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**THE REPARATION OF HARM: A CANONICAL ANALYSIS OF
CANON 128 WITH REFERENCE TO ITS COMMON LAW PARALLELS**

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

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ABSTRACT

In 1983, a maxim of the natural law was concretized into a canonical obligation requiring one remedy the harm that one inflicts. In addition to canon 128's providing legal encouragement for one voluntarily to remedy the harm that one inflicts, if the person does not act voluntarily, c. 128 provides a legal foundation for persons who have been harmed to exercise their right to vindicate and defend their rights in an ecclesiastical forum. It also provides a foundation from which the Church can act to enforce this principle and compel a person to remedy the harm that he or she inflicts.

The primary purpose of this work is to explain the meaning of c. 128 and the nature, procedures, and methods of the remedy of harm in canon law. In addition, this work compares canonical concepts with similar concepts found in common law, and distinguishes those concepts that may be foreign to the common law tradition.

This work seeks to show that c. 128 has been under-used as a basis for petitioning a canonical forum to remedy unlawfully inflicted harm. It demonstrates that c. 128 can be used as a foundational canon having its own broad applications rather than simply being a philosophical and canonical support for other juridic principles. Furthermore, this work endeavors to contribute to the canonical discussion on how justice is viewed and administered in the Church. Finally, it is hoped that this work will supply a common law perspective to the remedy of harm in canon law, and provide concrete examples from the common law that can aid judges and administrators in assigning fair and equitable remedies to persons that have been harmed.

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DEDICATION

This thesis is dedicated to the memory of my husband, Michael Alan Poll.

Without Michael's active support and encouragement, I would never have followed my heart and taken two years to study canon law at Saint Paul University. He was a constant inspiration by his own example, and he pushed me to excel even beyond my own expectations. His memory continues to inspire and motivate me.

LIST OF ABBREVIATIONS

ADR	Alternate Dispute Resolution
<i>ARRT Dec.</i>	<i>Apostolicum Rotae Romanae Tribunal Decisiones</i>
<i>AAS</i>	<i>Acta Apostolicae Sedis</i>
BCE	Before the common era
c., cc.	Canon, canons
ca.	circa
cf.	compare
CCEO	<i>Codex canonum Ecclesiarum orientalium</i>
CE	Common era
CDF	Congregation for the Doctrine of the Faith
CIC, CIC/83	<i>Codex iuris canonici</i> , 1983
CIC/17	<i>Codex iuris canonici</i> , 1917
CLSA	Canon Law Society of America
<i>CS</i>	<i>Cleri sanctitati</i>
ed.	Editor
eds.	Editors
e.g.	for example
et al.	and others
FLANNERY	A. Flannery, (gen. ed.), Vatican Council II
i.e.	that is
<i>ME</i>	<i>Monitor ecclesiasticus</i>

NCCB	National Conference of Catholic Bishops
p., pp.	Page, pages
<i>PB</i>	<i>Pastor bonus</i>
<i>REU</i>	<i>Regimini Ecclesiae universae</i>
<i>RRT Dec.</i>	<i>Romanæ Rotæ Tribunal Decisiones</i>
<i>SRR Dec.</i>	<i>Tribunal Apostolicum Sacræ Romanæ Rotæ Decisiones</i>
TRO	Temporary Restraining Order

INTRODUCTION

If your brother sins (against you), go and tell him his fault between you and him alone. If he listens to you, you have won over your brother. If he does not listen, take one or two others along with you, so that 'every fact may be established on the testimony of two or three witnesses.' If he refuses to listen to them, tell the church. If he refuses to listen even to the church, then treat him as you would a Gentile or a tax collector. (Mt. 18:15-17.)¹

As evidenced from this New Testament passage, Christians have been struggling with how to resolve cases of one person harming another since the beginning of Christianity. Christians maintain the hope that once it has been pointed out to a fellow believer that he or she has caused harm, the person's moral principles would dictate the immediate remedy of that harm. That expectation has been concretized from the scriptures and the natural law into a canonical obligation to remedy the harm that one inflicts. When the revised Code of Canon Law was promulgated in 1983, a new canon contained a principle that mirrors the biblical principle that the person causing the harm must repair it forthwith. Canon 128 states:

Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa positio, alteri damnum infert, obligatione tenetur damnum illatum reparandi.

