a penal sanction.¹²³ Furthermore, we do not believe it would be appropriate for a superior to impose a penal sanction outside of a penal procedure even if, in a spirit of contrition or for some other reason, a religious who committed some type of non-penal misconduct voluntarily submitted to one. While such contrition on the part of the member may be laudable, it seems to us that a superior might cause scandal, or at least compromise his or her own credibility in the eyes of other members, if he or she were seen to be imposing sanctions which all members know are beyond his or her authority. The punishment must always fit the crime and to punish non-penal misconduct with a penal sanction would seem, by definition, to be excessive.

As we discussed above, religious enjoy certain rights, some because of their religious consecration, others because they are numbered among the Christian faithful, and still others because of the natural law (basic human rights). While religious do agree to relinquish certain rights by joining an institute and professing the evangelical counsels, they most certainly do not relinquish all their rights nor does any superior, even the supreme moderator,

by certain persons and therefore, *ipso iure*, they are under the penalty the law attaches to the offence.

¹²³ It stands to reason, also, that a religious superior could not impose some punishment that was identical to a penal sanction, but called by a different name. However, religious superiors could lawfully impose certain restrictions, obligations, or prohibitions that are identical to certain penal sanctions for a non-penal reason, such as, for instance, a superior who forbids a priest from celebrating the eucharist because he has dementia and can no longer do so in an edifying way (cf. c. 1044 §2, 2°), or, a superior who restricts the residence of a member for the member's personal safety or health.

have complete liberty to moderate the rights of members as he or she pleases. Canon 223 §2 states: "In view of the common good, ecclesiastical authority can direct the exercise of rights which are proper to the Christian faithful." In terms of our broader discussion, we see two important elements in this canon. The first is that ecclesiastical authority can direct the exercise of rights in view of the common good, but not just for any reason or for some private good. The second is that this canon is concerned with the "rights which are proper to the Christian faithful," that is, not with basic human rights. This stands to reason, in keeping with the above-mentioned principle that an authority cannot limit or revoke a power or privilege that is not in its authority to grant. Fundamental human rights originate in the natural law, that law which God has written into the hearts of all men and women, and as a divine law grant, apart from truly exceptional circumstances, they are not within the power of the Church to limit. Cenalmor writes in relation to this canon:

[I]f ecclesiastical authority has the power to regulate the exercise of rights inherent to and shared by the baptized, it is to keep in mind that this rule finds an inviolable limit in divine law, and that the same common good of the Church demands respect for, and the advancement of, the fundamental rights of the faithful within their just measure. For this reason, any subsequent limitation on those rights should be of an exceptional nature and should be justified on the basis of grave and adequate reasons.¹²⁴

The decision by a superior in a disciplinary case to restrict the exercise of rights of a member is a grave matter that must always be carefully considered, properly motivated, and proportionate. At the same time, even

¹²⁴ D. CENALMOR, "Commentary on Canon 223," 151.

outside of disciplinary matters, religious superiors always retain the authority to limit and to control a member's absence from the religious house, their carrying out of the apostolate, and their access to money.

Aware of the superior's duties to protect the rights of members, and especially those rights that are most fundamental, we consider it beyond the authority of any religious superior to impose some punishment perpetually as a result of a non-penal disciplinary procedure. Canon 1342 §2 states: "Perpetual penalties cannot be imposed or declared by decree." While the context of this canon is clearly the application of penal sanctions, we believe that the same principle should apply to non-penal sanctions, since the non-penal disciplinary procedure that we are considering is clearly more closely related to an administrative procedure than a judicial procedure.

We realize, however, that recent developments in the practice of the Roman Curia do in fact allow for the imposition of certain perpetual penalties by means of administrative decree when those decrees are approved by the relevant dicastery.¹²⁵ Perhaps, then, superiors may impose perpetual punishments in special cases, when approved to do so by the supreme moderator or some other external review mechanism.

¹²⁵ See CONGREGATION FOR THE CLERGY, *Circular Letter on Special Faculties and Procedure for Laicizing Some Priests*, 18 April 2009, in *Studies in Church Law*, 5 (2009), 45-56 and *Norms*.

Conclusion

In this chapter we have examined the significant issues that set the parameters for the administration of discipline in non-penal cases. In the first section, we looked at the question of the nature of the authority exercised in religious institutes and concluded that, although it is not expressly labeled as such, all superiors in religious institutes would seem to enjoy the ecclesiastical power of governance, albeit they do not all enjoy the same prerogatives. Those recognized in law as ordinaries are capable of carrying out a penal procedure involving their subjects, whereas religious superiors who are not ordinaries cannot carry out such a penal procedure. All religious superiors would be able to follow the non-penal disciplinary procedure that we are concerned with, whether or not they are ordinaries.

The second section examined the rights that would be operative in the administration of non-penal disciplinary procedures. As we saw, this is a sensitive area since it is an area of recent and rapid development and the understanding of the rights of members vis-à-vis their superiors and their institutes is still emerging. The old presumption that religious superiors had *carte blanche* authority to do as they pleased is becoming much more nuanced as the Church expresses more clearly the rights of her various members, and as the institutions of the Church become more conscientious about modeling the respect for rights which they regularly demand from institutions and governments outside the Church. Although an abundance of

experience and academic analysis have greatly enhanced our appreciation for, and sophistication in, addressing the complex issues related to human rights, the application of these new insights to the role of rights within the Church is challenging because the Church is an entity unlike any other.

The final section delineated the boundaries within which a non-penal administrative procedure would be possible. It is, of course, of the utmost importance that any such procedure be carried out in accordance with the law, and the limitations on such procedures are not always immediately evident.

With this background, we can now turn our attention to an examination of the disciplinary procedures that already exist in the *CIC*. These procedures will then serve as the basis for the disciplinary procedure we will propose in the final chapter.

CHAPTER III

ADMINISTERING DISCIPLINE ACCORDING TO THE *CIC*

Introduction

In this chapter we will examine select canons that are used in disciplinary cases and which will serve to inform the development of the non-penal disciplinary procedure in the fourth chapter. We will examine canons from *Book II* that may be enacted by superiors of all religious institutes as well as canons from *Book VI* that can be enacted only by those religious superiors who are also ordinaries in accordance with c. 134 §1. Of special importance will be our examination of cc. 1341 and 695 §1, since these canons refer to the authority of the superior to decide whether or not it is necessary to pursue any procedure at all. Lastly, we will examine cc. 1321-1330, and the norms they establish for assessing an offender's liability for punishment.

3.1 – Modes of Discipline Available in *Book II*

In this section we will examine three means of discipline that are available to all religious superiors in specific situations. We will examine the purpose of each procedure, in what circumstances it can be used, and how it is enacted.

3.1.1 – Imposed Exclaustration (c. 686 §3)

Imposed exclaustration is a relatively new juridical institute, having been in use only since 1953.¹ It has a distinct nature, being neither a penalty nor a favour but most closely resembling a precept, albeit one that includes elements of a dispensation.² Ramos describes imposed exclaustration in the following manner:

Imposed exclaustration was intended to respond to especially grave situations where a religious' personality and behaviour made life in the institute very difficult but, on the other hand, still did not constitute facts making possible a dismissal process. Imposed exclaustration, then, is intended to protect the interests of the community in the face of difficult individuals whose personalities are a constant source of tension in the community. Likewise, it seeks to safeguard canonical equity and charity toward the individuals who are frequently victims of their own defects.

The difference between imposed exclaustration and the indult of exclaustration appears in the way exclaustration itself is qualified. The indult of exclaustration is a favour granted to the religious who requested it. In contrast, imposed exclaustration is requested by the supreme moderator with the consent of his council, and although it is not a penal sanction, it has an odious character, since it is imposed by competent authority on the individual and deprives him of some rights.³

We see that imposed exclaustration bears some of the marks of a sanction – it requires certain actions, deprives one of certain rights, and is imposed by legitimate authority – yet it is not imposed because of the commission of some delict. Rather, it is imposed, typically, as the result of some habitual behaviour or personality trait that renders the person unsuited for

¹ M. RUESSMANN, *Exclaustration: Its Nature and Use According to Current Law*, JCD diss., Rome, Editrice Pontificia Università Gregoriana, 1995, 22 (= RUESSMANN, *Exclaustration*).

² M. RUESSMANN, "Aspects of Exclaustration," in *Periodica*, 84 (1995), 252-253 (= RUESSMANN, "Aspects of Exclaustration").

³ F.J. RAMOS, "Commentary on Canons 686 and 687," in *Exegetical Comm*, vol. II/2, 1842 (= RAMOS, "Canons 686 and 687").

community life. Either because the necessary criteria for dismissal or expulsion have not been satisfied, or because equity and charity dictate that dismissal or expulsion would be excessive in this particular case (e.g., because of advanced age or illness), the decision is made for the religious to live permanently outside a house of the institute without, however, all ties to the institute being severed.⁴

Since imposed exclaustation limits certain rights, and in order to ensure that it is not imposed arbitrarily, it is imposed following a defined procedure. While the canons do not describe the necessary procedure in detail, the praxis of the Holy See indicates that it closely follows the pattern for dismissal outlined in cc. 695, 699-700:⁵ namely, after the need for imposed exclaustation has been decided upon by the major superior, the proofs are collected, and then these proofs are made known to the member who is allowed an opportunity for self-defence. The proofs and the response of the member are then forwarded to the supreme moderator who considers the case with his or her council. If the supreme moderator and council are in

⁴ Given that exclaustation can be imposed at the discretion of the competent authority, the reasons why it may be imposed are potentially limitless. In addition to the reasons given above, various authors suggest other possible reasons: community life has become unbearable for the member to the point that it endangers his or her wellbeing; repeated (non-culpable) disobedience; scandalous example of religious life; untreated alcoholism or other addiction. See, RUESSMANN, "Aspects of Exclaustation," 242-243; P.D. THOMAS, *Exclaustation in the Code of Canon Law*, JCD diss., Saint Paul University, 1993, 168 (= THOMAS, *Exclaustation*).

⁵ RAMOS, "Canons 686 and 687," 1843.

favour of requesting the imposed excommunication, the matter is referred to the competent authority.⁶

There are two major differences between imposed excommunication and dismissal. First, although the reasons for imposed excommunication must be grave, external, and juridically proven, unlike for dismissal, they do not need to be imputable. Second, unlike dismissal according to cc. 695 and 699-700, the decree itself is not issued by the supreme moderator and confirmed by the competent authority but is issued by the competent authority upon the request of the supreme moderator and council. For this reason, the supreme moderator lacks authority on his or her own to end the imposed excommunication and to readmit the member to community life, but instead must request the suspension of the precept from the competent authority unless, it were given for a fixed period of time which has now finished.

The right that is most clearly infringed upon by imposed excommunication is the right to live in a religious community that one acquires with profession of the vows.⁷ The *CIC* requires religious to live in community and regulates in what circumstances they may be allowed to be absent from the religious house.⁸ It is therefore an anomaly that in certain circumstances the Church

⁶ That is, the diocesan bishop for institutes of diocesan right, and the CICLSAL or the Congregation for the Oriental Churches for institutes of pontifical right. Cf. c. 686 §3 and *ibid.*, 1845.

⁷ Cf. cc. 654.

⁸ Canon 665 §1: "Observing common life, religious are to live in their own religious house and are not to be absent from it except with the permission of their superior. If it

would order a particular religious to refrain from living in any house of the institute.

The only other right that is always lost by exclaustation is active and passive voice,⁹ although it is possible that other limitations, such as the denial of the right to wear the habit, could be included in the precept. The precept could also contain certain exceptions, such as the right of the religious to visit the community periodically or to attend certain events like funerals. Exclaustation imposed on a religious priest would also require the consent of the ordinary of the place in order for him to exercise priestly ministry.¹⁰

Unlike voluntary exclaustation, imposed exclaustation potentially has no time limit, nor does the exclaustation end just because the reason it was imposed ends. Most often, however, it is imposed for a determined period of time which can be renewed. As has already been mentioned, the supreme moderator lacks the authority to end the imposed exclaustation and must refer the matter back to the competent authority.

In this way we see that imposed exclaustation is a helpful innovation for maintaining the peace and integrity of a religious community when it

concerns a lengthy absence from the house, however, the major superior, with the consent of the council and for a just cause, can permit a member to live outside a house of the institute, but not for more than a year, except for the purpose of caring for ill health, of studies, or of exercising an apostolate in the name of the institute."

⁹ Cf. c. 687.

¹⁰ Cf. c. 686 §1. The canon states this about religious clerics seeking voluntary exclaustation but it would seem also to apply in cases of imposed exclaustation, at least to the extent that the religious priest desired to continue to exercise public ministry.

becomes disturbed by the comportment of one of its members, especially in cases where the member cannot be faulted for his or her behavior and where penal sanctions or dismissal would not be in accord with charity and equity.

3.1.2 – Dismissal from the Institute (cc. 694-701)

The canons governing dismissal from a religious institute address three types of dismissal: automatic, mandatory, and facultative. Not surprisingly, the procedure governing *ipso facto* dismissal (c. 694) is the simplest of all the dismissal procedures, because there is little to decide or evaluate. All that is required is that sufficient proof of one of the causes given in the canon is collected, and that the proof is deemed sufficient by the major superior to prove a cause given in the canon; in this situation, the member is dismissed by operation of the law itself.

Canon 694 gives two possible causes for *ipso facto* dismissal, namely that the member "has defected notoriously from the Catholic faith" or "has contracted marriage or attempted it, even only civilly." It is important to note that "to have defected notoriously from the Catholic faith" includes a broader range of actions than just heresy, apostasy, or schism as described in c. 751. Morrissey describes the meaning of this phrase when he writes:

A person who notoriously abandons the Catholic faith is first of all one who receives ordination (or the equivalent) in another church or ecclesial community, or who has made a public profession of faith in it, or has

registered as a member. Second, it is a person who is an apostate from the faith, a schismatic, or a heretic (cf. c. 751).¹¹

He goes on to note that abandoning the faith need not be done in writing, but that it must involve some sort of formal act that is "known by a large number of people"¹² (i.e., it must be notorious). Written proof of the abandonment is required, but such written proof, in addition to official documentation, could take the form of written testimony given by reliable witnesses or a personal declaration of the member.

Likewise, some written proof of the contracted marriage or attempted marriage is necessary for the ipso facto dismissal to be proven. In either case, once the proofs have been collected, the major superior assesses their sufficiency with his or her council and if the proofs are deemed sufficient to prove the fact, then drafts a decree declaring this fact.¹³

A noteworthy difference between c. 695 governing mandatory dismissal and c. 694 governing ipso facto dismissal, is that, for c. 695 to be applicable, all the necessary elements of the delict must be in place in order for the dismissal to be operative. Most often the element that is of key importance is whether or not the commission of the delict is fully imputable.

¹¹ F.G. MORRISEY, "Commentary on Canon 694," in *Exegetical Comm*, vol. II/2, 1861-1862 (= MORRISEY, "Canon 694").

¹² *Ibid.*, 1862.

¹³ It is interesting to note that the major superior can execute this form of dismissal whereas the other two forms of dismissal are both enacted by the supreme moderator. Furthermore, the vote or consent of the major superior's council is not required, only that they are consulted.

Canon 1321 §3 presumes imputability – namely, that people have intended to do what they are known to have done – but some sort of psychic ailment, either long-term or temporary, can diminish imputability with the result that c. 695 would not be operative. That is why, unlike c. 697, which requires the member to be warned regarding his or her actions together with a threat of dismissal before he or she can be dismissed, a warning can be helpful in c. 695 cases, even though it is not strictly required. A prior warning, of course, would foreclose any possibility that the member could claim to be unaware that such behaviour is a delict for which he or she must be dismissed.¹⁴

The delicts included in c. 695 which require dismissal are, not surprisingly, major delicts which are completely irreconcilable with religious life: murder, kidnapping, grave violence, abortion, and various sexual offences. While the non-sexual delicts are presumably rare, the sexual offences enumerated in c. 1395 are not unknown.¹⁵ The first paragraph of c. 1395 refers to repeated or ongoing sexual offences: concubinage or other ongoing, scandalous external sins against the sixth commandment. The second paragraph refers to offences which are so grave that even a single

¹⁴ Cc. 1323 and 1324 list exculpating and mitigating circumstances, respectively. Since the delict in question must have been complete and fully imputable, even the presence of one mitigating factor would mean that the mandatory dismissal would not be operative. Although it is presumed that as part of their formation that religious are instructed about the laws governing their vocation, a given member could always claim the contrary.

¹⁵ C. 1395 uses the technical phrase of a sin or offence "against the sixth commandment of the Decalogue." For a discussion of the origin and meaning of this phrase, see J.H. PROVOST, "Offenses Against the Sixth Commandment: Toward a Canonical Analysis of Canon 1395," in *The Jurist*, 55 (1999), 632-663.

commission of one of these delicts warrants dismissal unless, as c. 695 §2 states, "the superior decides that dismissal is not completely necessary and that correction of the member, restitution of justice, and reparation of scandal can be resolved sufficiently in another way."¹⁶ In any case, c. 695 treats of delicts that are so antithetical to religious life that the *CIC* demands that their commission result in the dismissal of the member from the institute. Canon 695 §2 describes how such dismissals are to proceed:

In these cases, after the proofs regarding the facts and imputability have been collected, the major superior is to make known the accusation and proofs to the member to be dismissed, giving the member the opportunity for self-defense. All the acts, signed by the major superior and a notary, together with the responses of the member, put in writing and signed by that member, are to be transmitted to the supreme moderator.

This canon explains what must be done at the level of authority closer to the offender, namely, the major superior. Canon 699 will determine what must be done at the level of the supreme moderator concerning these cases and those of c. 696.¹⁷

¹⁶ This clause will be discussed in detail later in the chapter. It is also important to note that, although the delict outlined c. 1395 refers exclusively to clerics, its use in c. 695 clearly refers to all religious, lay and clerical alike. See S. HOLLAND, "Canonical Dismissal from Institutes of Consecrated Life and Societies of Apostolic Life," in *Studies in Church Law*, 2 (2006), 66 (= HOLLAND, "Canonical Dismissal").

¹⁷ An exception to the application of this canon are the more grave delicts reserved to the CDF. Art. 6, §1 of *Norms* states, "1° the delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years; in this case, a person who habitually lacks the use of reason is to be considered equivalent to a minor; 2° the acquisition, possession, or distribution by a cleric of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology." Although, as already noted, c. 695 applies the delicts mentioned in c. 1395 to all religious, these delicts are reserved to the CDF only when committed by a cleric. In cases where a major superior suspects a clerical member has committed one of the reserved delicts, after completing the initial investigation in accordance with c. 1717, the case would have to be referred to the CDF. See section 2.3.3.