The English translation of the Canon Law Society of Great Britain and Ireland is:

¹ This translation is found in: *Deluxe Bible, New American Bible Version 2.0*, Rocky Mountain Laboratories, Fort Collins, CO, 1996; *New American Bible with Revised New Testament*, Confraternity of Christian Doctrine, Washington, DC, 1986.

Whoever unlawfully causes harm to another by a juridical act, or indeed by any other act which is malicious or culpable, is obliged to repair the damage done.²

The new translation of the Canon Law Society of America (CLSA) is:

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.³

It is significant that the canon does not state that the person who has been harmed can or should take legal action to have this harm remedied. That right is stated later in CIC c. 221. Rather, c. 128 places the obligation on the person who has caused the harm to remedy the harm that he or she has caused, in accord with the biblical directive. It encourages one who has been harmed to go to the person who has inflicted the harm, to make the harm known to the perpetrator, and allow the perpetrator to remedy it of his own accord without ever having to resort to a formal procedure.

Unfortunately, people cannot always settle their disputes by themselves. Sometimes the intervention of a third party is necessary to adjudicate the dispute. Thus, the ecclesiastical and natural obligation of c. 128 provides the foundational basis for the right to vindicate and defend one's rights before an ecclesiastical forum, as stated in c. 221 §1. Like the Matthean scripture, which allows the matter to be taken to the community if one's brother does not give satisfaction, c. 221 §1 states:

² G. SHEEHY et al. (eds.), *The Canon Law: Letter & Spirit: A Practical Guide to the Code of Canon Law*, prepared by the Canon Law Society of Great Britain and Ireland in association with the Canadian Canon Law Society, Collegeville, MN, Liturgical Press, 1995, p. 75.

³ *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus*, Città del Vaticano, Libreria editrice Vaticana, 1983. American version of the English language translation: *Code of Canon Law, Latin-English Edition*, [CIC], new English translation prepared under the auspices of the Canon Law Society of America, Washington, DC, CLSA, 1999, pp. 37-38. This will be the English translation used throughout this work, unless otherwise specified.

Christ's faithful may lawfully vindicate and defend the rights they enjoy in the Church, before the competent ecclesiastical forum in accordance with the law.

This canon enunciates the right of the Christian faithful to bring an action before an ecclesiastical forum to vindicate and defend their rights. In virtue of the power given to it by Christ, the Church has the legal authority to adjudicate a case concerning the violation of the Christian faithful's rights (cc. 1400, 1401). The Church also has the authority to render a judgment to compel a person to remedy the harm that one has caused if that person has refused to remedy the harm himself. Canon 128, then, serves two purposes. First, it gives legal encouragement for a person voluntarily to remedy any harm inflicted. However, if the person does not act voluntarily, the canon then provides a legal foundation from which the Church can act to enforce this principle and compel a person to remedy any harm that he or she has unlawfully inflicted.

Despite the Church's ability to compel a person to remedy harm, c. 128 is not a penal law and must be distinguished from the penal sanctions imposed when one commits a delict. Neither cc. 128 nor 221 are in Book VI of the CIC concerning delicts and penal trials, because these canons do not deal with penal law. It is not the purpose of this canon to punish the wrongdoer or facilitate his reform on behalf of the Church. Rather, c. 128 addresses the harm caused by juridic acts and what the common law calls "torts:" private wrongs or injuries between physical or juridic persons for which the tribunal provides a remedial judgment. The function of c. 128 is to facilitate justice and reconciliation between members of the community by encouraging or compelling one to remedy the harm that he or she has inflicted on another person.

The purpose of this work primarily is to explain the meaning of c. 128 and the nature, procedures, and methods of the remedy of harm in canon law. In doing so, this work strives to foster a greater understanding of the principles and procedures of canon law in those who come from a common law perspective. For those accustomed to common law, this work will provide comparisons of canonical concepts with those of the common law, and will distinguish those concepts that may be foreign to a common law system. It will also show that the common law has abundant principles and rules that may be useful to the canonical judge, bishop, or superior in equitably resolving cases requiring the reparation of harm, if canon law is silent on the subject. For those coming from a civil law standpoint, this work will provide insight both into how the common law functions as well as explain some of its fundamental concepts in regards to the remedy of harm. Given that one third of the world's population is governed by principles of the common law,⁴ it is important that canonists from common law countries contribute to the development of canon law and jurisprudence by explaining their understandings and insights on questions impacting both canon law and common law. This work attempts this task with respect to the topic of the administration of justice and the remedy of harm.

Chapter 1 of this work provides a historical overview of the necessity for the remedy of harm, as well as various historical procedures and remedies. It begins by examining the Roman law tradition of remedying harm, since the legal concepts found in that tradition were widely adopted into canon law. Then the scriptural tradition is explored to understand its procedures and requirements for remedying harm. This

⁴ See F.G. MORRISEY, "Canon Law Meets Civil Law," in *Studia canonica*, 32 (1998), p. 185.

section then traces an overview of the Christian tradition calling for the remedy of harm to understand the principles, influences, and traditions leading up to the creation of c.

128. The chapter concludes by examining the period of the canon's creation, beginning in the 1940's and progressing through Vatican II, the work of two Code committees, and the various schemas containing what became c. 128. This last section ends with the final draft of the canon in the 1983 Code, as well as its counterpart, c. 935, in the CCEO.

The purpose of Chapter 2 is to situate the canon textually and contextually. The first section situates the canon within its broader context by examining the nature of c. 128 and its location in the Code. Additionally, this section provides a comparison of the remedy of harm in c. 128 to the penal law to understand how the two systems interrelate, as well as how they serve separate functions. The second section of Chapter 2 is a textual analysis of the canon. This analysis is intended to provide a general overview of the canon in its entirety, before proceeding to engage in a specific, in-depth examination of the remedy of harm for juridic acts and "other acts" in Chapters 3 and 4.

Chapters 3 and 4 break c. 128 down into two parts, so that each section can be examined separately. Chapter 3 examines the first part of c. 128, which concerns the unlawful infliction of harm caused by a juridic act. The first section explains the various ways that a juridic act can unlawfully inflict harm through the act being invalid, rescindable, illicit, or illegitimate. Next it considers public juridic acts, which consist of judicial and legislative acts as well as administrative acts, and discusses which of the canonical processes, including hierarchical recourse and recourse to the Apostolic Signatura, can be used to remedy the harm unlawfully inflicted by these acts. Lastly, the

chapter treats the nature of a private juridic act, and determines how harm unlawfully inflicted by these acts can be remedied.

Finally, Chapter 4 examines the unlawful infliction of harm from acts other than juridic acts. These include acts placed with either *dolus* or *culpa* that violate the law, a person's rights, or a person's duty. The chapter then explores the processes available to address this harm, including the ordinary and oral contentious processes, as well as methods of Alternate Dispute Resolution. The final section concludes by examining and comparing the remedies found in canon law and the common law. Some suggestions are made for the adoption by Church judges and superiors of certain equitable concepts arising from the common law to resolve concrete cases involving the reparation of harm.