Canon 696 §1 states: "A member can also be dismissed for other causes provided that they are grave, external, imputable, and juridically proven." It then proceeds to give a non-taxative list of possible reasons for dismissal, namely:

habitual neglect of the obligations of consecrated life; repeated violations of the sacred bonds; stubborn disobedience to the legitimate prescripts of superiors in a grave matter; grave scandal arising from the culpable behavior of the member; stubborn upholding or diffusion of doctrines condemned by the magisterium of the Church; public adherence to ideologies infected by materialism or atheism; the illegitimate absence mentioned in c. 665, §2, lasting six months; other causes of similar gravity which the proper law of the institute may determine.

Not surprisingly, given that this canon allows for dismissal for reasons even beyond those that are listed in the canon, the procedure to be followed is much more developed than those we have seen in cc. 694 and 695. The procedure for facultative dismissal unfolds in two stages, one at the level of the major superior, addressed in c. 697, and the other at the level of the supreme moderator, addressed in c. 699.¹⁸

Canon 697 requires that the major superior hear his or her council even before initiating the facultative procedure for dismissal. If the decision is made to pursue dismissal, the first step is to "collect or complete the proofs."¹⁹ The major superior must then appropriately warn the member that he or she is in danger of being dismissed, giving the reason and sharing with the

¹⁸ C. 699 also describes how the supreme moderator must proceed in cases governed by c. 695. Of course, in institutes which are not divided into provinces both stages would be completed at the level of the supreme moderator.

¹⁹ C. 697, 1°.

member the proofs, so as to provide the member with an opportunity for self-defense. If the member does not respond, or responds in a way that the major superior deems insufficient, the major superior must warn the member again after a period of at least fifteen days since the initial warning.²⁰ If even the second warning fails to bring about the reform of the member within fifteen more days, the major superior and his or her council acting collegially, is to evaluate the proofs and the testimony of the member (if any has been given) and to decide if the member has shown sufficient incorrigibility to warrant dismissal. If they decide in the affirmative, then "the major superior is to transmit to the supreme moderator all the acts, signed personally and by a notary, along with the signed responses of the member."²¹

Canon 699 describes what is necessary at the level of the supreme moderator in order to complete the dismissal. It states:

§1. The supreme moderator with the council, which must consist of at least four members for validity, is to proceed collegially to the accurate consideration of the proofs, arguments, and defenses; if it has been decided through secret ballot, the supreme moderator is to issue a decree of dismissal with the reasons in law and in fact expressed at least summarily for validity.

§2. In the autonomous monasteries mentioned in can. 615, it belongs to the diocesan bishop, to whom the superior is to submit the acts examined by the council, to decide on dismissal.

Two aspects of this canon pertain to validity: first, the council and second, the decree. The council must consist of at least four members in addition to the

²⁰ Morrissey states that the interval between warnings should not extend beyond a period of three months. See F.G. MORRISSEY, "Commentary on Canon 697," in *Exegetical Comm*, vol. II/2, 1872. These warnings must take place either in writing or before two witnesses (c. 697, 2°).

²¹ C. 697, 3°.

supreme moderator and they must proceed collegially by secret ballot. Although the decision is made collegially, the supreme moderator alone issues the decree. For validity, the decree must contain the reasons in law and in fact, at least in summary form.

Canon 700 states: "A decree of dismissal does not have effect unless it has been confirmed by the Holy See, to which the decree and all the acts must be transmitted; if it concerns an institute of diocesan right, confirmation belongs to the bishop of the diocese where the house to which the religious has been attached is situated."²² For validity's sake, the decree must also include the member's right to make recourse within ten days of notification. Such recourse suspends the effect of the decree, although the competent superiors could make use of expulsion or imposed exclaustation²³ in the interim, if they had not done so already.

These canons governing facultative dismissal contain numerous elements that are necessary for validity.²⁴ The reason for this should be obvious: the member's acquired right to live religious life is at stake and the

²² The diocesan bishop of domicile exercises this function for religious of diocesan right.

²³ If granted by the Holy See following the procedure described in the previous section.

²⁴ One, the supreme moderator must act with his or her council. Two, the council must have a minimum of four members. Three, the council decides collegially and by secret ballot. Four, the decree must contain the motivating reasons in law and in fact. Five, the decree must include the right of the member to make recourse within ten days. Six, the decree must be confirmed by the Holy See or the competent diocesan bishop for a congregation of diocesan right to be effective.

Church wants to be certain that no one is ever deprived of this right arbitrarily. Especially when the Church is not strictly limiting grounds for dismissal, such as in c. 696, it is only prudent that the law ensures that the reasons for the dismissal are sound and the procedure is rigorous. This is especially true since the religious superiors and council members who are participating in the procedure, which may conclude with something closely akin to the imposition of a penalty, are not often experts in the Church's penal law. The *CIC* ensures that all tribunal judges have at least a licentiate,²⁵ whereas it is less likely that those carrying out these comparable functions in cases of dismissal from a religious institute, have such training. Indeed, the question of whether or not dismissal from a religious institute constitutes a penalty is an important one that has recently been subject to debate.

In his cover letter presenting the new draft of *Book VI* to the deans of the faculties of canon law in July of 2011, Cardinal Francesco Coccopalmerio, president of the Pontifical Council for Legislative Texts, specifically asked the faculties to offer their opinion on the question (among others) of whether or not dismissal from a religious institute was penal in nature.²⁶ The question is important for a number of reasons. Firstly, if dismissal is penal in nature it would be governed by additional safeguards in the *CIC*, such as, c. 18 ("laws

²⁵ C. 1421 §3.

²⁶ Coccopalmerio wrote: "In modo particolare ci sarebbe utile conoscere il parere ... circa la natura penale o meno della dimissione da un Istituto religioso." PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, prot. 13254/2011, letter to the deans of faculties of canon law presenting the new draft of *Book VI*, 26 July 2011, 2.

which establish a penalty ... are subject to strict interpretation) and c. 1342 §2 ("perpetual penalties cannot be imposed or declared by decree"). Secondly, the question of whether or not it could be administered by non-ordinaries would need to be considered as well as whether or not it was appropriately addressed apart from the other canons of *Book VI*. As we have just seen, dismissal must follow the commission of certain delicts,²⁷ which certainly colours it with the light of a penalty, but, at the same time, dismissal may follow from the commission of certain acts which are not criminal and which are not in themselves even sinful outside the context of religious life (e.g., entering into a marriage).²⁸

Borek examines the question of whether or not dismissal according to c. 694 is rightly considered a *latae sententiae* expiatory penalty and concludes that it is not. After a careful examination of the relevant canons he notes that, although the commission of the delicts²⁹ mentioned in c. 694 results in dismissal without a decision on the part of any authority but simply by operation of the law itself, and because of this it resembles a *latae sententiae* penalty, significant differences remain. First of all, dismissal is expiatory in

²⁷ Cf. c. 695.

²⁸ Cf. c. 696.

²⁹ As noted above, the meaning of "defected notoriously from the Catholic faith" (c. 694 §1 1°) is broader in scope than simply the delicts of heresy, apostasy and schism included in c. 1364.

nature and not medicinal like the majority of *latae sententiae* penalties.³⁰ Furthermore, dismissal is permanent whereas medicinal penalties must end when contumacy ends.³¹ He notes that the *latae sententiae* expiatory penalties in the *CIC* are always prohibitions not privations, such as the prohibition against the exercise of some power, office, function, right, privilege, faculty, favour, title, or insignia.³² He notes that these prohibitions never alter someone's state of life the way dismissal does with its consequent permanent loss of all rights and obligations related to religious life.³³ He goes on to point out that dismissal cases based cc. 695 and 696, follow a *sui generis* type of administrative procedure that is distinct from any other administrative or judicial process, including the penal one. He also notes that dismissal cannot be considered a penalty because it is not always brought about by the commission of a delict but often simply because there is a grave lack of an essential quality or appropriate behaviour in the member. Furthermore, perpetual penalties cannot be imposed by a decree.³⁴ But he also notes that dismissal includes not just the loss of certain rights, which is punitive, but also the loss of certain obligations, which is a grace, especially for someone

³⁰ D. BOREK, "La dimissione dei religiosi a norma del can. 694 del *Codex* del 1983: È una pena espiatoria *latae sententiae*?," in *Commentarium pro religiosis et missionariis*, 81 (2000), 67 (= BOREK, "La dimissione dei religiosi").

³¹ Cf. 1358.

³² Cf. c. 1336.

³³ BOREK, "La dimissione dei religiosi," 94.

³⁴ C. 1341 §2. See *ibid.*, 95.

who has shown himself or herself unable or unwilling to live the vows. Ultimately, Borek concludes that dismissal is a type of sanction in the broad sense, but that it does not fit the definition of either an expiatory penalty or a censure. Dismissal is not intended as a punishment for the commission of certain crimes (although the commission of certain delicts can bring it about), but as a means to maintain discipline in order that the institute can continue to attain the ends for which it was founded.³⁵

When Astigueta considers the question of whether or not dismissal is rightly considered a penalty, he also concludes that it is not. He attributes the confusion around the issue to a mistaken conflation of the terms "sanction" and "penalty." He traces the origins of the terms and then notes how they are used in the *CIC*. He notes that the word *sanction* is used without qualification only in the title of *Book VI* and in two other places in the *CIC* outside *Book VI*.³⁶ He mentions that it is not easy to discern the difference between the terms *sanction* and *penalty* until one examines cc. 1311 and 1312, together with the title of *Book VI* and the title of Part I of *Book VI*, wherein it becomes clear that a *penalty* or *penal sanction* is a subset of the broader category of *sanction*. He goes on to explain that, "we understand the sanction as a response of the legal

³⁵ Ibid.

³⁶ Cc. 96 and 1457 §2. See, D.G. ASTIGUETA, "La pena come sanzione: un contributo su questo concetto," in *Periodica*, 101 (2012), 508 (= ASTIGUETA, "La pena come sanzione").

system to those activities which deviate from the law"³⁷ whereas a penalty is a specific type of sanction that results from the commission of a delict. He then examines certain sanctions that are not penalties, for instance the institution of irregularities (c. 1041), which deprive one of the ability to receive or exercise Holy Orders. He observes that they can arise because of a defect in the person or because of the commission of some offence. He also notes, however, that the irregularity is distinct from a penalty that may apply because of the commission of a delict, such as in the case of one who procures an abortion (c. 1398). One who helped procure an abortion could have the penalty of excommunication remitted, but the irregularity would remain unless removed by competent authority.

Astigueta also notes that certain types of suspensions are non-penal sanctions. Of course, there are suspensions which are penalties, as described in c. 1336 §1, 3°, but there are also sanctions that very closely resemble a suspension, such as the one described in c. 1722, which are not a penalty.³⁸ In the same vein, he also cites the obligation of the ordinary to suspend a priest who requests to be dispensed from the obligations of the clerical state.³⁹

³⁷ "Intendiamo la sanzione come una risposta dell'ordinamento giuridico verso quelle condotte che di discostano dalla legge." Ibid., 510.

³⁸ C. 1722 does not use the word "suspension" but instead says that, "the ordinary ... can exclude (*arcere*) the accused from the sacred ministry or from some office and ecclesiastical function."

³⁹ ASTIGUETA, "La pena come sanzione," 529.

Lastly, Astigueta cites c. 1457 regarding the disciplining of judicial officials and compares it with c. 1389 regarding abuse and neglect of office and examines what is being distinguished between the two canons. Would not any abuse or neglect by a tribunal official be included within the scope of c. 1389? He posits that, although both canons call for penalties to be imposed upon the relevant delinquents, the penalties called for by c. 1457 §1 are not true penal sanctions but are mere non-penal sanctions, whereas those called for by c. 1389 are true penal sanctions. What is the difference? The finality of the sanctions. Astigueta argues that c. 1389 calls for “a true and proper penalty, intended for the safekeeping of the common good of the Church”⁴⁰ whereas those called for by c. 1457 are intended “to guarantee the peaceful exercise of rights of the faithful within the administration of justice.”⁴¹ The difference between the sanctions is further highlighted by the location of the two canons, c. 1389 in *Book VI* and c. 1457 in *Book VII*. It is by means of these examples that Astigueta concludes that dismissal from a religious institute is a sanction, but not a penal sanction. Why? Because of how it is enacted (a *sui generis* administrative procedure), the reason why it is enacted (to maintain the discipline and integrity of the institute), and where it is found in the *CIC* (*Book II*).

⁴⁰ “[È] una pena vera e propria, destinata alla tutela del bene comune della Chiesa.” Ibid., 532.

⁴¹ “[G]arantire il pacifico esercizio dei diritti dei fedeli all’interno dell’amministrazione della giustizia.” Ibid.

Abbass observes that the *CCEO* preserves the right to appeal against a decree of dismissal from a religious institute by means of a judicial procedure, just as under previous norms in both the Eastern and Latin Churches, perpetually professed religious of exempt clerical institutes could be dismissed exclusively by a judicial procedure. He examines how various authors view the current provisions for dismissal in both East and West and he notes that, although some appreciate the speed and simplicity of the new system, others are concerned that the ability of the one dismissed to exercise his or her right of defense is more limited.⁴² Given the differences in the various provisions, it is impossible to ascertain with certainty which is more likely to produce a fair outcome, although it is nearly certain that those comprising a tribunal will be trained in canon law whereas no such guarantee exists for the officials of a religious institute or even in some cases for the officials of a dicastery of the Holy See. However, the expectation that all cases of dismissal be handled by a tribunal makes sense only when dismissal is viewed as a penalty. If dismissal is a non-penal sanction, as Borek and Astigueta argue, this author sees no reason why such a disciplinary matter cannot be left to the relevant authorities of the religious institute, provided that the procedure is appropriately structured in order to supply the necessary safeguards, especially those related to the right of defense.

⁴² J. ABBASS, "Dismissal from Religious Institutes of the Latin and Eastern Catholic Churches," in *Commentarium pro religiosi et missionariis*, 78 (1997), 373-376.

3.1.3 – Expulsion (c. 703)

Expulsion is an emergency solution to the problem of a religious whose presence in the community has suddenly become intolerable. The canon states that a religious may be expelled for "grave external scandal or [for] most grave imminent harm to the institute." De Paolis points out that, for the first reason to apply, the immanent harm must be grave in both reason and exteriority.⁴³ For the scandal to be "exterior" means it must be scandalous outside the religious community as well as inside it. To say that the harm must be imminent is to say that, if it is not already present, it is clearly threatening.⁴⁴ Also, the threatened harm must be to the institute in general and not just to select persons.⁴⁵ The canon presupposes that a transfer to another house is an insufficient remedy,⁴⁶ and that being expelled from one house means the religious cannot be admitted to a different house of the same institute.⁴⁷

⁴³ V. DE PAOLIS, *La vita consacrata nella chiesa*, Bologna, Edizioni Dehoniane Bologna, 1991, 397 (= DE PAOLIS, *La vita consacrata*).

⁴⁴ Cf. S.L. HOLLAND, "Commentary on c. 703" in *CLSA Comm2*, 873 and *ibid*.

⁴⁵ E. McDONOUGH, "Commentary on c. 703," in J. HITE, S. HOLLAND and D. WARD (eds.), *A Handbook on Canons 573-746: Religious Institutes, Secular Institutes, Societies of the Apostolic Life*. Collegeville, MN, Liturgical Press, 1985, 264.

⁴⁶ L. CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, 3rd ed., Bologna, Edizione Dehoniane Bologna, 2011, vol. 1, 835 (= CHIAPPETTA, *Il Codice di diritto canonico*). Expulsion, which is not a penal measure, is distinct from the expiatory penalty described in c. 1337 that would impose or prohibit a religious's place of residence.

⁴⁷ J. BEYER, *Le droit de la vie consacrée: commentaire des canons 573-606*, Paris, Editions Tardy, 1988, 201 (= BEYER, *Le droit de la vie consacrée*).

Canon 703 states that either the major superior acting alone can enact the expulsion or, "if there is danger in delay," even the local superior can do so with the consent of his or her counsel. The last clause of the canon notes that, if necessary, the major superior should begin one of the processes of dismissal or refer the matter to the Apostolic See, which makes clear that expulsion is meant as an emergency provision until a more permanent solution is found.⁴⁸ In referring the case to the Apostolic See, various outcomes are possible, such as, guidance for how the relevant superiors should proceed, the grant of a decree of imposed excommunication, or even, in grave and compelling cases, a decree of dismissal from the institute. Also, if the superiors proceeded unjustly, the Apostolic See could reverse the expulsion.⁴⁹ A religious can be subject to expulsion regardless of his or her culpability for the offending behaviour.⁵⁰

Expulsion is an institute that is not often used but at the same time it is clearly necessary given the time which justice and precision demand of the more permanent resolutions to such difficult situations.

⁴⁸ Of course, it would be wholly inappropriate to leave a religious indefinitely in a state of expulsion without any further disciplinary action or attempt at reconciliation. The obligation to live in one's proper house is a fundamental obligation of all religious (c. 665). Cf., D.J. ANDRÉS, *El derecho de los religiosos: comentario al Código*, 4th Spanish, 2nd Italian ed., Rome, Edizioni, 1999, 648 (= ANDRÉS, *El derecho de los religiosos*).

⁴⁹ See, DE PAOLIS, *La vita consacrata*, 397 and *ibid.*, 649. The Apostolic See can dismiss a religious even without the usual processes described in the *CIC*. In cases of unjust expulsion, the religious can make recourse to the Apostolic See and even seek redress. Cf., BEYER, *Le droit de la vie consacrée*, 202.

⁵⁰ BEYER, *Le droit de la vie consacrée*, 201 and CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, 835.

3.2 – Modes of Discipline Available in *Book VI*

In this section we will examine some of the modes of discipline applicable to religious that are found in *Book VI*. Canon 1341 states, "to impose or declare penalties ... [a]n ordinary is to take care to initiate a judicial or administrative process." According to c. 134 §1, major superiors of clerical religious institutes of pontifical right are ordinaries in regards to their own members. This means that among all religious superiors only those that qualify as "major superiors" and who pertain to "clerical religious institutes of pontifical right" can impose or declare penalties on their members.⁵¹ Nonetheless, as we shall see, superiors who are not ordinaries can make use of certain devices which closely resemble sanctions.