Though the canonical tradition of requiring a person who has inflicted harm to repair it is not new, c. 128 of the 1983 Code is a new canon that was not present in the Code of 1917. It requires, or it can be used to compel people to remedy the harm that results from their actions. While the concept of repairing the harm that one causes is not new to canon law, c. 128 is the first time that the general principle has been added specifically to the code. Because it is a new addition, there has been little comprehensive analysis of this canon. There are only two doctoral works on the subject.⁵ Helmuth Pree has published two articles in *The Jurist* that extensively examine the canons pertaining to

⁵ See F. CACIOPPO, *La disciplina della riparazione dell danno nel diritto canonico del secolo XX*, JCD diss., Romae, Pontificium Athenæum Sanctae Crucis, Facultas Iuris Canonici, 1996; and G. R. BACARDÍ, *Pautas para una concepción del resarcimiento de daños*, JCD diss., Pamplona, Universidad de Navarra, S.A., 1993, [pro manuscripto].

juridic acts (cc. 124-128).⁶ Only two other articles principally address specific aspects of c. 128.⁷ Rather than being addressed directly, the principle of remedying harm has more frequently been cited in reference to other canons. Most of the time, authors supporting the right to an appropriate remedy for the unlawful infliction of harm cite the canons that allow for hierarchical recourse or a contentious trial, rather than specifically using c. 128 as a basis to justify their petition for a remedy. If c. 128 is cited, it is used almost as an afterthought to support an argument that harm should be remedied rather than being used as a foundational canon on which the case is based. However, this study intends to demonstrate that c. 128 has its own broad applications rather than being used only to support other canonical claims.

The necessity for a study of this nature is timely and is critical. Little work has been done to explore the ramifications of c. 128, which undergirds the administration of justice in the Church, and provides a solid juridic basis founded in the natural law to petition for the remedy of harm. Yet now more than ever the faithful need to know that there are fair, just, and open methods within the Church by which they can have their rights vindicated and their harm remedied. It is hoped that this work will provide

⁶ See H. PREE, "On Juridic Acts and Liability in Canon Law: Part One," in *The Jurist*, 58 (1998), pp. 41-83; and H. PREE, "On Juridic Acts and Liability in Canon Law: Part Two," in *The Jurist*, 58 (1998), pp. 479-514. Because these two articles written by Helmuth Pree are some of the only material that provide an in-depth analysis of c. 128, they will be cited quite frequently within this work.

⁷ See J.J. FOLMER, "The Canonization of Civil Law. Part II: The Law of Personal Injury," in *CLSA Proceedings of the Forty-Sixth Annual Convention*, Washington, DC, CLSA, Catholic University of America, 1984, pp. 46-65; and J. KRUKOWSKI, "Responsibility for Damage Resulting from Illegal Administrative Acts in the Code of Canon Law of 1983," in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law*, organized by Saint Paul University and held at the University of Ottawa, August 19-25, 1984, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, pp. 231-242.

canonists with new insights in how the unlawful infliction of harm can be remedied, as well as engender further canonical discourse on the subject.

CHAPTER 1

THE HISTORY OF THE REMEDY OF HARM IN CANON LAW

Since time immemorial, humanity has developed numerous ways of promoting justice and maintaining order and discipline within its various communities. As time progressed, many of these methods became formalized and codified into recognizable systems whose purpose was to maintain societal order and administer justice. Because people have the unfortunate tendency to harm others, and because these same individuals are not always willing to repair the harm that they cause, legal systems were developed to ensure that those suffering harm had a legal means of airing their grievances.¹ The remedies developed by these systems attempted to redress the harm committed, by punishing the offender and/or by compensating the aggrieved party.

One of the most historically influential legal systems was the Roman system, which was developed and adapted by the Roman Empire over many centuries. The Romans believed that their system was superior to the multitude of “barbarian” alternatives, and they imposed their own legal system throughout Europe during their centuries of power.² Most European legal systems were direct descendents of Roman

¹ The development of legal means to remedy harm prevented aggrieved persons from taking the initiative and administering “justice” themselves.

² The Romans did allow some local legal systems to function as long as they did not conflict with the administration of Roman justice. In particular, the Jews were allowed to maintain their own tribunals, and the Romans even recognized the decisions of these courts as long as both parties were Jews. See K. MATTHEWS, “The Development and Future of the Administrative Tribunal,” in *Studia canonica*, 18 (1984), p. 19.

law, though some of these systems also incorporated various aspects of the systems of their indigenous peoples.³ The Roman law model heavily influenced canon law.

From the beginnings of Christianity, the Christian scriptures have exhorted believers to take personal responsibility for their actions and on their own initiative repair the harm that they inflict. Later canons reinforced this exhortation, transforming this moral standard into a juridic requirement. Though there have been canons over the centuries that have dealt with how harm should be remedied, there have only been a few canons explicitly requiring that the one responsible for inflicting harm must remedy that harm. There was no explicit reference to this general mandate in the 1917 Code.

When scriptural exhortations and canonical norms failed to oblige the perpetrator voluntarily, laws and jurisprudence were created to compel Church members to remedy the harm that they committed. Over the centuries the Church developed several processes to redress harm within Christian communities. Many features of these processes have not changed since the time of the first Ecumenical Councils. There has been two thousand years of development leading up to the exhortations, principles, and remedies for harm that are currently found in the CIC and the CCEO.

This chapter intends to examine the history of the requirement to remedy harm within canon law and the development of canonical thought and legislation leading up to the creation of CIC c. 128 and CCEO c. 935. This analysis will trace the history of the

³ England was one of the few countries that did not adopt a version of the Roman civil law, but rather created the English common law. For an outline of the development of the common law, and in particular the English courts of equity, see Appendix I.

remedy of harm in canon law in a broad context, beginning with examining the roots of these canonical principles found in Roman law. The next section will examine the mandate to remedy harm found in scripture, then trace the development of procedures and remedies from the first few centuries of its development, through Gratian and the Gregorian Decretals, up to the promulgation of the 1917 Code of Canon Law.⁴ Finally, this chapter will trace the history of c. 128 through its various revisions until its promulgation in the Codes of 1983 and 1990.

1.1 – The Remedy of Harm in Roman Law

Written Roman law precedes Christian canon law by hundreds of years and was quite developed by the time the Church found it necessary to have its own laws. Roman law was imposed throughout the Roman Empire, allowing wide latitude for local customs. During the first few centuries of Christianity, the Church was growing in areas that utilized the professional and efficient Roman legal system. This system not only utilized praetors, or judges, to settle legal disputes, but it also had different types of

⁴ *Codex iuris canonici. Pii X Pontificis Maximi iussu digestus. Benedicti Papae XV auctoritate promulgatus.* Romae. Typis polyglottis Vaticanis. 1917. English language translation: *The 1917 Pio-Benedictine Code of Canon Law*, E.N. PETERS (ed.), San Francisco, CA, Ignatius Press, 2001.

arbitri, or arbitrators, whose function was to arbitrate various types of disputes.⁵ When Christianity was legalized, it drew heavily on these traditions.

The early period of Christianity coincided with the classical age of Roman law, where a number of eminent Roman jurists wrote learned legal treatises outlining various areas of Roman law. These treatises were very well known and were disseminated throughout the Roman Empire. When the time came for the Church to develop its own written law, the decretalists and legal scholars saw no reason not to “canonize” whole areas of Roman law and procedure rather than “reinventing the wheel” and coming up with a wholly new system.⁶ It is for this reason that many of the principles and procedures found in Roman law eventually were adopted into canon law. Because it is within a Roman law framework that much of canon law came into being, it is important to briefly examine how the Roman law addressed the remedy of harm.