3.2.1 – Penal Precepts (c. 1319)

Canon 1319 states:

§1. Insofar as a person can impose precepts in the external forum in virtue of the power of governance, the person can also threaten determinate penalties by precept, except perpetual expiatory penalties.

§2. A penal precept is not to be issued unless the matter has been considered thoroughly and those things established in cc. 1317 and 1318 about particular laws have been observed.

⁵¹ In theory, major superiors of clerical religious institutes of pontifical right could establish tribunals to judge penal cases but in practice this is almost unheard of. Instead, they typically opt to impose or declare penalties by means of an administrative process. This process will be discussed in detail later in the chapter.

A penal precept is a type of precept⁵² to which has been attached the threat of a determined penalty for failure to comply. Unlike laws or general decrees that apply to a population in general and require legislative power to enact, penal precepts apply to a specific person or persons and require only executive power to be enacted. Although all religious superiors who enjoy the power of governance can enact precepts, only major superiors and general chapters of clerical religious institutes of pontifical right can enact penal precepts.⁵³

The penalty attached to the precept must always be determined, that is, explicitly identified. In a penal precept, the penalty can never be left indeterminate, and c. 1319 itself forbids the threat of perpetual expiatory penalties.⁵⁴ All penal precepts must be in accord with the canons on singular decrees and precepts (cc. 48-58). Sanchis states:

⁵² Canon 49 describes a precept: "A singular precept is a decree which directly and legitimately enjoins a specific person or persons to do or omit something, especially in order to urge the observance of law."

⁵³ "Although local and district superiors, who are not major superiors, of pontifical clerical religious institutes, have the power of governance in the external forum, it seems that they do not have the authority to impose penal precepts... Since according to c. 1341 an ordinary can begin a judicial or administrative procedure to impose a penalty, it seems that superiors who are not ordinaries cannot impose penal precepts; they do not have the authority to enforce their observance." W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd ed., Ottawa, Faculty of Canon Law, Saint Paul University, 2003, 20-21 (= WOESTMAN, *Ecclesiastical Sanctions*). See also A. CALABRESE, *Diritto penale canonico*, Milan, Edizioni paoline, 1990, 20-21. The vicars of major superiors cannot impose penal precepts. See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 630.

⁵⁴ Also excluded from consideration, in light of the law itself are the following: expiatory penalties not foreseen in the law (c. 1312 specifies that only "the law can establish other expiatory penalties"); perpetual censures (c. 1358 §1 makes these impossible); and *latae sententiae* general suspensions (c. 1334 §2 forbids this). See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 630.

The legitimacy of a precept is determined by its essential elements, which are competence, written form and notification or summons. Functional competence is executive power in the external forum, territoriality, personally or materially determined. The external form of a precept must obligatorily be written, with at least a summary indication of the reasons (cf. c. 51). Notification or summons of the precept may be made ordinarily (document with the written text of the precept), extraordinarily (cf. c. 55) or by the equivalent (c. 56).⁵⁵

In cases of doubt penal precepts are always subject to strict interpretation (c. 36 §2) and recourse can always be made to the competent authority (cc. 1734-1739) or to the Supreme Tribunal of the Apostolic Signatura (c. 1445 §2).

As stated above, although only those religious superiors who are also recognized in the law as ordinaries can make use of penal precepts, they are potentially a clear and forceful means for correcting a member who has possibly violated the law, or who seems to be in danger of doing so.⁵⁶

3.2.2 – Warnings and Rebukes (c. 1339)

Canon 1339 states:

§1. An ordinary, personally or through another, can warn a person who is in the proximate occasion of committing a delict or upon whom, after investigation, grave suspicion of having committed a delict has fallen.

§2. He can also rebuke a person whose behavior causes scandal or a grave disturbance of order, in a manner accommodated to the special conditions of the person and the deed.

§3. The warning or rebuke must always be established at least by some document which is to be kept in the secret archive of the curia.

⁵⁵ J. SANCHIS, "Commentary on Canon 1319," in *Exegetical Comm*, vol. IV/1, 251.

⁵⁶ According to c. 1320, "[t]he local ordinary can coerce religious with penalties in all those matters in which they are subject to him," so superiors who are not ordinaries could petition the local ordinary to impose a penal precept on a member, at least in regards to matters over which the local ordinary has authority. In relation to all other matters, a penal precept would have to be sought from the relevant dicastery of the Roman Curia. For serious matters, major superiors could also consider the formal threat of dismissal in accordance with cc. 696-697.

This canon describes two penal remedies, namely the warning and the rebuke. Although any religious superior can give a warning or a rebuke in the common sense of these words, only religious superiors who are ordinaries in accord with c. 134 §1 can issue the warnings and rebukes mentioned in this canon. In describing the role of penal remedies in the penal system, Sanchis writes:

Thus ecclesiastical authorities have available not only penalties (to punish offences actually committed and proved through the penal process), but also penal remedies suitable for handling situations that might be called intermediate, since the offence has not actually been committed (cf. c. 1328 §2), or the behaviour does not in and of itself constitute an offence, or finally, because the presumed delinquent action is not sufficiently certain for the penalty to be applied (cf. c. 1348).⁵⁷

The first paragraph of c. 1339 tells us that the warning is used in two principal moments: one, when a person is considered to be "in the proximate occasion of committing a delict;" and two, when, after an investigation, there is grave suspicion (but not proof) that a person has committed a delict. A warning can also be given when the commission of a delict is certain, but the culpability of the person is not full.⁵⁸

⁵⁷ J. SANCHIS, "Commentary on Canon 1339," in *Exegetical Comm*, vol. IV/1, 351 (= SANCHIS, "Canon 1339"). Chiapetta says, "penal remedies ... do not have a penal character: properly speaking they are measures or provisions of a disciplinary character" ("i rimedi penali ... non hanno carattere di pena: sono propriamente delle misure o provvedimenti di carattere disciplinare"). CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 667. In light of c. 1312, and our discussion above, like dismissal from a religious institute, we regard penal remedies and penances as examples of sanctions that are not penalties.

⁵⁸ This is true also of the rebuke and the penance referred to in c. 1340. Cf. cc. 1328, §2, 1343, 1344, 2° and 1348. Although c. 1339 speaks only of "an ordinary," judges can also decree penal remedies or penances as substitutes for penalties. See WOESTMAN, *Ecclesiastical Sanctions*, 63. An example of someone who commits a crime but without full culpability would be a person who steals money as a result of being a kleptomaniac.

It is important to note that the warning referred to in c. 1339 is distinct from the warnings referred to cc. 697 and 1347 §1. The warning referred to in c. 697 must include the specific threat of dismissal and must give the reasons in law for why the member is in danger of being dismissed. The warning referred to in c. 1347 §1 is given when the commission of an offence is certain but the offender is given an opportunity to withdraw from contumacy before suffering the effect of the censure. Although it is similar, a c. 1339 warning cannot be considered equivalent to the warnings referred to in cc. 697 and 1347 §1, it can be used to counter a claim of ignorance of the law put forward by someone accused of a delict (cf. c. 1323, 2°) and, if it was issued as a substitute for the imposition of a penalty in a previous case of the same delict, it could be used to justify a more grave penalty for the repeated offence (cf. c. 1326, 1°).

Canon 1339 §2 states that a rebuke is intended for "a person whose behaviour causes scandal or a grave disturbance of order" but whose actions do not qualify as a delict. Chiapetta describes the rebuke in the following manner:

The canonical rebuke is a formal reproof for conduct that is irregular, but not exactly criminal, of a person, who, with his actions, causes scandal or grave disturbance of ecclesiastical discipline.

The rebuke must be commensurate to the conditions of the subject (age, gender, character, status, physical and mental condition, etc.) and to the circumstances of the case (imprudence or carelessness, grave negligence, malice, recidivism, etc.). It is necessary, to that end, to carry out a serious

investigation, with great prudence in order to protect suitably the good name of the subject.⁵⁹

In this way we see that commission of the misdeed must be certain, that is, it must be proven by an investigation, even if the misdeed itself does not qualify as a delict. The rebuke itself must be carefully drafted so as to take into consideration the facts and all relevant circumstances. Like the warning, a rebuke can also be used where the commission of an offence is certain but the application of a penalty is deemed excessive.

Both penal remedies can be applied simultaneously and repeatedly.⁶⁰ They can also be applied even while a canonical investigation in keeping with c. 1717 is underway.⁶¹ As c. 1339 §3 states, penal remedies "must always be established at least by some document which is to be kept in the secret archive."⁶² Chiapetta makes the point that "[e]ither the warning or the rebuke

⁵⁹ "La repressione canonica è un biasimo formale della condotta irregolare, ma non propriamente delittuosa, di una persona, la quale, col suo agire, provoca scandalo o grave turbamento dell'ordine disciplinare ecclesiale.

La riprensione deve essere commisurata alla condizioni del soggetto (età, sesso, indole, stato, condizione fisica e psichica, etc.) e alle circostanze del fatto (imprudenza o leggerezza, colpa grave, dolo, recidività, etc.). Occorre, a tal fine, svolgere una seria indagine, con molta prudenza in modo da tutelare convenientemente la buona fama del soggetto." CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 669.

⁶⁰ V. DE PAOLIS, "Penal Sanctions, Penal Remedies and Penances in Canon Law," in P.M DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Montreal, Wilson & Lafleur, 2005, 172-173 (= DE PAOLIS, "Penal Sanctions").

⁶¹ "These measures may be used during the period of time between notice of the possible commission of an offence and certainty that it was committed." SANCHIS, "Canon 1339," 354.

⁶² Woestman makes the point although such documents should always be duly prepared they need to be preserved in the secret archives only to the extent that the offence was occult. WOESTMAN, *Ecclesiastical Sanctions*, 64.

can be made in secret or public, judicial or extrajudicial (cf. c. 2309 §§ 1-4 *CIC/17*), according to the particular requirements of the case."⁶³

Lastly, in our consideration of penal remedies, it is worth noting that the comparable canons in the *CIC/17* included two penal remedies that are not included in the *CIC*, namely, the penal remedies of precept and vigilance. Many authors agree that the list of penal remedies given in c. 1339 is not taxative and that nothing would prohibit an ordinary from applying the penal remedies of precept and vigilance today.⁶⁴ The penal remedy of precept of the *CIC/17* closely resembled the penal precept that we have discussed above with the exception that it was applied for an offence that was known with certainty to have occurred; it imposed a suspended sentence that would only come into force if the offender failed to meet certain conditions.⁶⁵

Woestman describes the penal remedy of vigilance in the following manner:

It consisted in the prohibition to go to certain places at all or only with an assigned companion, or not without special permission, or the obligation to stay in a determined place and to present oneself at fixed intervals to the superior or his delegate.⁶⁶

⁶³ "Sia la riprensione che l'ammonizione possono essere effettuate in forma segreta o pubblico, giudiziale or extragiudiziale (cfr. can. 2309, §§ 1-4, Codice 1917), secondo le esigenze del caso." CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 669. De Paolis writes, "[a rebuke] can be applied publicly only where a person has been proved to have committed an offence, or has confessed to it." DE PAOLIS, "Penal Sanctions," 173. The same logic can be extended to warnings. It would seem highly imprudent, and potentially injurious to a person's good name (cf. c. 220), either to warn or rebuke them publically for actions that are not certain.

⁶⁴ CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 668; DE PAOLIS, "Penal Sanctions," 172; WOESTMAN, *Ecclesiastical Sanctions*, 63.

⁶⁵ DE PAOLIS, "Penal Sanctions," 173.

⁶⁶ WOESTMAN, *Ecclesiastical Sanctions*, 63.

Woestman goes on to offer that an ordinary could approximate the penal remedy of vigilance by drawing up a penal precept to the same effect.⁶⁷

3.2.3 – Penances (c. 1340)

In contrast to the penances that are imposed as part of the sacrament of penance and reconciliation and which are a matter of the internal forum, the penances described in c. 1340 are imposed in the external forum either by an ordinary or a judge.⁶⁸ De Paolis describes their purpose in this way:

Penances, insofar as they are applied within the ambit of penal law and by virtue of coercive power in the external forum, have the special aim of repairing scandal and of obtaining proof of the offender's change of heart and firm purpose of amendment. Thus they have a double effect: the punishment of the offender with a lesser penalty, and the avoidance of a greater penalty established by law; or in cases where the penalty has already been incurred, the remission of the penalty, and the substitution of a penance instead.⁶⁹

In this way we see that the penance is typically applied in lieu of a penalty, which would naturally be more burdensome. Chiapetta observes that, in contrast to penalties which entail the denial of some spiritual or temporal

⁶⁷ Ibid.

⁶⁸ The canon does not state explicitly that only ordinaries and judges can impose external forum penances, but Montini extrapolates from c. 1342 §1 ("penal remedies and penances, however, can be applied by decree in any case whatsoever") that, since only ordinaries and judges can make canonical decrees, they are also the only ones who can impose penances. G.P. MONTINI, "Rimedi penali e penitenze" in Z. SUCHECKI (ed.), *Il processo penale canonico*. Rome, Lateran University Press, 2003, 96 (= MONTINI, "Rimedi penali e penitenze"). Calabrese observes that the constitutions of a religious institute may allow for the extra-sacramental imposition of penances but that such penances would be distinct from those of c. 1340. A. CALABRESE, *Diritto penale canonico*, Milan, Edizioni paoline, 1990, 139-140 (= CALABRESE, *Diritto penale canonico*).

⁶⁹ DE PAOLIS, "Penal Sanctions," 175.

good (cf. c. 1312 §2), the imposition of a penance is the imposition of a positive act of religion, piety, or charity.⁷⁰ Also, in contrast to a penalty, a canonical penance must be accepted by the offender.⁷¹

Penances are imposed for the commission of an act that is both a sin and an offence or at least an unconsummated offence (cf. c. 1328).⁷² Montini sees penances applied in three diverse cases: as an autonomous punishment (cf. cc. 1328 §2 and 1341), as a substitute punishment (cf. c. 1312 §3, 1324, 1343, 1344, 2°, and 1358 §2) and as an aggravating punishment (cf. c. 1312 §3, 1326, 1340 §3).⁷³

It is rightly noted that the public imposition of penances goes back to the earliest centuries of the Church.⁷⁴ Chiapetta observes that, while a public penance can never be imposed for an occult offence (c. 1340 §2), this does not mean that a public offence necessarily requires a public penance. In fact, he posits that, due to the right of all people to a good reputation (c. 220), a public

⁷⁰ CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 667. Although the *CIC* does not discuss what are suitable canonical penances, c. 2313 of the *CIC/17* listed the following as the "chief penances:" recitation of determined prayers; performing a pious pilgrimage or other work of piety; observing a special fast; putting alms to pious uses; and performing spiritual exercises in a pious or religious house for a certain number of days.

⁷¹ MONTINI, "Rimedi penali e penitenze," 93. Montini explains that this does not mean the offender accepts the penance spontaneously and easily -- after all, it should still be somewhat burdensome -- it is just to verify that the penance is not totally repugnant to the offender. If an offender were given the choice, presumably a penance would be preferable to a penalty.

⁷² *Ibid.*, 96.

⁷³ *Ibid.*, 93-97.

⁷⁴ CALABRESE, *Diritto penale canonico*, 139; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 670.

penance would be justified only when the need to repair scandal demands it.⁷⁵

While the canon is silent on the question of if and where the imposition of a penance should be recorded, it seems only prudent, given that penances are imposed in the external forum either by ordinaries or judges as the result of a judicial or administrative process, that they be imposed by means of a decree and that the decree be appropriately preserved in the relevant archive.⁷⁶ As with any administrative or judicial act, the right to make recourse against the decision remains intact.⁷⁷

In every case where an offender readily accepts his or her responsibility and expresses sincere contrition, and where there is little or no public scandal, one can see that the imposition of a penance would be a more suitable response to a transgression than the application a penalty.

3.2.4 – Imposition or Declaration of Penalties by Administrative Procedure (cc. 1341-1353; 1717-1728)

As we have already noted above, major superiors who are also ordinaries in accord with c. 134 are able to conduct a penal administrative process or to establish a penal tribunal in order to carry out a penal judicial procedure (however, the latter practice would seem to have fallen into

⁷⁵ CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 669.

⁷⁶ WOESTMAN, *Ecclesiastical Sanctions*, 65.

⁷⁷ MONTINI, "Rimedi penali e penitenze," 97.

abeyance). If major superiors limit themselves to conducting penal administrative processes, this means that they are necessarily limiting the penalties they are able to apply, and by extension, the offences which may call for these penalties to be imposed.⁷⁸ According to c. 1342 §2, "[p]erpetual penalties cannot be imposed or declared by decree, nor can penalties be so applied when the law or precept establishing them prohibits their application by decree." In addition to those penalties that particular law or precept might restrict from being applied as a result of an administrative procedure, this means that one cannot impose dismissal from the clerical state or deprivation of office since these penalties are by their nature perpetual.⁷⁹ Furthermore, it means that one cannot impose any expiatory penalty perpetually, although, besides the two penalties that are by nature perpetual, the other expiatory penalties could be imposed for a set period of time.⁸⁰ Censures, as noted

⁷⁸ One possible way around this quandary is for the major superior to forswear the imposition of penalties beyond his authority, but this would be highly imprudent. To do so would essentially be to pre-judge the entire case before the procedure had run its proper course and all the facts were known and witnesses were heard.

⁷⁹ V. DE PAOLIS, "Commentary on Canon 1342," in *Exegetical Comm*, vol. IV/1, 368 (= DE PAOLIS, "Canon 1342").

⁸⁰ Canon 1336 describes expiatory penalties:

§1. In addition to other penalties which the law may have established, the following are expiatory penalties which can affect an offender either perpetually, for a prescribed time, or for an indeterminate time:

1° a prohibition or an order concerning residence in a certain place or territory;

2° privation of a power, office, function, right, privilege, faculty, favour, title, or insignia, even merely honorary;

3° a prohibition against exercising those things listed under n. 2, or a prohibition against exercising them in a certain place or outside a certain place; these prohibitions are never under pain of nullity;

4° a penal transfer to another office;

5° dismissal from the clerical state.

above, can never be applied perpetually (cf. c. 1358 §1). A major superior in penal cases would also have to keep in mind c. 1338 §1, which states:

The privations and prohibitions listed in c. 1336, §1, nn. 2 and 3, never affect powers, offices, functions, rights, privileges, faculties, favors, titles, or insignia which are not subject to the power of the superior who establishes the penalty.

The meaning of this clause is self-evident and it reflects a basic principle regarding the exercise of power in the Church.⁸¹

As we discussed in the previous chapter, there are also offences that are reserved to the CDF and for this reason are beyond the authority of any religious superior.⁸² Even these cases, however, once presented to the CDF, could be referred back to the supreme moderator and his council by the CDF in order to be handled administratively, with confirmation of their decision reserved to the CDF.⁸³

Another factor to be considered in the imposition of penalties by means of an administrative procedure are the special faculties conceded to the Congregation for the Clergy and the Congregation for the Evangelization of Peoples by Pope Benedict XVI in 2009. Regarding the circumstances that are potentially addressed by the special faculties, religious ordinaries could present cases via these special types of administrative procedures that may

§2. Only those expiatory penalties listed in §1, n. 3 can be *latae sententiae*.

⁸¹ G. DI MATTIA, "Commentary on Canon 1338," in *Exegetical Comm*, vol. IV/1, 350-351.

⁸² See section 2.3.3, especially footnote 116.

⁸³ See C.J. SCICLUNA, "The Procedure and Praxis of the Congregation for the Doctrine of the Faith Regarding *Graviora Delicta*" in P.M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Montreal, Wilson & Lafleur, 2005, 242.

possibly result in dismissal from the clerical state as well as other perpetual expiatory penalties. But in a manner similar to those delicts reserved to the CDF, the ultimate imposition of the penalty lies with the relevant congregation or with the pope himself, not the religious ordinary per se.⁸⁴

Although religious ordinaries may feel that their institutes are ill-equipped to staff and operate penal tribunals, the penal administrative procedure maintains many of the same elements as a penal judicial procedure. The only canon to describe the penal administrative procedure is c. 1720:

If the ordinary thinks that the matter must proceed by way of extrajudicial decree:

- 1° he is to inform the accused of the accusation and the proofs, giving an opportunity for self-defense, unless the accused neglected to appear after being properly summoned;
- 2° he is to weigh carefully all the proofs and arguments with two assessors;
- 3° if the delict is certainly established and a criminal action is not extinguished, he is to issue a decree according to the norm of cc. 1342-1350, setting forth the reasons in law and in fact at least briefly.

Of first importance, we observe that the accused's right of defense must remain perfectly intact throughout the administrative procedure. Indeed, were the one carrying out the administrative procedure to fail in this regard,

⁸⁴ The first special faculty, granted to both congregations, is to present, directly to the pope for dismissal, together with a dispensation from the obligations of the clerical state, cases of priests who have gravely violated celibacy. The second faculty, granted to both congregations, is to present directly to the pope for the imposition of perpetual penalties cases of priests who have violated other divine or ecclesiastical laws. The next faculty, granted only to the Congregation for the Clergy, is to dismiss priests, and dispense from clerical obligations, those who have abandoned priestly ministry for a minimum of five consecutive years. Finally, the Congregation for the Evangelization of Peoples was granted the faculty to assist priests who voluntarily seek dismissal and dispensation from clerical obligations. For a full treatment of the faculties and the procedures by which they are availed of, see J.A. RENKEN, "The 2009 Special Faculties Conceded by Pope Benedict XVI to Address Serious Clergy Issues: A Brief Commentary," in *Studies in Church Law*, 5 (2009), 277-296.

the sentence would be null.⁸⁵ Regarding the accused's access to an advocate,

Renken states:

Canon 1720 does not state expressly that the accused must have an advocate in the extrajudicial penal process (as is required for the judicial penal process: see cc. 1481 §2, 1723); nonetheless, the natural right to self-defence would mandate the involvement of an advocate for the accused in the extrajudicial penal process. An advocate certainly assists the accused in the legitimate vindication and defence of the accused's ecclesiastical rights (see c. 221 §1).⁸⁶

The canon also states that the one presiding must weigh the proofs and the arguments with two assessors, an obligation which binds for validity.⁸⁷ It is also important to note that the ordinary need not preside over the extrajudicial procedure himself, but is free to, and I would say that he is well advised to, delegate to another person the task of carrying out the procedure.

Calabrese writes:

[The ordinary] can pursue the action himself, but, in his dealing with the inflicting or the declaring of penalties, it is more pastorally suitable to delegate another priest, preferably the judicial vicar, who has been institutionally appointed to handle canonical procedures.⁸⁸

⁸⁵ J.A. RENKEN, *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 2015, 450, footnote 153 (= RENKEN, *Penal Law*). See also, A. CALABRESE, "Commentary on Canon 1720" in *Exegetical Comm*, vol. IV/2, 2010 (= CALABRESE, "Canon 1720").

⁸⁶ RENKEN, *Penal Law*, 412. Along the same lines, it can be argued that a promoter of justice should be named in administrative procedures in order to protect the public good.

⁸⁷ *Ibid.*, 413.

⁸⁸ CALABRESE, "Commentary on Canon 1720," 2009. Of course, a major superior could substitute another expert in penal law for the judicial vicar. Even if the religious ordinary were himself an expert in penal law, it would seem advisable to delegate the task to a third party, perhaps even from another province or region of the institute, who might be better placed to judge the case objectively and without the danger of being prejudiced by extraneous factors.

Delegating an expert in penal law makes all the more sense when one considers the technical skill needed to evaluate the proofs and to arrive at moral certainty about the question at hand. Calabrese writes:

Before everything else, it must be known with certainty that the delict has been committed. The certainty demanded is moral, and it must be attained from the acts and the proofs (c. 1608 §§1-2). A personal conviction does not suffice, nor do secret reasons or proofs, though recognized by the ordinary or his delegate but not brought forward as proofs nor presented to the accused.

Moreover, it must be known with certainty that the delict is imputable to the accused, not only materially, but also morally. Therefore, there will have to be an evaluation of the circumstances that diminish or eliminate imputability (c. 1345).

In the decree, the ordinary must show, at least in a concise way, the reasons of law and the facts of the case, beginning with those by means of which he has arrived at moral certitude.⁸⁹

In this way we have seen that, although the extrajudicial process follows a different course than the judicial process, the standard for evaluating proofs, the protecting the right of defense of the accused, and the respecting the other provisions of the law are no less exacting.

3.3 – Canon 1341⁹⁰ and the Decision to Forego a Judicial or Administrative Procedure

In the first two sections of this chapter we have considered modes of discipline available to religious superiors in *Book II* and *Book VI* of the *CIC*. In

⁸⁹ Ibid., 2011. Renken points out, "In evaluating proofs, the ordinary will be cognizant of the obligatory norms of canons 1526-1586, particularly of canons 1572-1573 on the trustworthiness of testimonies." RENKEN, *Penal Law*, 413.

⁹⁰ C. 1341: "An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender."

this section we will consider the canon that Green calls "very significant,"⁹¹ due to its fundamental role in guiding ordinaries as to when it is appropriate to initiate a penal procedure.

As c. 1317 states: "Penalties are to be established only insofar as they are truly necessary to provide more suitably for ecclesiastical discipline." The Church clearly regards the imposition or declaration of penalties to be a measure of last resort. In the words of Chiapetta:

In the spirit of the law, the canonical penalty is an exceptional measure, the last option to fall back on when all other means have been exhausted in vain and it is beyond a shadow of a doubt that there is no other possibility.⁹²

Indeed, c. 1341 requires that the possibility of other solutions be explored before the ordinary can initiate a penal procedure.

The canon presupposes that the investigation in accordance with c. 1717 has been completed and that, at least in a preliminary way, sufficient evidence has been gathered to warrant a further and more careful examination of the possible commission of a delict which appears to be imputable to a certain subject.⁹³ If, following the investigation, it is clear that no delict has been committed, or that there was a violation of a law or precept

⁹¹ T.J. GREEN, "Commentary on Canon 1341," in *CLSA Comm2*, 1558.

⁹² CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, 671. "Nello spirito della legge, la pena canonica costituisce una misura eccezionale, l'estremo tentativo a cui ricorrere quando siano stati esperiti inutilmente tutti gli altri mezzi e sia risultato senza ombra di dubbio che non esiste altra possibilità."

⁹³ De Paolis states, "In particular, [the ordinary] will have verified all the necessary and sufficient elements to determine that there is an imputable offence, taking into consideration other circumstances (cf. cc. 1321-1324)." V. DE PAOLIS, "Commentary on Canon 1341," in *Exegetical Comm*, vol. IV/1, 365 (= DE PAOLIS, "Canon 1341").

but it is not imputable to the subject, the task placed before the ordinary in c.

1341 is not operative. In the words of De Paolis:

If there is no violation of a penal norm or if there are circumstances preventing verification of the offence or its punishability, it is not possible to start the penal process because there is no object of the process, which is an offence and its punishment.⁹⁴

If, however, there is sufficient evidence to indicate that a delict has been committed, then the need for a penal procedure must be considered. Before that can happen, however, other means of healing the effects of the delict must be contemplated. De Paolis states:

The immediate and proximate purpose of a penal procedure is to impose or declare a penalty. However, its ultimate purpose is not to punish, but to obtain the purpose of the penalty... to repair scandal, re-establish justice, correct the offender (cf. cc. 1341, 1347 §1).⁹⁵

If other means can succeed in repairing the scandal, re-establishing justice and correcting the offender, even when the commission of the offence and its imputability are certain, those means must be used and the penal procedure forsaken. De Paolis even points out that c. 1341 uses the word "sufficiently" to assess the level by which the alternative means must repair scandal, restore justice, reform the offender. By use of this word, he observes, the alternative means do not necessarily need to surpass the penal procedure in effectiveness or even equal it: they simply need to attain the ends "sufficiently."⁹⁶

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid., 366. "[T]he purposes of a penalty may be achieved 'sufficiently,' it does not say *better than* or *similarly to* with a penal procedure, then the penalty may be, and in a certain sense, should be, waived."

The Church's reticence, however, to pursue the penal procedure and its willingness to consider alternative means for attaining the same goals does not mean that the penal procedure must be avoided at all costs. The alternative means, namely, "fraternal correction or rebuke or other means of pastoral solicitude" must attain all three purposes (i.e., repair scandal, restore justice, and reform the offender) of the imposition of a penalty. Renken states:

a prerequisite of the reform of the offender is the person's withdrawal from contumacy (see c. 1347 §2). If only one or two of the factors (but not all three factors) are achieved by fraternal correction, warning, or some other means of pastoral solicitude, it seems the ordinary is to proceed with some penal process. Indeed, if the ordinary does not pursue a penal process when such is appropriate, he himself seems to commit the delict of canon 1389.⁹⁷

De Paolis sounds a similar note when he writes:

The Church cannot remain passive or indifferent to offences committed within it. That would be to betray its very mission and, for pastors, it would be to ignore their responsibilities. Certainly, c. 1341 cannot signify indifference to an offence or passiveness in the task of re-establishing justice or helping the faithful to return to the road of conversion and salvation. The problem is to discern which road to follow to eliminate the consequences of delinquent actions. The penal channel is one such road, but it is not the only one, nor even always the right one. Therefore, the perspective of c. 1341 is precisely to give us the choice of road.⁹⁸

In this way we see the Church's clear desire that justice be restored, but also its willingness to pursue justice, not by some rigidly pre-determined route, but by whatever route may be most appropriate for the situation at hand.

⁹⁷ RENKEN, *Penal Law*, 142-143.

⁹⁸ DE PAOLIS, "Canon 1341," vol. IV/1, 366

3.4 – Canon 695 §1 and the Decision Against Obligatory Dismissal

Canon 695 §1 parallels the content of c. 1341 in that both refer to the need to repair scandal, restore justice, and reform the offender, or in the phrasing of c. 695, correct the member. The first paragraph of c. 695 states: "A member must be dismissed for the delicts mentioned in cc. 1397, 1398, and 1395."⁹⁹ Since this canon is in the section of the *CIC* governing religious institutes, this authority applies to all religious superiors and not just those who are ordinaries. The canon allows, however, that dismissal need not follow in every case of a delict included in c. 1395 §2 if "the superior decides that dismissal is not completely necessary and that correction of the member, restitution of justice, and reparation of scandal can be resolved sufficiently in another way." The question begs: why is it not absolutely necessary to dismiss the member in c. 1395 §2 cases whereas they must always be dismissed in c. 1395 §1 cases, especially since the former includes such grave delicts as the sexual abuse of a minor? One reason may be that, while the delicts included in c. 1395 §2 are indeed grave, they are, potentially, single acts, whereas the offences of c. 1395 §1 are habitual. Habitual acts are usually indicative of a firmly held intention to violate the law and the teachings of the Church, whereas a single act may be more easily attributed to a moment of weakness. In any case, dismissal would not be mandatory for any of the delicts included

⁹⁹ Although c. 1395 describes delicts committed by priests, in the context of c. 695 the delicts can be committed by any religious, male or female, lay or clerical. See V. DE PAOLIS, *La vita consacrata*, 387.

in c. 695 §1 if they were not fully imputable in accordance with cc. 1321-1325.¹⁰⁰ In applying this canon it is important to note, presuming the full imputability of the offender, that only the delicts included c. 1395 §2¹⁰¹ can admit of exceptions to the requirement for mandatory dismissal and, even then, the option of not expelling the member can only be taken for the reasons given, namely, "that correction of the member, restitution of justice, and reparation of scandal can be resolved sufficiently in another way." Often, the most difficult thing to provide for is the sufficient reparation of scandal. Even if certain restrictions are imposed upon a member instead of dismissal, if those limitations are not obvious to the faithful, the perception that the member was not punished at all for his or her offence is likely to endure. While the institute may desire to keep the offender for laudable and charitable reasons (such as the member's poor health, advanced age, or inability to live outside of community life), presuming the offence is fully

¹⁰⁰ See F.G. MORRISEY, "Commentary on Canon 695" in *Exegetical Comm*, vol. II/2, 1865-1866. Of course, the testimony of the member himself or herself would be essential in determining imputability. Furthermore, in every case, the member's right of defense must always be respected. An example of someone who committed an offense, even an intrinsically evil one, for which c. 695 requires dismissal, but who would not actually have to be dismissed because of a lack of full imputability, would be a religious woman who has an abortion because of grave fear (cf. c. 1324 §1, 5°).

¹⁰¹ As noted above in footnote 17, the delicts included in Art. 6, §1 of *Norms* are reserved to the CDF. Therefore, in cases where these delicts would seem to have been committed by clerics, the religious superior would lack the authority to decide against dismissal and would be obliged to refer the case to the CDF.

imputable, those are not legitimate grounds from refraining from the mandatory dismissal that c. 695 requires.¹⁰²

3.5 – Assessing Liability for Punishment (cc. 1321-1330)

An examination of the canons from the title "The Subject Liable to Penal Sanctions,"¹⁰³ will be helpful in understanding the circumstances in which the legislator expects offenders to be punished more severely, less severely, or not at all.

Canon 1321 §1 states the basic premise governing the application of penalties: "No one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence." Imputability is the most fundamental concept in understanding the application of penalties.¹⁰⁴ To say that the commission of a delict is gravely imputable to an offender is to say that a certain person is the author of the delict both physically (i.e., he or she completed the criminalized act) and morally (i.e., he or she did the act freely and with either malice or negligence).

¹⁰² De Paolis writes: "It must be stated that the discretion left to the superior does not mean arbitrariness, because he always has the duty to provide for the administration of justice: he has discretion in choosing the ways to implement justice, not in doing justice or not." (Si deve affermare che la discrezionalità lasciata al superiore non significa arbitrarietà, in quanto egli ha sempre il dovere di provvedere all'amministrazione della giustizia: egli ha discrezionalità nella scelta delle vie per attuare la giustizia, non nel fare o no giustizia.) DE PAOLIS, *La vita consacrata*, 388. De Paolis does posit, however, that a dispensation from the obligation to dismiss for delicts mentioned in cc. 1397, 1398 and 1395 §1, could be requested from the Holy See. See DE PAOLIS, *La vita consacrata*, 390.

¹⁰³ Book VI, Part I, Title III.

¹⁰⁴ Á. MARZOA, "Introduction to Title III: Those Who Are Liable to Penal Sanctions," in *Exegetical Comm*, vol. IV/1, 255-259 (= MARZOA, "Introduction to Title III").

To say that an offence is imputable by malice (*dolus*) or negligence (*culpa*) is to say that the delict was committed either intentionally or by omission of due diligence, respectively. Canon 1321 §2 clarifies that only those delicts imputable by malice are punishable whereas those committed as a result of negligence are not, unless the law provides otherwise.¹⁰⁵ Canon 1321 §3 establishes a presumption of law, namely: "When an external violation¹⁰⁶ has occurred, imputability is presumed unless it is otherwise apparent."¹⁰⁷

Canon 1322 describes those who are incapable of committing offences, namely, "[t]hose who habitually lack the use of reason." It follows logically that if a person lacks the use of reason he or she is incapable of a human act and is therefore incapable of intending to violate a law, however gravely contrary to divine or ecclesiastical law a particular action may be.¹⁰⁸

Canon 1323 describes seven situations in which those who have committed offences are not to be punished. This is not to say that the offences in question cannot be imputed to the person in question, but simply that the

¹⁰⁵ In the *CIC* there is only once such exception, namely c. 1389 §2, although other laws or precepts could make additional exceptions. See Á. MARZOA, "Commentary on Canon 1321," in *Exegetical Comm*, vol. IV/1, 273.

¹⁰⁶ Both §1 and §3 of c. 1321 refer to "external violations" of the law. To say that a violation is *external* is to say that it is a physical action that is perceivable to others and not a mere thought or intention.

¹⁰⁷ While the law presumes imputability, evidence can prove otherwise.

¹⁰⁸ Although it is conceivable that someone who "habitually lacks the use of reason" does in fact have the use of reason at the moment of committing a delict, the legislator determines that such people are "incapable of a delict" and therefore not subject to any penalty. See Á. MARZOA, "Commentary on Canon 1322," 275-276.

legislator has determined that, regardless of the level of imputability of the offender, he or she will not be punished in these circumstances.¹⁰⁹

Among the exculpating circumstances described in c. 1323 that might be relevant in discipline cases involving religious are 2°, 4°, 6°, and 7°.