⁵ At the beginning of the first century, the Roman legal system had developed four categories of *arbitri*. The first was called the *judex privatus*. Such judges were assigned to the parties by the *praetor* to arbitrate the dispute. The second category was an arbiter by compromise, chosen by the parties themselves to adjudicate the dispute according to the principles of law. The third category was called an *arbitrator*, who, like a modern mediator, was able to make a decision based on both equitable and legal principles. Finally, a judge could delegate certain matters to a Special Judge. The Special Judge was allowed to make certain judgments concerning specific issues, but the primary judge could overturn these judgments if he so desired. See MATTHEWS, “The Development and Future of the Administrative Tribunal,” p. 20, and A. AMANIEU, “Arbitrage,” in *Dictionnaire de Droit Canonique*, vol. 1, Paris, Letouzey et Ané, 1935-1955, col. 863.

⁶ See R.H. HELMHOLZ, *The Spirit of Classical Canon Law*, Athens, GA, University of Georgia Press, 1996, p. 17.

1.1.1 – The Twelve Tables

From very early times, the Romans had laws concerning the remedy of harm. The Twelve Tables were an ancient collection of Roman law written about 450 BCE.⁷ Even then, the Romans were concerned about holding persons responsible for the harm that they caused. In Table VII, Law II stated that, “If you cause any unlawful damage...accidentally and unintentionally, you must make good the loss, either by tendering what has caused it, or by payment.”⁸ Similarly, Law XVI requires that if a person responsible for administering a guardianship perpetuates a fraud, that person must make good the loss by payment of double damages.⁹ The laws of the Twelve Tables were the foundation upon which all subsequent Roman law was built. They are referred to frequently in the writings of later legal scholars.¹⁰ In many cases it is presumed by these later scholars that persons reading their texts had extensive knowledge of the Tables because they are referred to and built on by these authors without being specifically cited. One possible reason that later authors did not cite more often the principle that one must make good for the unlawful damage one causes is that this principle was already enshrined within the Twelve Tables.

⁷ See H.F. JOLOWICZ and B. NICHOLS, *Historical Introduction to the Study of Roman Law*, 3rd edition, Cambridge, University Press, 1972, p. 5.

⁸ “The Laws of the Twelve Tables,” in *Corpus juris civilis: The Civil Law*, S.P. SCOTT (ed.), vol. 1, New York, AMS Press, 1973, p. 69.

⁹ See *ibid.*, p. 71.

¹⁰ See S. P. SCOTT, *Corpus juris civilis: The Civil Law*, vol. 1, New York, AMS Press, 1973, pp. 13-17.

1.1.2 – The Age of Classical Roman Law

Roman law flourished during the time of the second and third centuries CE. Because this time period produced so many distinguished jurists, it was known as the age of classical Roman law. While there were many distinguished jurists of this era, there are four Roman jurists of the second and third centuries CE who profoundly affected the development of Roman law. These men were responsible for much of the creating, codifying, and shaping of the Roman law that occurred during this time. The writings of these four jurists - Gaius (also spelled Caius), Papinianus, Ulpianus Domitius (also known as Ulpianus, or Ulpian), and Julius Paulus (also known as Paulus) - had a profound and lasting effect, not only on Roman jurisprudence, but also for many centuries after their deaths. The works of these men were used as the standard texts of Roman law until the time of Justinian, and more importantly for the purposes of this work, their material was subsequently used as the primary source material for Justinian's digests.¹¹ Unfortunately, over time many of the original works were lost, and only certain books, fragments and references to these works still exist in their original form.

Gaius has been described as “one of the most accomplished professors of Roman law and writers on the subject,” who lived from about 110 to 180 CE.¹² Gaius' most famous surviving work is his *Institutiones*, a collection of four books concerning the private law of the Romans on the subjects of family, property, and legal procedure.¹³

¹¹ See *ibid.*

¹² H.T. PECK, *Harper's Dictionary of Classical Literature and Antiquities*, 2nd edition, New York, Cooper Square Publishers, Inc., 1965, p. 703.

¹³ See GAIL, *Institutionum Iuris Civilis Commentarii Quatuor or Elements of Roman Law by Gaius*, translation and commentary by E. POSTE, 2nd edition, Oxford, Clarendon Press, 1875.

These books were used as the most common textbooks of Roman law until Justinian compiled his digests.¹⁴ When Justinian was looking for material for his digests, he used Gaius' Institutes as a basis for his work.¹⁵

Papinianus was a friend of the emperor Septimius Severus, and lived from about 140 CE until he was executed in 212 CE. Papinianus is considered the most famous name in all of Roman jurisprudence,¹⁶ not only because of "the high station that he filled, his penetration and his knowledge, that left him an imperishable name; [but] his excellent understanding, guided by integrity of purpose, has made him the model of a true lawyer."¹⁷ His works were so influential that if various jurists disagreed on a point of law, his opinion was used to break the impasse.¹⁸ His most important works are a thirty-seven-book work on the subject of various legal questions, aptly entitled *Quaestiones*, and a nineteen-book compilation of legal decisions known as *Responsa*.¹⁹ Both Ulpianus and Paulus were students of Papinianus.²⁰

¹⁴ See W. SMITH, *A Dictionary of Greek and Roman Biography and Mythology*, vol. 2, New York, AMS Press, Inc., 1967, p. 197.

¹⁵ See JOLOWICZ, *Historical Introduction to the Study of Roman Law*, p. 389.

¹⁶ See *ibid.*, p. 391.

¹⁷ SMITH, *A Dictionary of Greek and Roman Biography and Mythology*, p. 117.

¹⁸ See JOLOWICZ, *Historical Introduction to the Study of Roman Law*, p. 391.

¹⁹ See "Fragments des livres I, V, et IX des *Responsa* de Papinien," in *Textes de Droit Roman*, P.F. GIRARD and F. SENN (eds.), 7th edition, Paris, Dalloz, 1967-1977, pp. 264-273; and "Fragment des *Quaestiones* de Papinien," in *Textes de Droit Roman*, P.F. GIRARD and F. SENN (eds.), 7th edition, Paris, Dalloz, 1967-1977, p. 273.

²⁰ See SMITH, *A Dictionary of Greek and Roman Biography and Mythology*, vol. 3, p. 117.

Ulpianus was a learned Roman jurist as well as chief advisor to emperor Alexander Severus (222 CE). He was eventually named *praefectus praetorio*, an unpopular move that eventually resulted in Ulpianus' murder by Roman guards in 223 CE.²¹ Ulpianus has one principal surviving work known as the *Liber singulari regularum*.²² This work only exists in an abridged form.²³ Two works that have not survived are his *Ad Edictum*, an eighty-two-book collection on praetorian law, and his fifty-one-book collection on the civil law, known as *Ad Sabinum*.²⁴ This second collection was used as foundational material for the Pandects in Justinian's *Corpus*.²⁵

Julius Paulus was a Roman jurist who lived in the third century.²⁶ He was legal assessor under the emperor Septimius Severus, and *praefectus praetorio* under the emperor Alexander Severus.²⁷ Paulus is best known for his collection of five books collectively known as the *Sententiae*,²⁸ which was a "very popular compendium of undisputed principles on the most frequent points of law."²⁹ The Emperor Justinian used this work, as well as extracts from various monographs to create a sixth part of

²¹ See *ibid.*, p. 1279.

²² "The Rules of Ulpian," in *Corpus juris civilis: The Civil Law*, S.P. SCOTT (ed.), vol. 1, New York, AMS Press, 1973, pp. 223-255.

²³ See SCOTT, *Corpus juris civilis: The Civil Law*, vol. 1, p. 14.

²⁴ See JOLOWICZ, *Historical Introduction to the Study of Roman Law*, p. 393.

²⁵ See PECK, *Harper's Dictionary of Classical Literature and Antiquities*, p. 1625.

²⁶ See *ibid.*, p. 1186.

²⁷ See *ibid.*

²⁸ See PAULUS, "IVLII Pauli Sententiarum ad Filium," in *Textes de Droit Roman*, P.F. GIRARD and F. SENN (eds), 7th edition, Paris, Dalloz, 1967-1977.