♦ 2° *"A person who without negligence was ignorant that he or she violated a law or precept; inadvertence and error are equivalent to ignorance."*

While it is difficult to imagine a religious who would be ignorant without negligence of the laws that at least pertain to religious life and the Christian life in general,¹¹⁰ it is not outside the realm of possibility that a religious could fail to be mindful of the law or make an erroneous judgement about the applicability of the law in a certain case (i.e., "inadvertence and error are equivalent to ignorance").

♦ 4° *"A person who acted coerced by grave fear, even if only relatively grave, or due to necessity or grave inconvenience unless the act is intrinsically evil or tends to the harm of souls."*

Likewise, it is not unimaginable that the circumstances described in c. 1323, 4° might, however rarely, have relevance in a penal case involving religious,

¹⁰⁹ See MARZOA, "Introduction to Title III," 259-260. Only those circumstances enumerated in cc. 1323-1325 that are likely to have relevance in misconduct cases involving religious will be discussed here, and even then, only briefly. For a detailed description of each circumstance, see Á. MARZOA, "Commentary on Canons 1323-1325" in *Exegetical Comm*, vol. IV/1, 277-295.

¹¹⁰ It is incumbent upon people to be familiar with the laws pertinent to their way of life, therefore, while one may in fact be ignorant of the laws related to his or her way of life, he or she would not be considered to be ignorant "without negligence." In any case, because c. 1321 presumes imputability, ignorance would have to be proven. See Á. MARZOA, "Commentary on Canon 1323," in *Exegetical Comm*, vol. IV/1, 280.

namely, relative grave fear, necessity, and grave inconvenience. It must be noted, however, that the exception does not apply in cases where the action in question is "intrinsically evil or tends to the harm of souls."¹¹¹

♦ 6° *"A person who lacked the use of reason, without prejudice to the prescripts of cc. 1324, §1, 2° and 1325."*

Canon 1323, 6° refers to situations where, in contrast with c. 1322, a person who typically enjoys the use of reason, lacks it at the moment of participating in the criminal action, not including reasons of drunkenness or "crass, supine, or affected ignorance" (c. 1325).¹¹²

♦ 7° *"A person who without negligence thought that one of the circumstances mentioned in 4° or 5° was present."*

In this case, an offender would not be liable to punishment even when he or she mistakenly believed that the circumstances described in c. 1323, 4° or 5° were operative. Canon 1323, 5° refers to "[acting] with due moderation against an unjust aggressor for the sake of legitimate self defense or defense of another."

Canon 1324 §1 lists ten circumstances in which "[t]he perpetrator of a violation is not exempt from a penalty, but the penalty established by law or precept must be tempered or a penance employed in its place." Some of these

¹¹¹ Although, in such cases, c. 1324, 5° would apply and the required punishment would be reduced.

¹¹² For reasons of drunkenness (unless the drunkenness was sought to excuse the delict, see c. 1325), c. 1324, 2° would apply and the required punishment would be reduced.

circumstances that may be relevant in penal cases involving religious are: 1°, 9°, and 10°.

- ♦ 1° *"A person who had only the imperfect use of reason."*

In the context of religious life, an example of this could be a member who is suffering from some mild or moderate psychological condition which reduces imputability but does not completely impede it, or the case of a religious who is suffering the moderate diminishment of his or her mental faculties due to old age.

- ♦ 9° *"A person who without negligence did not know that a penalty was attached to a law or precept."*

In this case, the person knew that the matter was regulated by ecclesiastical or divine law, but did not know that a penalty was attached to such misconduct.

- ♦ 10° *"A person who acted without full imputability provided that the imputability was grave."*

Lastly, c. 1324 §1, 10° provides for the generic case where someone's imputability is deduced for a non-specified reason, but not to the extent that he or she should be completely immune from disciplinary action.

Canon 1325 disqualifies "crass, supine or affected ignorance" as either an exculpating or mitigating factor, as well as drunkenness that was deliberately sought to excuse the commission of a delict.

Canon 1326 establishes certain criteria that warrant the imposition of a more grave punishment, such as, recidivism (§1, 1°) and "a person who has

been established in some dignity or who has abused a position of authority or office in order to commit the delict" (§1, 2°).

Canon 1327 establishes that particular law or precepts can establish other exculpating, mitigating, or aggravating circumstances.

Canon 1328 governs the frustrated or failed commission of delicts as well as cases where the offender initiated the commission of a delict but wilfully ceased its completion.¹¹³

Canon 1329 §1 specifies that co-conspirators of a delict that has a *ferendae sententiae* penalty attached to it are subject to the same or lesser penalties as the principal culprit. Canon 1329 §2 stipulates that accomplices in delicts that carry *latae sententiae* penalties, if without their assistance the delict would not have been completed, warrant the same *latae sententiae* penalty as the principal actor if nothing prohibits this; otherwise, a *ferendae sententiae* penalty is to be imposed on them.

Lastly, c. 1330 stipulates that, "[a] delict which consists in a declaration or in another manifestation of will, doctrine, or knowledge" is not to be considered to have happened unless it was perceived by someone.

In this section we have examined the canons governing the imposition of penalties. These canons will provide important data as we move to the

¹¹³ Laggès notes that c. 1328 may have application in cases where a cleric is known to have "groomed" a minor for sexual abuse but that the consummation of the abuse is unknown or uncertain. See P. LAGGÈS, "The Penal Process: The Preliminary Investigation in Light of the *Essential Norms* of the United States," in *Studia canonica*, 38 (2004), 374-375.

fourth chapter, which will develop the procedure for the administration of discipline in non-penal cases.

Conclusion

In this chapter we have examined the various means of administering discipline available in the *CIC*. In particular, we have focused on how such norms might be applied in the context of religious life. We have examined the sanctions available in *Book II* and in *Book VI* as well as the procedures to be followed and the ancillary norms that must be considered before a sanction can be imposed. In analysing these norms we have completed a thorough examination of the Church's disciplinary procedures as they pertain to religious life. This exposition will enable us in the next chapter to propose elements of a disciplinary procedure for cases that lie outside the scope of penal law, but which will be in harmony with the values enshrined in it.

CHAPTER IV

ELEMENTS OF A NON-PENAL DISCIPLINARY PROCEDURE

Introduction

In this chapter we will describe the essential elements of the non-penal disciplinary procedure in detail as well as the circumstances in which its use would be appropriate. We will also examine some of the challenges related to its application. Throughout this chapter, in line with c. 19,¹ we will apply procedural canons by analogy in order to address our various areas of concern.

4.1 – When to Use the Non-Penal Disciplinary Procedure

As we have already discussed in the second chapter, it would be contrary to the law to address the apparent commission of a delict in any way other than in accordance with the law, that is, by means of a penal judicial procedure, or a penal administrative procedure, and by observing the other relevant canonical norms. Certainly, a religious superior who is not an ordinary cannot use a non-penal disciplinary procedure to address misconduct that is penal in nature since the penal procedure is beyond his or her competence. At all times, cases of misconduct that involve the violation of

¹ Canon 19: "If a custom or an express prescript of universal or particular law is lacking in a certain matter, a case, unless it is penal, must be resolved in light of laws issued in similar matters, general principles of law applied with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons."

penal law must be treated in accordance with the relevant norms for that offence, such as, those found in *Book VI* and *Book VII* of the *CIC* and in the *Norms*. In every case where religious superiors who are not ordinaries become aware of the possible commission of a delict by one of their subjects they must refer the matter to the appropriate authority.² This is, of course, without prejudice to the right of every religious superior to order a member, in accordance with the law, to do or not to do certain actions regardless of what misconduct or criminal behaviour they believe may have taken place.³

The non-penal disciplinary procedure is intended for those violations of proper, ecclesiastical, or divine law that are not delicts. Included in the concept of “proper law” would also be things such as province policies or codes of conduct which apply to members of the institute within a certain territory. Although the non-penal disciplinary procedure may not be necessary in its full form in cases where the accused accepts responsibility for his or her misconduct, it will be especially helpful in cases where the accused completely denies the accusation, when the proofs supporting the accusation are weak or absent, when the accused presents compelling counter-proofs, or

² See 2.3.3.

³ The fact that an accusation against a member may become the object of a penal procedure or a non-penal disciplinary procedure in no way diminishes a superior's authority to give an order under holy obedience to that member regarding future behavior, provided the superior gives the order in accordance with the law and the object of the order is subject to his or her authority. Such an order may have a preventative value or serve to clarify for the member that certain behavior he or she believed was permissible is in fact forbidden.

when the accuser lacks credibility.⁴ The non-penal disciplinary procedure would likely have a formal rigour which some would find distasteful or out-of-place in religious life where a more familial atmosphere often prevails. But in cases where a serious accusation of misconduct is levelled, and the truth of the matter is not readily apparent, a reliable method for ascertaining the truth which does not betray a bias either for the accuser or the accused, will be helpful to assure all parties that the accusation is taken seriously and examined fairly, and in accordance with the church law and ecclesiastical jurisprudence.

4.2 – The Essential Elements of a Non-Penal Disciplinary Procedure

In this section we will examine the elements that comprise the non-penal disciplinary procedure. They are not examined in precise order since some may occur concurrently or in an atypical order depending on the circumstances of the case under consideration. A procedure intended to cover such a wide range of eventualities will necessarily need to be flexible and adaptable. The person charged with carrying out the procedure will need to be certain that all the essential elements are respected and included, however straightforward or convoluted a given case may be, without, at the same time,

⁴ See J.A. RENKEN, Penal Law: A Realization of the *Misericordiae vultus Ecclesiae*, seminar presentation at the 50th Annual Convention of the Canadian Canon Law Society, Tuesday, October 27, 2015, 34 of manuscript.

allowing the procedure itself to become excessively burdensome or disruptive to the lives of those involved.

4.2.1 – Publication of Procedures

It is of fundamental importance that, whatever procedures are decided upon by a particular institute or by a portion of an institute, they are published and made available to all concerned so that it is known within the corresponding territory that a certain procedure exists and will be used when necessary. The prior knowledge of the existence and content of a procedure helps to foreclose any possible accusation that the one in charge is acting arbitrarily, favouring one party or another, or acting with excessive zeal. Establishing an objective procedure should also help to ensure that there is continuity in the administration of discipline even when the office of superior passes from one member to another. The existence of such a procedure also serves to remind everyone that all allegations of misconduct will be taken seriously, and treated fairly and objectively. As we have noted above, appropriate training in canon law is often lacking among religious superiors and, while a case of misconduct in which the member readily admits his or her transgression is likely within the abilities of an experienced major superior to address, dealing with an accusation where the evidence (e.g., witness testimony) is of questionable value, or contradictory, is quite a different matter. In such a case, superiors without the requisite experience or

knowledge could be inclined either to excessive harshness or laxity, or perhaps not to address the accusation at all.

4.2.2 – Who Carries Out the Procedure?

While we would recommend that cases of misconduct be handled at the level of the major superior (i.e., the level above the local superior), it need not be the case that the major superior personally carries out the procedure. Ideally, a designated person, who has been delegated to handle all such cases, could follow the procedure on behalf of the major superior. This would have the benefit of having someone with the necessary expertise, and with the dedicated time and resources, to carry out the procedure effectively. Once the case is fully instructed, it will be decided by the major superior with the assistance of certain experts. We would not consider the local superior to be ideal for carrying out the procedure since he or she might also be a witness to what happened, might be influenced by the current mindset of the accused, or might be biased in regards to the member due to their presence together in the same community.⁵ It would not seem necessary that the delegate be a

⁵ Any person with an official function in the procedure should declare any conflict of interest in a particular case as soon as possible. The major superior will judge if it is necessary to substitute someone else to fulfill that person's function. In cases where the major superior judges that he himself, or she herself, has a conflict of interest or a prejudice in regards to either the accuser or accused, he or she may delegate another to decide the case on his or her behalf. Cf. c. 1448.

member of the institute, although the delegate would need to be familiar with religious life in general.

4.2.3 – Initial Collection of Proofs

Once the delegate has received the report of the misconduct by a member of the institute, he or she will attempt to gather as much useful evidence as possible, especially the testimony of those affected and/or other first-hand witnesses. As canon 1526 §1 states, "The burden of proof rests upon the person who makes the allegation." Therefore, the one presenting the allegation must also be prepared to direct the delegate regarding where or from whom sufficient proofs may be discovered. Of course, hearsay testimony will be of limited value unless it can point the delegate toward first-hand witnesses and/or to proofs that are incontrovertible.⁶ As much as possible, the delegate will attempt to verify that the accusation is credible (e.g., that the accused was physically present at the place and time when the

⁶ Canons 1549 and 1550, which we would regard as binding in the non-penal disciplinary procedure by analogy, describe who can be witnesses. Canon 1549: "All persons can be witnesses unless the law expressly excludes them in whole or in part." Canon 1550: "§1. Minors below the fourteenth year of age and those of limited mental capacity are not allowed to give testimony; they can, however, be heard by a decree of the judge which declares such a hearing expedient. §2. The following are considered incapable: 1° the parties in the case or those who stand for the parties at the trial, the judge and the judge's assistants, the advocate, and others who assist or have assisted the parties in the same case; 2° priests regarding all matters which they have come to know from sacramental confession even if the penitent seeks their disclosure; moreover, matters heard by anyone and in any way on the occasion of confession cannot be accepted even as an indication of the truth."

misconduct is alleged to have happened) and that the accuser and any other witnesses are trustworthy.

4.2.4 – The Defence of the Accused

Before accused persons are presented with any accusation or proofs, they will be reminded of their rights. In the first place, they enjoy the right to privacy and to a good reputation⁷ and therefore they are under no obligation to admit to any wrongdoing.⁸ Secondly, they are entitled to an advisor or advocate. This advisor may be a canonist, a civil lawyer, or simply a trusted friend. The advisor need not be a member of the institute. The advisor serves the purpose not only of offering advice, but also of providing moral support and of creating a degree of transparency regarding the procedure. Although such procedures must be treated confidentially, lest an innocent person's reputation be sullied by a false accusation, at the same time, the procedure must allow for as much transparency as possible. If there is a question of paying for the services of the advisor, the institute has the right to approve the expense. Although the accused has the right to an advisor, the institute has the right to refuse a particular advisor whose services are more expensive than it can bear. The advisor cannot be called to give testimony regarding

⁷ Canon 220: "No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy."

⁸ Canon 1728 §2: "The accused is not bound to confess the delict nor can an oath be administered to the accused."

what the accused has told him or her in regards to the case. For this reason, the advisor should not be someone with direct knowledge of events related to the accusation.⁹

Once the accused has been reminded of his or her rights, and an advisor of the accused's choosing has been found and is present, the accused may be invited to respond to the accusation. As has already been stated, the accused has the right either not to respond or to respond in whatever way he or she chooses. The accused cannot be obliged to take an oath (cf. c. 1728 §2). In any case, the accused may point to certain facts that undermine the accusation or recommend witnesses who can testify on his or her behalf.

Due to a possible conflict of interest or a bias in regards to one party or another, it would not be appropriate for the person who advised the accused to serve later as an advisor to the major superior who decides the case.¹⁰

4.2.5 – Completion of the Proofs

Once the delegate has heard the accused, he or she will complete the proofs, interviewing additional witnesses or gathering other proofs as he or

⁹ If it comes to light later in the investigation that the advisor was a witness to matters related to the accusation, he or she can be questioned about the events themselves, leaving aside anything the accuser has told him or her since. In assessing the testimony, however, the major superior will have to consider the possibility that it is biased in favour of the accused or perhaps even tainted by the advisor's conversations with the accused after the incident itself.

¹⁰ Unless, of course, that person was agreed upon by the accused, the accuser and the major superior as a mediator. Cf. c. 1446. Circumstances in which a mediator could be used are discussed more fully in 4.3.4.

she deems necessary. Once the delegate has decided that no further proofs are necessary or possible to obtain, he or she will present the proofs together with a recommendation to the major superior. The recommendation of the delegate will include a summary of the proofs, a summary of the relevant laws and principles of jurisprudence, an assessment of the apparent truthfulness of the various witnesses (understanding that the delegate may have discerned certain clues when taking their statements which a written transcript may not reflect), as well as his or her recommendation for how the case should be resolved.

At this point, in a manner parallel to what is described in c. 1598, we think it would be appropriate that the major superior share the proofs with the parties. At that time, the parties may propose further proofs or raise objections to proofs already gathered. In any case, the sharing of the proofs will be essential in insuring the accused's right of defence.¹¹

4.2.6 – Consultation with Experts

The major superior will consider the case with the assistance of two experts, at least one of whom should be an canonist and at least one of whom

¹¹ Canon 1598: "§1. After the proofs have been collected, the judge by a decree must permit the parties and their advocates, under penalty of nullity, to inspect at the tribunal chancery the acts not yet known to them; furthermore, a copy of the acts can also be given to advocates who request one. In cases pertaining to the public good to avoid a most grave danger the judge can decree that a specific act must be shown to no one; the judge is to take care, however, that the right of defence always remains intact. §2. To complete the proofs, the parties can propose additional proofs to the judge. When these proofs have been collected, it is again an occasion for the decree mentioned in §1 if the judge thinks it necessary."

should be a member of the institute.¹² Expert advice will be of assistance in weighing and assessing the proofs and in determining a lawful and appropriate punishment,¹³ other authoritative response, or the decision to enter into mediation.¹⁴ Except in cases where the major superior is able to resolve the situation by means of mediation, the major superior will never decide a case, impose a punishment, establish a protective measure, or give any other definitive response, without the assistance of the two experts. The advice of the experts will help to insure that every case is decided carefully and with the assistance of at least one expert in canon law. Such delicate matters must always be dealt with in accordance with the law and with an even, unbiased hand. The experts will not have been part of the procedure in any way until such time as they are called upon to assist the major superior.¹⁵

¹² In recommending that the major superior be assisted by two experts, we are following the example set in c. 1720, 2° which requires the ordinary in extrajudicial procedures to be assisted by two assessors. Also, the requirement in c. 1742 that when considering the removal of a pastor, the bishop should discuss the matter with two pastors appointed for this purpose.

¹³ We will use the word 'punishment' to refer to those punitive measures that may be imposed by a major superior as a result of the non-penal disciplinary procedure. The word 'penalty' will be reserved for those punitive measures that may be imposed only by means of a penal procedure or by operation of the law itself, as in the case of *latae sententiae* penalties.

¹⁴ The circumstances in which the major superior may consider mediation are discussed below in 4.3.4.

¹⁵ Cf. c. 1447.

4.2.7 – Deciding a Case

The major superior's task of deciding the case is succinctly reflected in the words of c. 1608 on the judge in a judicial procedure:

- §1. For the pronouncement of any sentence, the judge must have moral certitude about the matter to be decided by the sentence.
- §2. The judge must derive this certitude from the acts and the proofs.
- §3. The judge, however, must appraise the proofs according to the judge's own conscience, without prejudice to the prescripts of law concerning the efficacy of certain proofs.
- §4. A judge who was not able to arrive at this certitude is to pronounce that the right of the petitioner is not established and is to dismiss the respondent as absolved, unless it concerns a case which has the favor of law, in which case the judge must pronounce for that.

In this canon we see the essential elements needed to arrive at a decision. The standard of proof for a finding of guilt will be moral certainty.¹⁶ The certainty of the decision must be based upon the proofs and acts. In evaluating the proofs, the major superior will follow his or her own conscience and the laws of the Church governing the evaluation of proofs.¹⁷ In every case where the

¹⁶ In his address to the Roman Rota in 1942, Pope Pius XII described moral certainty in this way: "Between the two extremes of absolute certainty and quasi-certainty or probability, is that *moral certainty* ... It is characterized on the positive side by the exclusion of well-founded or reasonable doubt ... on the negative side, it does admit the absolute possibility of the contrary and in this it differs from absolute certainty." W.H. WOESTMAN, (ed.), *Papal Allocutions to the Roman Rota: 1939-2002*, Ottawa, Faculty of Canon Law, Saint Paul University, 2002, 18.

¹⁷ Cf. cc. 1526-1583. We observe here the change regarding the evaluation of proofs instituted by Pope Francis in c. 1678 of *Mitis Iudex Dominus Iesus*, in which he allows for the possibility that a judicial confession, a declaration of a party, or the testimony of a witness may, in certain circumstances, constitute full proof. Canon 1678 states: "§ 1. In cases of the nullity of marriage, a judicial confession and the declarations of the parties, possibly supported by witnesses to the credibility of the parties, can have the force of full proof, to be evaluated by the judge after he has considered all the indications and supporting factors, unless other elements are present which weaken them. § 2. In the same cases, the testimony of one witness can produce full proof if it concerns a qualified witness making a deposition concerning matters done *ex officio*, or unless the circumstances of things and persons suggest it." POPE FRANCIS, *motu proprio Mitis Iudex Dominus Iesus*, 15 August 2015, in *Origins*, 45 (2015), 418-423.

proofs do not support a finding of guilt, the accused will be declared innocent.¹⁸

In deciding a case, the major superior together with the experts will consider the proofs and recommendation presented by the delegate.¹⁹ The major superior will also review the personnel file of the accused for any relevant background information, which he or she may share with the advisors, depending on the circumstances.²⁰ In no case, however, will the major superior decide a case based on information from the accused's personnel file or any other source which is not included in the proofs.²¹ In deciding a case, especially with a definitive finding of guilt, the superior will

¹⁸ The CIC does not explicitly invoke the principle of "innocent until proven guilty," although c. 1608 §4 approximates it quite closely. Richardson states, "The expression *innocent until proven guilty* is not one right but encompasses several related rights, which together constitute the right to a fair trial for anyone accused of a crime." W. RICHARDSON, *The Presumption of Innocence in Canonical Trials of Clerics Accused of Child Sexual Abuse: An Historical Analysis of the Current Law*, Leuven, Peeters, 2011 (= RICHARDSON, *The Presumption of Innocence in Canonical Trials*). We have already discussed these rights in 2.2.2. See also K. PENNINGTON, "Innocent Until Proven Guilty: The Origins of a Legal Maxim," in P.M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Montreal, Wilson & Lafleur, 2005, 45-66 (= PENNINGTON, "Innocent Until Proven Guilty").

¹⁹ The canons governing proofs (cc. 1526-1586) will be applied *mutatis mutandis*.

²⁰ Data regarding the accused's past, of course, cannot supply proof regarding the question of misconduct in the current moment, but it can illuminate patterns in the member's behaviour which cast the current accusation, or the member's current testimony, in clearer light. Such information may be particularly helpful in helping the major superior to establish an appropriate punishment, or other authoritative response, or protective measure.

²¹ Cf. c. 1608 §2. Richardson writes: "To those who might say that the pope or another judge might have secret knowledge of the truth in a particular case, Monachus pointed out that a judge is not a private person. He acts in a public capacity. He is unable, therefore, to judge in a private capacity. He must learn the truth in a public manner." RICHARDSON, *The Presumption of Innocence in Canonical Trials*, 19. In the context of a religious community, it may be difficult, even impossible, for the superior to completely exclude all previous knowledge of the accused when making a decision, and in some cases, such knowledge may be useful. In every case, however, the decision must stand on the evidence contained in the proofs, lest the accused's right of defense be compromised.

issue a written decision that includes a summary of the reasons in fact and law.²² A version of the decision, redacted if necessary depending on circumstances, will be shared with both the accuser and the accused.

When deciding a case, the major superior and the experts will also consider the canons governing culpability for an offence (cc. 1321-1330) if applicable.

4.2.8 – Determining the Appropriate Response

As has been discussed above, whenever possible the imposition of punishments is to be avoided.²³ In cases where culpable non-penal misconduct gives rise to scandal among the faithful, however, the imposition of a punishment may be necessary. This may be especially true in cases where the accused denies his or her responsibility but the major superior judges nonetheless that the accused is guilty. The question then arises, what punishments can a major superior impose as a result of the non-penal disciplinary procedure? As we have discussed above, canonical penalties can be imposed only as the result of a penal procedure.²⁴ We would argue,

²² Cf. cc. 1611-1612.

²³ See 3.3. Cf. c. 1341: "An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender."

²⁴ See 2.3.4. Cf. c. 221: " §1. The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law. §2. If they are summoned to a trial by a competent authority,

however, that certain punishments, even those which parallel some of the penal sanctions, are within the authority of all major superiors to impose, such as, the warning, the rebuke, an external forum penance, and certain expiatory penalties. As we have discussed above, cc. 1339 and 1340 describe warnings, rebukes, and external forum penances which, because of their placement in *Book VI*, are the domain of those who in the law are recognized as ordinaries.²⁵ Nothing, however, would prevent any religious superior, in light of the vow of obedience, from issuing a warning, rebuke, or external forum penance in the ordinary, non-canonical sense of these terms. In a like manner, it is within the authority of all religious superiors to impose certain restrictions or punishments which are within their authority, even if they resemble some of the expiatory penalties mentioned in c. 1336. Some examples would be: “a prohibition or an order concerning residence in a certain place or territory” (c. 1336 §1, 1°); “privation of a power, office, function, right, privilege, faculty, favour, title, or insignia, even merely honorary” (c. 1336 §1, 2°); “a prohibition against exercising those things listed under n. 2, or a prohibition against exercising them in a certain place or outside a certain place” (c. 1336 §1, 3°); and “a ... transfer to another office” (c. 1336 §1, 3°). In each case, the major superior could impose a punishment

the Christian faithful also have the right to be judged according to the prescripts of the law applied with equity. §3. The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.”

²⁵ See 3.2.2.

resembling one of the aforementioned measures only when the object of the measure (the assignment to a particular location, ministry or function; the bestowal or denial of a certain privilege or power, such as, active and passive voice in chapter; etc.) was within his or her authority.

In no case, can a religious superior impose anything that resembles in its effects excommunication or interdict. While religious superiors, for a just reason, can limit the movements of their subjects and thereby, in the case of an ordained minister, limit his ability to celebrate the sacraments for the faithful, a religious superior, acting under his or her own authority, could never deny a member access to receive the sacraments.²⁶ Although the censure of suspension "can affect only clerics" (c. 1333 §1), religious superiors would be able to apply a punishment that resembles suspension in regards to assignments or functions that are within their authority.²⁷

²⁶ One could imagine a scenario that might justify a religious superior ordering a subject not to attend a particular celebration of the Eucharist (or certain other sacramental celebrations) due to its location or because of the expectation that certain other people would be present, and the unfavorable environment that might create. No religious superior, however, could issue a blanket prohibition against attending all celebrations of the Eucharist or all sacramental celebrations. This would be a grave violation of the right of the faithful to receive the sacraments so long as they "seek them at appropriate times, are properly disposed, and are not prohibited by law from receiving them" (c. 842, §2).

²⁷ It is due to the special gravity of censures that their imposition is reserved exclusively to penal procedures or by action of the law itself (e.g., the *latae sententiae* excommunication that is incurred for participating in an abortion, c. 1398). Also, given the gravity of censures, it is difficult to imagine that they would be an appropriate response to a case of non-penal misconduct. Furthermore, censures are reserved for offences in which the offender persists in contumacy (cf. c. 1347 §1), whereas the non-penal disciplinary procedure is foreseen predominately as a means for addressing particular acts of misconduct that are not ongoing.

The key element in recognizing that any religious superior can impose a punishment in the aforementioned ways is that the superior in question acts at all times within his or her authority. For instance, no superior, not even the supreme moderator, could strip a member of an honour awarded by the Supreme Pontiff, or a provincial superior could not remove someone from an office conferred by the supreme moderator.²⁸ In this way, local superiors, major superiors, and supreme moderators can impose punishments, provided they act within their authority as defined by universal and proper law. Furthermore, nothing would prevent a superior from imposing some other deprivation of a spiritual or temporal good, not included in c. 1336, that is within the scope of his or her authority but not expressly foreseen in the law. In no case, however, can a superior impose a perpetual punishment as a result of the non-penal disciplinary procedure: since c. 1342 §2 forbids the imposition of a perpetual penalty by means of the extrajudicial penal process,²⁹ it seems to us that the non-penal disciplinary procedure would also be an insufficient means for the application of a perpetual punishment. In exceptional cases where it would seem that the imposition of a canonical penalty or some other perpetual punishment would be appropriate, the major

²⁸ Unless, of course, proper law or some other agreement permitted this.

²⁹ Canon 1342 §2: "Perpetual penalties cannot be imposed or declared by decree, nor can penalties be so applied when the law or precept establishing them prohibits their application by decree."

superior could petition the competent dicastery of the Holy See, to impose such a measure.

For less serious cases of misconduct, and especially in cases where the member accepts responsibility for his or her actions, and scandal is minimal or non-existent, the imposition of some external forum penance would often be the most appropriate response. Never can a superior impose under obedience that a member seek psychological counselling or therapy, since to do so would be a violation of the member's right to privacy.³⁰ It could be, however, that a superior imposes a certain punishment, and then suspends the execution of that punishment, if the member observes certain requirements. If the member fails to meet those requirements, then the original punishment will be applied.³¹

When determining an appropriate punishment, it would also be reasonable to apply c. 1344 *mutatis mutandis*, namely: to defer the application of a punishment until a more opportune time; abstain from imposing a

³⁰ See PIUS XII, address to a Congress of the International Association of Applied Psychology, 10 April 1958, in AAS, 50 (1958), 276, English translation in *The Pope Speaks*, 5 (1958), 15; SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, instruction *Renovationis causam*, 6 January 1969, in AAS, 61 (1969), 103-120, English translation in *L'Osservatore Romano: Weekly English Edition*, 13 February 1969, 6; SECRETARIAT OF STATE, instruction prot. 311157, 6 August 1976; E. McDonough, "The Troubling Religious: Further Considerations," in *Review for Religious*, 49 (1990), 620.

³¹ In such a case, it would be acceptable to impose a punishment on the member, but then to suspend it provided the member seeks counselling. But the precise conditions would need to be clearly delineated. What kind of counselling? For how long? What if the member seeks counselling in good faith but the underlying problem persists and the attendant misbehaviour recurs? In any case, the willingness of the member to enter counselling will have to be evaluated carefully. Experience dictates that forcing a member to seek counselling for behaviour or other problems that he or she is not willing to confront is rarely fruitful.

punishment, or impose a lighter one, when the offender already has, or likely will be, punished by civil authorities³²; and suspend the punishment for a first offence where there is no great scandal in need of repair.³³

The question must be asked: to what extent can superiors limit an ordained member's sacramental ministry? Although religious superiors cannot dismiss a member from the clerical state on their own authority, religious superiors can limit the ministry of members almost completely. Of course, as we have already noted, by limiting the member's movements, they can completely limit his ministry outside the community and, under the vow of obedience, could order a member not to celebrate a sacrament for the faithful or even, in extreme cases, for fellow members.³⁴ In no case, however,

³² Canon 1344, 2° includes the possibility of imposing a lighter penalty or no penalty at all in cases where the offender has reformed himself and repaired the scandal, but in such cases, as we have indicated above, we do not believe any punishment would be appropriate. See also V. DE PAOLIS, "Commentary on Canon 1344," in *Exegetical Comm*, vol. IV/1, 373-376.

³³ Canon 1344: "Even if the law uses preceptive words, the judge can, according to his own conscience and prudence:

1° defer the imposition of the penalty to a more opportune time if it is foreseen that greater evils will result from an overly hasty punishment of the offender;

2° abstain from imposing a penalty, impose a lighter penalty, or employ a penance if the offender has reformed and repaired the scandal or if the offender has been or, it is foreseen, will be punished sufficiently by civil authority;

3° suspend the obligation of observing an expiatory penalty if it is the first offence of an offender who has lived a praiseworthy life and if the need to repair scandal is not pressing, but in such a way that if the offender commits an offence again within the time determined by the judge, the person is to pay the penalty due for each delict unless in the interim the time for the prescription of a penal action has elapsed for the first delict."

³⁴ According to c. 974, for a grave cause, a religious superior who enjoys the power of governance could withdraw the faculty of a priest to hear the confessions of those subject to his authority.

could a priest be legitimately forbidden to celebrate a private Mass.³⁵ Although it would be legitimate to limit an ordained member's ministry as a protective measure (if, for instance, he had shown a tendency to abuse his position as a priest), no superior, apart from a penal process, could limit someone's sacramental ministry as a punishment.³⁶ To limit a priest's ministry as a punishment is to suspend him, either partially or fully, and suspensions are a type of censure which we have already determined cannot be imposed as a result of the non-penal disciplinary procedure.³⁷

In cases where certain misconduct would seem to be part of a pattern that might recur in the future, some protective measure might be warranted, but also, or perhaps alternatively, a penal precept might be applied that imposes still graver punishments than the member has already suffered. Of course, the gravest solution available to any superior would be to seek the

³⁵ See W.H. WOESTMAN, "Restricting the Right to Celebrate the Eucharist," in *Studia canonica*, 29 (1995), 155-178.

³⁶ Protective measures will be treated in the next section.

³⁷ Cf. c. 1333: "§1. Suspension, which can affect only clerics, prohibits:

1° either all or some acts of the power of orders;

2° either all or some acts of the power of governance;

3° the exercise of either all or some of the rights or functions attached to an office.

§2. A law or precept can establish that a suspended person cannot place acts of governance validly after a condemnatory or declaratory sentence.

§3. A prohibition never affects:

1° the offices or the power of governance which are not under the power of the superior who establishes the penalty;

2° the right of residence which the offender may have by reason of office;

3° the right to administer goods which may pertain to the office of the person suspended if the penalty is *latae sententiae*.

§4. A suspension prohibiting a person from receiving benefits, a stipend, pensions, or any other such thing entails the obligation of making restitution for whatever has been received illegitimately, even if in good faith."

dismissal of the member, but that would be possible only by observing the relevant canons and could never result simply from a non-penal disciplinary procedure.³⁸

In cases where the accused is found to be innocent of the accusation, it would only be fair that the member be exonerated with the same degree of publicity that attended the accusation. Furthermore, if one were harmed by a calumnious denunciation, he or she could seek recourse according to c. 1390 §2-3.³⁹ Moreover, if the accused were to have been egregiously harmed by an unmerited action of the superior, he or she could initiate an action for damages.⁴⁰

In cases where the accused is found innocent, because the proofs were insufficient, but significant suspicions remain about the accused's possible misconduct, an option might be to impose a penal precept on the member.⁴¹ The precept, of course, would do nothing to address any past misconduct that may have occurred, but it will make clear to the accused the precise consequences if, in the future, he or she were found to engage in such misconduct. Of course, although any superior can issue a written order, only

³⁸ See 3.1.2.

³⁹ C. 1390 §2: "A person who offers an ecclesiastical superior any other calumnious denunciation of a delict or who otherwise injures the good reputation of another can be punished with a just penalty, not excluding a censure.

§3. A calumniator can also be forced to make suitable reparation."

⁴⁰ Cf. c. 128: "Whoever illegitimately inflicts damage upon someone by a juridic act or by any other act placed with malice or negligence is obliged to repair the damage inflicted."

⁴¹ See 3.2.1.

ordinaries can issue penal precepts. Religious superiors who are not ordinaries could request the issuance of a penal precept, either from the local ordinary or the relevant dicastery of the Holy See. All religious superiors can issue warnings.

In cases where the proofs are insufficient to prove guilt and a penal precept would not seem to be warranted, a simple report to all concerned parties that the matter was investigated and that the accused was found innocent due to a lack of proofs, would be sufficient. Leaving a case open indefinitely in the hope that some definitive proof might emerge in the future would seem contrary to the principle of *habeas corpus*. The longer an unresolved accusation were to hang over someone, the more likely the good reputation of the accused is to be harmed.

In cases where it is determined that the member participated in some sort of misconduct but that he or she was not fully culpable, still available would be the possibility of protective measures or, depending on the circumstances, imposed exlaustration.⁴²

4.2.9 – Protective Measures

In light of a member's certain misconduct, it might be necessary to limit his or her ministry or movements in order to protect the faithful, the

⁴² See 3.1.1.

member himself or herself, the local community, and/or the entire institute. Protective measures are distinct from punishments in that their motivation is not to repair scandal, restore justice, or reform the member,⁴³ but simply to protect individuals or groups from harm. For this reason, they may be applied whether or not the member is fully culpable for the misconduct he or she has committed. Also, for this same reason, they may affect the member indefinitely, although the necessity and usefulness of their application should be reviewed regularly.

In no case would it be acceptable, however, to apply protective measures to a member whose misconduct was not certain. We have spoken about cases where the member is suspected of some kind of misconduct but when there are insufficient proofs to ascertain the guilt of the member with moral certainty. In such cases, a member might be subject to an extra degree of vigilance or supervision in relation to the ministry or setting in which the misconduct is alleged to have happened; to apply restrictions on the member's movements or ministry due to an unproven allegation, however, would be excessive and unjust.⁴⁴ If an allegation of misconduct against a member is not proven, and the faithful continue still to regard the member with suspicion, the major superior may need nevertheless to reassign the

⁴³ Cf. c. 1341

⁴⁴ Unless, of course, the behavior at issue would be inappropriate for any religious in any normal circumstance, such as kissing spiritual directees on the lips, or frequenting strip clubs and casinos. In such cases, even if it were uncertain the accused committed such behavior, it would still be appropriate to explicitly forbid a religious from doing such things.

member in order to allow him or her to pursue a more fruitful ministry. This would be neither a punishment nor a protective measure, but merely a routine act of governance intended to ensure that the talents of the member were being utilized appropriately.

4.2.10 – Prescription

Prescription is the legal institute by which after a certain period of time it is no longer possible to initiate an action or proceed against an accusation. Prescription presumes neither that an allegation is true or untrue, but for the sake of protecting the integrity of the judicial system, it establishes a prohibition against initiating a procedure. Canon 1362 states the general rule: “Prescription extinguishes a criminal action after three years...” We would also regard three years as ample time to bring forward a report of non-penal misconduct under normal circumstances. The rules governing prescription exist not because misconduct ceases to matter after an arbitrary period of time, but because the testimony of witnesses becomes less reliable and tangible evidence may become harder to discover; therefore, there is heightened risk of a miscarriage of justice.⁴⁵ For the more grave delicts reserved to the CDF, the Church extends the period of prescription for up to

⁴⁵ See P.J. BROWN, "Prescription and Statutes of Limitations," in *CLASP*, 70, 2008, 434-435.

twenty years.⁴⁶ While extending the period for pursuing these more grave delicts could make sense given that they are potentially heinous (as the sexual abuse of minors), presumably there would be little need to extend beyond three years the period in which someone can present an accusation of non-penal misconduct. If serious extenuating circumstances were to exist, the major superior could dispense from the three-year limit, just as the CDF can even dispense from the twenty-year limit.

4.2.11 – Confidentiality

As has already been mentioned above, preserving the confidentiality of the process is important, lest someone's good reputation be harmed when an accusation is subsequently discovered to be false. The major superior's delegate for studying the accusation must be held to strict confidentiality regarding the content of the investigation, and should not reveal anything to anyone who is not a direct participant in the procedure, without the express permission of the major superior, whether the procedure has been completed

⁴⁶ *Norms*, Art. 7: "§ 1. A criminal action for delicts reserved to the Congregation for the Doctrine of the Faith is extinguished by prescription after 20 years, with due regard to the right of the Congregation for the Doctrine of the Faith to derogate from prescription in individual cases.

§ 2. Prescription runs according to the norm of Canon 1362 §2 of the *Code of Canon Law* and Canon 1152 §3 of the *Code of Canons of the Eastern Churches*. However, in the delict mentioned in Article 6 §1 n. 1 [the sexual abuse of a minor or one who habitually lacks the use of reason], prescription begins to run from the day on which a minor completes his 18th year of age. "

or is still in process.⁴⁷ The major superior, again with the assistance of the experts mentioned above, will decide what information will be shared and with whom. Although the accuser may be encouraged to respect the confidentiality of the procedure while it is underway, strictly speaking, he or she may not be required to do so.⁴⁸ Firstly, the accuser might not be a member of the institute and therefore could not be bound by an order of the major superior. Yet, even if the accuser were a member of the institute, we feel it would be an illegitimate restriction of the accuser's rights to attempt to impose silence on him or her regarding the harm he or she may have suffered. People who have suffered harm by members of religious institutes should be encouraged to come forward so that any harmful behaviours by other members can be corrected. Attempting to impose silence upon those who would level an accusation of misconduct may give the impression that the institute is trying to conceal such misconduct and may result in adverse feelings on the part of the accuser, such as shame or isolation.⁴⁹

⁴⁷ Cf. c. 1475 §2: "Without a mandate of the judge, notaries and the chancellor are forbidden to furnish a copy of the judicial acts and documents acquired in the process."

⁴⁸ Of course, like all people, accusers are bound by natural law to protect their own good name and, depending on the nature of the accusation, publically making accusations against a religious could also lead people to question the morality or prudence of the accuser, thereby endangering his or her good name.

⁴⁹ It is not uncommon, however, when out-of-court settlements are agreed to in civil cases that in exchange for financial compensation, the victim agrees not to discuss the case publically. This is different, of course, than the major superior attempting to impose silence on the accuser from the outset.

In a parallel manner, although the major superior could order the accused not to discuss the case, since the accused is a member of the institute and therefore under obedience to the major superior, we do not feel that doing so would be just. The accused should have the same rights as the accuser to express himself or herself, although in most cases it would be highly imprudent to do so. In fact, for the sake of his or her own defence, the accused would be well advised not to discuss the case while the procedure is in process because anything the accused says could potentially be used against him or her in the procedure.

In deciding what information will be shared and with whom, the major superior will have to remember that a person's right not to have his or her good reputation illegitimately harmed (c. 220) remains intact even when the member has been found guilty of misconduct. The accused's right to a good reputation, however, is not absolute and must be balanced with the right of the accuser to know that justice has been served. Also, in misconduct cases that have caused public scandal, it is only appropriate that the faithful are made aware that the case has been addressed appropriately.⁵⁰ Of course, c. 220 binds not just the major superior, but every Latin Catholic,⁵¹ including any accuser or witness, and in a comparable manner c. 23 of the *CCEO* binds

⁵⁰ We recall the legal aphorism: "Not only must justice be done; it must also be seen to be done."

⁵¹ C. 220: "No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy."

every Eastern Catholic.⁵² Therefore, every Catholic who participates in a non-penal disciplinary procedure is bound to protect the good reputation of others, although each person will have to judge what harm to an individual's reputation is "illegitimate."

Individuals could always initiate actions against others for harming their reputations (cf. c. 128), and although major superiors would be advised to be cautious themselves in what they reveal and in what they permit the delegate to reveal, it would not seem prudent for them to get involved in trying to limit or to control the free expression of the parties, lest their actions be construed as attempts to manipulate the parties, or to put the good of the institute ahead of the good of individuals. At the outset of the procedure, it would be appropriate to remind all Catholic parties about the content of c. 220 and *CCEO* c. 23, as well as that of c. 223 §2 which states, "In exercising their rights, the Christian faithful ... must take into account the common good of the Church, the rights of others, and their own duties toward others."⁵³ Thereafter, the application of these canons must be left with the good judgement of the parties themselves.

⁵² *CCEO* c. 23: "No one is permitted to damage unlawfully the good reputation which another person enjoys nor to violate the right of any person to protect his or her own privacy."

⁵³ The equivalent of c. 223 in the *CIC* is c. 26 in the *CCEO*. Cc. 229 and 223 are discussed in detail in 2.2.2.

4.2.12 – Preserving the Acts

Regardless of the outcome of the procedure, all documents generated as part of the procedure, such as transcripts of interviews, other evidence, and written opinions of those involved in assessing the case, will be preserved in the confidential archive of the major superior (cf. c. 489 §2, 1472, and 1475 §1). This will be of importance in the event that one party challenges the decision and the higher authority seeks to review the acts of the procedure (cf. c. 1474). The preservation of the acts may also be of importance in the event that the member reoffends in the same or a similar manner afterwards. A copy of the major superior's decision, with a summary of the reasons in law and in fact that support the decision, should be preserved also in the accused's personnel file.

4.2.13 – Recourse Against the Decision

Both the accuser and the accused have the right to seek recourse at the conclusion of the procedure,⁵⁴ a fact which the decision of the major superior should indicate. In cases where it is believed that the decision of the major superior was harmful, the decision could be challenged at the level of the supreme moderator and ultimately to the competent dicastery of the Holy See. If there is a question regarding the violation of the law in a decision

⁵⁴ Cf. c. 1737.

issued or confirmed by a dicastery of the Holy See, the case could be referred to the Apostolic Signatura.

In any case, the curia of the major superior would likely need to assist whoever sought recourse and, if necessary, or requested by a religious, to provide him or her with an advocate.⁵⁵

4.3 – Particular Questions Regarding the Non-Penal Disciplinary Procedure

In this section we will examine some of the potentially neuralgic points in applying the non-penal disciplinary procedure.

4.3.1 – When Is a Protective Measure Unjust?

A major superior must always make clear for a member who has been found guilty of misconduct when a measure is a protective measure and when it is a punishment. As has been stated above, the two serve different purposes: the former, to protect individuals or groups; the latter, to repair scandal, restore justice, and/or reform the member. A protective measure must always correspond directly and precisely to the misconduct which the member is known to have committed. The major superior must always be able to justify the application of a protective measure by means of a logical extrapolation from the misconduct that is known to have occurred. It would be profoundly unjust for a major superior to apply a protective measure that

⁵⁵ Cf. c. 1738.

was significantly more extensive than the misconduct that had been proven. For instance, it would be unjust to limit a member's sacramental ministry, after a proven incident of misappropriation of funds. An inappropriate or dishonest use of financial resources is no predictor of the member's potential for harmful or abusive sacramental ministry. Likewise, it would be unjust to forbid a male member from all contact with women after an incident where the member was found to ask women inappropriate questions in a counselling context. Posing inappropriate questions to women in a private, counselling setting, is no predictor that the male member poses a general threat to all women in any possible circumstances, including public settings. In the first example, it would be appropriate to curtail or to supervise carefully, the member's access to funds. In the second case, it would be appropriate to require the member to desist from meeting with women in private or to receive further training. In all cases, major superiors must be able to justify their application of a protective measure by basing their decision on sound reasoning and established facts.

4.3.2 – Can the Major Superior Decide Against Using the Non-Penal Disciplinary Procedure?

It is possible that the major superior could dispense with the need for the non-penal disciplinary procedure in cases where the accusation of misconduct was of such trifling importance that, even if the member were

guilty, the major superior would not apply a punishment or protective measure. In such cases, to spare the cost and disruption of the investigation by the delegate, the major superior could simply issue a conditional warning by which the member is advised, if he or she did in fact do what is accused, to cease and desist or to face some sort of authoritative response for a subsequent offence.

It would not be appropriate for the major superior to forego the use of the non-penal disciplinary procedure in cases where, if the accusation were shown to be true, the misconduct would warrant a punishment or protective measure. The only exception in which a major superior might forego the use of the non-penal disciplinary procedure, and still impose a punishment, would be an extreme case where the misconduct was entirely public and therefore an investigation would be superfluous.⁵⁶ In such a case, a prompt punishment might be an appropriate response to widespread and instantaneous scandal. In any case, the major superior would need to give the presumed offender at least a hearing in which he or she was afforded an opportunity to defend himself or herself. Even in notorious cases, the right of defence must be respected.⁵⁷ Then the major superior would be advised to

⁵⁶ A possible example would be a religious arrested for drinking and driving that was reported in the media.

⁵⁷ Pennington gives the following, illuminating commentary on the thought of Johannes Monachus who died at the beginning of the 14th Century: "While glossing a decretal of Pope Boniface VIII (*Rem non novam*) he commented extensively on the rights of a defendant. He began by asking the question: could the Pope, on the basis of

hear the experts, so as to be certain that the punishment or protective measure was carefully chosen and appropriate, based on what is known to have transpired, and not decided upon hastily or rashly in a moment of high drama, but without suitable basis in law or the facts.

The purpose of establishing the non-penal disciplinary procedure is to limit the arbitrary use of power⁵⁸ and to assure everyone concerned that accusations of misconduct will be addressed fairly and rationally. Therefore, to dispense with the established procedure without a clear and compelling reason, would undermine the very purpose of establishing the procedure.

4.3.3 – Can the Accused Demand that the Non-Penal Disciplinary Procedure Be Followed?

Notwithstanding the sorts of cases discussed in the previous subsection, it would be wholly appropriate for the accused to call for the use

this decretal, proceed against a person if he had not cited him? Johannes concluded that the Pope was only above positive law, not natural law. Since a summons had been established by natural law, the Pope could not omit it. He argued that no judge, even the Pope, could come to a just decision unless the defendant was present in court. When a crime is notorious, the judge may proceed in a summary fashion in some parts of the process, but the summons and judgment must be observed. He argued that a summons to court (*citatio*) and a judgment (*sententia*) were integral parts of the judicial process because Genesis 3:9-12 proved that both were necessary. God had been bound to summon Adam; human judges must do the same. Then he formulated an expression of a defendant's right to a trial and to due process with the following words: a person is presumed innocent until proven guilty (*item quilbet presumitur innocens nisi probetur nocens*)...

...Johannes Monachus was the first European jurist to recognize the inexorable logic of God's judgment of Adam: God could not condemn Adam without a trial because even God must presume that Adam was innocent until proven guilty. Other canonists played with the idea of defendants' rights. They coined a proverb that God must even give the devil his day in court." PENNINGTON, "Innocent Until Proven Guilty," 55-56.

⁵⁸ The arbitrary use of power is discussed in 2.2.3.

of the non-penal disciplinary procedure in cases where he or she thought his or her good reputation was being harmed by an accusation that was not being addressed. It could also be requested in cases where the accused believed the major superior was punishing him or her without respecting the established procedure. If, however, the procedure is established by the authority of the major superior, and carried out completely under his or her authority, strictly speaking there would be no means by which the accused could oblige the major superior to follow the procedure, without recourse to some higher authority who could compel the major superior to observe the procedure. From the beginning, however, if the procedure were established for a particular territory by authority of the supreme moderator then, depending on the precise form of the procedure, the major superior might be obliged to respect such petitions by his or her subjects.

4.3.4 – Should the Major Superior Personally Interview the Accuser or the Accused? When Is Mediation Appropriate?

Although one would presume that the investigation by the delegate would provide sufficient proofs for the major superior to decide the case, it is conceivable that either or both the accuser and the accused would want to speak directly to the major superior, perhaps for the sake of sharing some sensitive information that he or she does not feel comfortable sharing with the delegate. In any case, it would be hard to imagine a major superior refusing to

see a member who sought to speak with him or her. Also, c. 1530 requires judges to hear parties in contentious trials who request to be heard in person and we would hold that this same obligation binds the major superior by analogy.⁵⁹ In such cases, the major superior will accept to hear directly from the accused or accuser but only after having received and considered carefully the report prepared by the delegate. After speaking with the accuser and/or the accused, the major superior may instruct the delegate to gather certain other testimonies or proofs, before rendering a decision.⁶⁰

The possibility of the major superior meeting with both the accuser and the accused raises the prospect of whether or not the major superior could agree to meet with both the accuser and the accused simultaneously.⁶¹ This possibility would have to be considered very carefully. Firstly, of course, both the accused and the accuser would have to agree to such a meeting. Secondly, the major superior would have to decide if some sort of facilitator or mediator would be helpful for such a meeting and, if so, if both parties were willing to accept the facilitator or mediator. Before any decision was made, however, regarding the use of a facilitator or mediator, the major

⁵⁹ Canon 1530: "The judge can always question the parties to draw out the truth more effectively and indeed must do so at the request of a party or to prove a fact which the public interest requires to be placed beyond doubt."

⁶⁰ Canon 1725 gives the accused the right to speak last.

⁶¹ Canon 1560 §2 addresses an analogous situation: "If witnesses disagree among themselves or with a party in a grave matter, the judge, after having removed discord and scandal insofar as possible, can have those who disagree meet together or confront one another."

superior would need to determine what is the scope and purpose of the conversation or mediation. In order to determine the purpose of the meeting, the major superior would need to determine if what was at stake is a private good (i.e., a matter with significance for only the parties) or the public good (i.e., matter with significance for some wider community).⁶² If only a private good is at stake, the major superior could call upon the assistance of a mediator, or perhaps could mediate a resolution himself or herself, in accordance with c. 1446.⁶³ If, however, the major superior were to determine that the alleged misconduct potentially has significance for the public good,⁶⁴ he or she would need to make it clear to both parties that, even if the parties were to reach some sort of peace between themselves, perhaps with the help

⁶² For example, even in a case where a victim of misconduct has forgiven her assailant, the major superior may still choose to impose a punishment or protective measure if he fears the assailant may commit comparable misconduct against others. Or, in cases where the misconduct was widely known, that the faithful would be scandalized if it seemed to them that the institute tolerated such misconduct.

⁶³ Canon 1446: "§1. All the Christian faithful, and especially bishops, are to strive diligently to avoid litigation among the people of God as much as possible, without prejudice to justice, and to resolve litigation peacefully as soon as possible. §2. Whenever the judge perceives some hope of a favourable outcome at the start of litigation or even at any other time, the judge is not to neglect to encourage and assist the parties to collaborate in seeking an equitable solution to the controversy and to indicate to them suitable means to this end, even by using reputable persons for mediation. §3. If the litigation concerns the private good of the parties, the judge is to discern whether the controversy can be concluded advantageously by an agreement or the judgment of arbitrators according to the norm of cc. 1713-1716."

⁶⁴ Canon 1715 §1: "An agreement or compromise cannot be made validly concerning matters which pertain to the public good and other matters about which the parties cannot make disposition freely."

of a facilitator, the major superior would still reserve to himself or herself the right to impose a punishment or protective measure.⁶⁵

Depending on the complexity of the case, the major superior may draw upon the assistance of the experts described above at any stage of the procedure. Their assistance will be helpful especially in making the determination regarding the possibility of meditation. Their opinions will always be heard before the major superior renders a final decision in cases involving the public good.

4.3.5 – Are Religious Superiors Bound to Proceed Against Every Report of Misconduct?

The definition of non-penal misconduct is quite broad and could potentially include matters that technically meet the definition but which are ultimately of trifling significance. The delegate will promptly refer accusations of doubtful significance to the major superior for a decision regarding whether or not the non-penal disciplinary procedure should be

⁶⁵ Illustrations might be useful. An example of a dispute over a private good might be a dispute which arises over an object of considerable value which a religious believes was given to him by a member of the faithful but which the faithful maintains was merely a loan. If the major superior could help to resolve the matter in a meeting with both parties, the matter could be considered closed. An example of a dispute regarding a matter that touches on the public good, might be a religious priest who has an affair with a grieving widow. Even if both parties were to come to some sort of reconciliation, depending on precise circumstances, the major superior might still decide to impose a punishment or protective measure, for fear that the religious priest might take advantage of another vulnerable woman in the future. In the second case, it would be imprudent and inappropriate for the major superior to cede the authority to resolve the matter to the parties themselves or to a facilitator, since he, as the ordinary who is charged with supervising the ministries of his members, has a solemn obligation to protect all the faithful, which a personal reconciliation between the parties would not guarantee.

followed. If the major superior decides that the matter does not warrant the full procedure, he or she could pursue various options, including, but not limited to: looking into the matter informally in person or through another (such as the local superior of the subject in question), warning the member, or simply notifying the accused of the accusation and placing a note in the member's personnel file, along with whatever response the accused may offer.

What about accusations regarding matters that are clearing significant, even penal? As we have stated above, as a general rule, accusations regarding penal matters must be addressed. They cannot be ignored or handled in some way apart from what is prescribed in the law. All the faithful, of course, are bound to uphold the Church's law and this is especially true of those who hold authority in the name of the Church, such as religious superiors.⁶⁶ In particular, c. 833, 8° stipulates that superiors in clerical religious institutes are bound to make the profession which includes the clause: "I shall foster the common discipline of the entire Church and I shall insist on the observance of all ecclesiastical laws, especially those contained in the *Code of Canon Law*."⁶⁷ As we have discussed above, those superiors who are recognized in law as

⁶⁶ See 2.1.1 regarding the nature of the authority of religious superiors.

⁶⁷ THE CONGREGATION FOR THE DOCTRINE OF THE FAITH, Formula to Be Used for the Profession of Faith and for the Oath of Fidelity to Assume an Office to Be Exercised in the Name of the Church, 1 July 1988, in AAS, 81 (1989), 104-106, English translation in *Origins*, 18 (1988-1989), 661 and 663.

ordinaries can address penal offences themselves, and those religious superiors who are not, must refer them to the relevant authority.⁶⁸

Are there any exceptions to the obligation to address penal misconduct? Perhaps the only exception to this obligation would be when the superior knows of the penal misconduct of the member exclusively in the internal forum. If the matter is completely occult, then it may be argued that the member's right to a good reputation and to privacy (c. 220) supersedes the duty to proceed against the alleged offence. This stance, however, would be difficult to maintain in cases where the alleged offence indicates a potential future danger to the faithful, notwithstanding, of course, the inviolable nature of the seal of confession. But in cases where the superior comes to know about an alleged offence by a subject in the external forum, the obligation to address the matter in accordance with the law would seem to be absolute.

Conclusion

In this chapter, we have developed the elements of the non-penal disciplinary procedure in a way that is both logical and in accordance with the law and jurisprudence of Roman Catholic Church. No procedure could anticipate every eventuality, but the procedure we have proposed should be sufficient for addressing the vast majority of accusations of non-penal

⁶⁸ See 2.3.3.

misconduct. The procedure we have developed should facilitate the protection of the rights of all parties concerned, without being burdensome or overly complex. The non-penal disciplinary procedure is a reasonable way to structure the difficult task of major superiors in a way that does not remove from them their proper authority or their rightful role as the leader of the institute within that territory. At the same time, the non-penal disciplinary procedure should provide every major superior, even those with little experience or knowledge of such cases, with the necessary structure and assistance to decide such cases justly and correctly.

GENERAL CONCLUSION

The administration of discipline in non-penal cases of misconduct may not be a routine concern for superiors of religious institutes, but it is important because such cases, which always involve the transgression of some law, be it divine, ecclesiastical, or proper, often touch upon the public good and call upon the one deciding the case to balance numerous considerations. Furthermore, this is an aspect of their responsibilities that few superiors are adequately trained for or experienced to carry out. The need to support the ministry of superiors with such procedures has arisen for two main reasons: a reticence in religious life to use the Church's penal law in the years since the Second Vatican Council,¹ and an emerging appreciation for human rights within the context of religious life.²

In the first chapter we examined the magisterial documents since this council that have bearing on our topic. We saw how the council called for a renewal of religious life which, in many institutes, was a challenge that was embraced enthusiastically. *Perfectae caritatis* called for religious institutes to return to the twin sources of their inspiration, namely the Gospel and the founding charism of their institute. The changes that grew out of this renewal, however, unsettled and alarmed some inside and outside of religious life while they were welcomed by the majority of religious. A key result of the

¹ See General Introduction, especially footnote 4, and 1.1.3.

² See 1.3.2.

renewal was the application of the principle of subsidiarity to religious life and the consequent greater involvement of all members in the life of the institute. This helped to lessen the spirit of paternalism that marked the relationship between superiors and members prior to the council. The period of renewal, however, also saw the rise of an anti-juridic mentality in religious life that was combined with a disinclination toward anything that hinted of formalism, legalism, or authoritarianism.

In the apostolic exhortations *Evangelica testificatio* and *Vita consecrata* we saw the reactions of Popes Paul VI and John Paul II, respectively, to changes in religious life. Writing in 1971, Paul VI clearly wanted to address some of the excesses he discerned in the renewal of religious life, most especially excessive experimentation and adaptation to modern ways of thinking, especially individualism. Writing in 1996, John Paul II addressed the challenges facing religious life by laying out a complete, albeit highly exalted, theology of religious life. Religious life has undeniably changed since Vatican II and it is safe to say that neither Paul VI nor John Paul II were completely satisfied with the new ethos guiding it. In regards to our topic, these changes are important because the increased responsibility given to each religious for his or her life and ministry has undoubtedly played a part in some conflicts between individual religious and those in authority. At the same time, the new expectations laid upon superiors regarding how they are to govern and

use their authority, has created a more balanced, albeit more complex, landscape in which they must provide leadership and impose discipline.

Next, we examined the four instructions written since the council that have bearing on this work. As decidedly more juridical in nature, these instructions provided a number of useful indications regarding certain realities and tensions that are part of religious life and which may give rise to incidents of misconduct. *Potissimum institutioni* reminded us that attention to the "four great fidelities" (the Gospel, the Church, religious life, and the charism of one's institute) helps to ensure the stability and perseverance of each vocation. We observed that misconduct often arises when one drifts from one or more of these fidelities. *PI* also reminded us of the importance of supporting members at key moments of transition in their religious lives. On the whole, *PI* teaches us that a thoughtful and well-ordered formation, integrated with the life and teachings of the Church, can help to lessen the likelihood of misconduct.

Fraternal Life in Community (1994) was at once both positive and realistic about the challenges facing religious life. It addressed the ever-deepening respect for human rights and democracy in society, but also noted that those same values have fed a spirit of individualism in religious life. It called for a re-appreciation of the role of asceticism in religious life, especially an increased willingness to be identified with the person of the crucified Christ. It spoke of a perpetual project of deeper integration with the religious

institute and with Christ. It spoke of the centrality and fundamental importance of the vow of obedience in religious life. *FLC* reaffirmed the central values of religious life as perennially valid and as the keys to its continued vitality in general and the conversion of its members in particular.

Starting Afresh from Christ (2002) put great emphasis on the superior as the linchpin of unity for the community. It also taught that the mission of consecrated persons is to convert the world to Christ, but that the presence of consecrated persons in the world, carries with it the danger that they will be converted to worldly values. It also pointed out that superiors must have the willing participation of the members if they are to be successful in their ministry. Superiors must lead their community's discernment about their life in common and their ministry. It places a spirituality of communion, in the Eucharist and in everyday life, at the heart of consecrated life.

The Service of Authority and Obedience (2008) offered a theological reflection on consecrated life that is grounded, practical, and insightful. It observes that while consecrated life takes almost countless forms, the essential challenge is universal: the individual as part of a community. While the Church confirms the charism of each institute, and approves its manner of life, the superiors are themselves fallible and imperfect. Religious obedience is never easy and in the midst of that ongoing challenge religious are called to ongoing conversion. *SAO* touches on many of the neuralgic points regarding

the exercise of authority in religious life, which are often the precise points where conflict and misconduct occur.

While the magisterial documents we reviewed almost never addressed our topic directly, they often addressed the vow of obedience and the ministry of superiors, two topics that are central to our thesis. They make clear that the spirit of subsidiarity called for by the council is essential, but so too is it the responsibility of superiors to make the final decision. A spirit of service and collaboration is essential, but that does not mean that superiors (who are often no longer called by this title) have nothing left to do. Christ loves the Church, and Christ serves the Church in the manner of a slave, but Christ does not cease to lead.

In the first section of the second chapter we examined the exercise of the power of governance in religious institutes. The *CIC* presents a somewhat confused picture regarding the power of governance. On one hand, c. 274 §1 states, "Only clerics can obtain offices for whose exercise the power of orders or the power of ecclesiastical governance is required." On the other hand, c. 1421 §2 allows, in certain circumstances, for the appointment of laypersons as judges, an office that clearly involves the power of governance. Before the Second Vatican Council, the *CIC/17* distinguished between the so-called dominative power, which was enjoyed by all religious institutes, and the power of jurisdiction, which was reserved strictly to clerics. Canon 501 §6 of the *CIC/17* stated, "Superiors and Chapters, according to the norm of the

constitutions and common law, have dominative power over subjects; in clerical exempt religious [institutes], they have ecclesiastical jurisdiction both for the internal forum and for the external." Furthermore, c. 118 of the *CIC/17* stated, "Only clerics can obtain power, whether of orders or ecclesiastical jurisdiction...." Canon 118 of the *CIC/17* stated that only clerics could obtain jurisdiction, despite numerous examples from the same era and earlier, which, however exceptional, clearly showed that laypeople were capable of enjoying jurisdiction, even to a quasi-episcopal degree.³ Ultimately, we concluded that there is no absolute link between holy orders and the power of governance. Since only the capital offices of bishop and presbyters are established by divine law, in every other case, the Church is free to structure the exercise of the power of governance as it sees fit. This question is of importance to our thesis because the *CIC* limits those who have the authority to carry out a penal procedure strictly to those who are recognized as ordinaries in accordance with c. 134, namely, amongst religious, "major superiors of clerical religious institutes of pontifical right." While this limitation is perfectly lawful, and as such must be respected, it does not mean that in the future the Church could not structure things in another manner, such as to allow all major superiors in religious institutes to follow penal procedures in certain cases, as all major superiors may now follow the

³ See 2.1.2.

procedure governing dismissal from the institute. Since the disciplinary procedure we develop is expressly "non-penal," all religious superiors may follow it.

In the second section of the second chapter, we looked at the role of rights in disciplinary procedures. This is something of an emerging area since, although the Church has always recognised rights in some way throughout its legal history, the concept of human rights, rooted in the dignity of each person as a creation of God, is relative new. Historically, rights in the Church were regarded as a sort of concession or privilege granted by one with the requisite authority. The new understanding of human rights is gradually being integrated into the Church's manner of proceeding and, in particular, in religious life where until recently the authority of superiors was regarded as nearly absolute. With the passing of time, the Church, and religious institutes in particular, are improving their lived witness to human rights, something of which they have been vocal supporters at least since the time of *Pacem in terris*, but which they have not always successfully integrated into their praxis.

In the third section of the second chapter, we examined the limits on the authority of superiors. Although every religious takes absolute vows to God, no superior on earth enjoys absolute power over his or her subjects because the law, divine and ecclesiastical, places limits on the exercise of that authority. The authority of superiors is limited in various ways: by the rights

of the members (e.g., to the sacraments, to live religious life, to privacy, etc.); by their duty to obey procedural law (e.g., such as the canons governing the issuing of decrees and precepts and proper law governing the issuance of an order under holy obedience); by the limits on their jurisdiction by reason of territory or person; by a particular offense being reserved to a certain authority (e.g., an ordinary or the CDF); or by the imposition of the penalties (e.g., censures) being carefully regulated and applied only in precisely limited circumstances.

Understanding the nature of the power of superiors in religious institutes, the rights of all parties involved in disciplinary procedures, and the limits on the authority of the superiors is essential to any just and fair disciplinary procedure.

In the third chapter we examined some of the modes available in the *CIC* for the imposition of discipline in religious life, including provisions of *Book II*, which are available to superiors of all religious institutes, as well as some from *Book VI* which are, by definition, reserved only to those religious superiors who are also recognized as ordinaries in accordance with c. 134. We examined these for the sake of assessing the means already available to superiors of religious institutes for imposing discipline as well as the circumstances in which each mode is most appropriate. The particular way in which each mode must be applied also provides useful indications regarding the hallmarks of just procedures, namely, the importance of consultation (e.g.,

in imposed excommunication, dismissal, and expulsion) and providing for circumstances in which the guilt of the accused is not certain (e.g., penal precepts and warnings). Our examination of c. 1341 also helped to illuminate the circumstances in which no procedure may be necessary, but perhaps in which cases can be resolved by alternative means. In a comparable manner, our examination of c. 695 §1 looked at the precise circumstances in which dismissal is not absolutely necessary, while also respecting that superiors do not have absolute discretion to decide against mandatory dismissal in whatever case they choose. Our examination of the canons that govern the assessment of one's liability for punishment was of great help in casting light on the circumstances in which, regardless of the offense, the law may augment, reduce, or remove altogether the usual penalty.

In our fourth and final chapter we developed the essential elements of the non-penal disciplinary procedure, which was the purpose of our entire thesis. In the process of developing the procedure we came to the following important conclusions:

- ♦ Discipline cases, which involve only some private good,⁴ and in which the accused admits his or her fault, are typically simple to resolve and may not need to utilize every element of the procedure that has been

⁴ A form of misconduct that involves mostly a private good might be a religious who gambles regularly at a casino or who routinely accesses adult pornography. Such a religious may be harming himself or herself, and/or the good reputation of the institute, but poses no significant danger to the faithful or the public at large.

developed. Cases in which the accused denies responsibility, however, and/or which touch upon the public good,⁵ are considerably more complex and need to be treated with greater care and with all of the provisions described in the fourth chapter. The public good is engaged anytime someone commits a form of misconduct with another person that would not seem to be exclusive to that particular victim⁶ or be the result of certain extreme circumstances that are not likely to be replicated.⁷ Major superiors must always bear in mind that, simply because the victim considers a case to be resolved satisfactorily, this does not mean the task of administering discipline is complete. The danger to the public good in the present,⁸ and in the future,⁹ must always be assessed,¹⁰ and appropriate action must be taken.

- ♦ In cases where the accusation is contested, major superiors must diligently protect the rights of all parties and treat all parties with comparable care and concern. It is as equally unjust to favour the accuser, as it is to favour the accused, or to put the good of the institute ahead of the public good. To

⁵ For example, a religious who has repeatedly driven a vehicle under the influence of alcohol poses a danger to anyone on the street and thereby endangers the public good.

⁶ For example, a religious who is accused of inappropriate hugging and touching during spiritual direction, might presumably be inclined toward such behavior with all, or at least a certain profile of, spiritual directees, and therefore could be considered a threat to the public good.

⁷ For example, a mature religious who had never before engaged in inappropriate hugging and touching, but who did so while taking a medication that has the potential side effect of reducing inhibitions, might reasonably be presumed to be of no future risk to anyone, provided he or she stops taking the medication.

⁸ For example, public scandal in relation to what happened.

⁹ For example, a possible risk to new victims.

¹⁰ Preferably, the two experts discussed in 4.2.6 would participate in this assessment.

value the good of one soul above another, or to prejudice a procedure in favour of one party over another, is not only contrary to justice, but it is also contrary to the Gospel. If the major superior is uncertain of his or her ability to follow the procedure impartially, he or she must delegate a substitute to follow the procedure and decide the case.

- ♦ It is potentially unjust for the major superior to wait until the commission of some misconduct to publish or to establish protocols for disciplinary cases. Such protocols or procedures should be known in advance to all people for whom they may be relevant, so that there can be no doubt that the same procedures will apply equally to everyone concerned and that they were not generated for the sake of "this particular case" or "this particular religious."

- ♦ Religious superiors can and must use discretionary authority. Since non-penal misconduct cases are potentially very delicate and complex, it is necessary that the superior's use of discretionary authority be carefully structured, so as to increase the likelihood that rights will be safeguarded and the law upheld.

- ♦ Superiors must know and respect the limits of their authority and they must follow the established procedures assiduously. They must be able to justify all of their decisions by means of recourse to the established procedures, analogy with other relevant law, and/or sound reasoning based on established facts. The superior may not base the decision upon private

information or invoke other justifications for a decision besides the aforementioned criteria.

- ♦ While respecting anything that is necessarily confidential, as well as each party's right to good reputation (c. 220), the major superior must endeavour to follow the procedure with as much transparency and openness as possible. This means allowing the accused and the accuser the right to counsel or even, simply, the company of a trusted friend who can be with them throughout the procedure. It also means that the major superior engages the help of the experts in a meaningful way and never fails to provide the reasons for his or her decisions. It also means that the faithful or the public at large be informed about the outcome of the procedure, to the extent the particulars of the case demand.

- ♦ Superiors may never use the procedure developed here to address penal matters, nor may they ever impose a penal sanction as the result of this procedure. Delicts must always be addressed in accordance with the relevant canons of *Book VI* and *Book VII*.

- ♦ Sound and well-developed disciplinary procedures are neither antithetical to the Gospel nor to the spirit of religious life.¹¹ The salvation of souls is the supreme law, but those in authority must care for the souls of all people equally: the accuser, the accused, other involved parties, and, often,

¹¹ In fact, disciplinary procedures are acts of charity towards members whenever they help those who have committed some act of misconduct to face difficult truths about themselves and/or to avoid the same pitfalls in the future.

the general public. This is almost never a simple or straightforward task. Especially in complex cases, where different accounts of what happened are proposed, where rights conflict, and where laws are silent, rarely will the spontaneous inspirations of those in authority be more effective at saving souls, serving justice, and testifying to Gospel values, than will be the sound procedures inspired by the law and praxis of the Church, which are themselves the fruit of centuries of the experience and the collective work of countless holy souls.

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BIOGRAPHICAL NOTE

A native of Fenwick, Ontario, Michael attended local Catholic schools before entering the Jesuits in 1994. His Jesuit formation took him to the United States of America, Ireland, and Italy for studies, as well as Jamaica, El Salvador, and South Sudan for pastoral assignments. He has served as a teacher and chaplain at the two high schools operated by the Jesuits in Canada in Winnipeg and Montreal. He obtained a Baccalaureate in Philosophy from the Milltown Institute of Theology and Philosophy in Dublin (1999), a Bachelor of Arts from Brock University (2000), a Master of Divinity from Regis College and the University of Toronto (2005), and a Licentiate of Canon Law from the Pontifical Gregorian University (2011). Michael was ordained to the priesthood on the feast of St. John the Baptist, June 24, 2006.