²⁹ See PECK, *Harper's Dictionary of Classical Literature and Antiquities*, p. 1186.

Justinian's digest.³⁰ In book five of *Sententiae*, Title IV addresses various kinds of injuries, as well as the manner in which these injuries should be remedied according to law or custom.³¹ Violations of custom required that the person be punished with a suitable penalty (Tit. IV, sec. 7), whereas a civil conviction for injury required that the person pay the damage caused and become infamous (Tit. IV, sec. 9). Libelous poems, songs, and statements were generally punished with banishment to an island (Tit. IV, sec. 15-17), and injuries to good morality were to be punished with "extraordinary severity" (Tit. IV, sec. 21).

1.1.3 – Justinian

The Roman Emperor Justinian was born in Serbia to a peasant family, adopted by his uncle, and in 527 CE succeeded his uncle in becoming the Emperor of Rome. Justinian ruled from 527 to 565, and his reign had a profound effect on religion as well as on law. The emperor was responsible for what can only be called the "great codification," which was a massive project of restating and reforming the law by codifying the whole of Roman law into one *Corpus juris civilis*, which was divided into the Institutes, the Code, and the Digest or Pandects.³² The work codified the various legal texts of the time, including the works of Gaius, Papinianus, Ulpianus, and Julius

³⁰ See JOLOWICZ, *Historical Introduction to the Study of Roman Law*, p. 392.

³¹ Book 5, Title IV of *Sententiae* addresses public and private injuries, injuries to a third party, as well as corporeal and non-corporeal injuries such as theft, libel, solicitation, injuries committed against good morals and sexual crimes against children. It also states that infants and insane persons are incapable of malicious intent, and therefore cannot be held accountable for their actions. SCOTT, *Corpus juris civilis: The Civil Law*, vol. 1, pp. 312-314. Interestingly, these same definitions of what constitutes injury are used when Justinian defines what is an injury in his *Enactments*, Book IV, Title IV. (1), p. 144.

Paulus. This codification not only had a significant impact on the Roman law but also played an important role in the development of classical canon law.³³

In Book IV, Title IV of Justinian's Enactments, a section is devoted to crime, injury, and reparation. In this section, Justinian includes the definition of injury as:

An injury, generally speaking, means everything that is done contrary to law, and particularly it sometimes signifies outrage, which is derived from the word *contemnere*, and is styled by the Greeks ὕβρις at other times gross negligence which the Greeks designate as ἀδίκημα, and in this way "unlawful damage" is understood in the *Lex Aquilia*; and then again it denotes unfairness and injustice which the Greeks call ἀδικία, for when a Praetor or a Judge renders a decision against anyone contrary to law the latter is said to have sustained an injury.³⁴

Overall, the legal codification that occurred under Justinian has affected profoundly the way law was understood, interpreted, and applied. The principles found in these works of Roman law are still used and continue to influence the development of both civil law and canon law.

1.2 – New Testament Origins of the Obligation to Remedy Harm

One cannot look at the canonical history to repair harm without briefly looking at the mandate of Christian scripture. In the New Testament a number of passages in the letters of St. Paul, along with passages from Matthew's gospel recognize that unfortunately most people who knowingly inflict harm on others do not choose to remedy that harm of their own accord.

³² See S. P. SCOTT, *Corpus juris civilis: The Civil Law*, New York, AMS Press, 1973, vols. 2-7.

³³ See HELMHOLZ, *The Spirit of Classical Canon Law*, p. 17.

Saint Paul, while lamenting the fact that the Christian community in Corinth cannot seem to get along, exhorts the people to at least keep their disputes within the community rather than taking them before the pagan civil courts. In his letter to the Corinthians he writes:

How can any one of you with a case against another dare to bring it to the unjust for judgment instead of to the holy ones? Do you not know that the holy ones will judge the world? If the world is to be judged by you, are you unqualified for the lowest law courts? Do you not know that we will judge angels? Then why not everyday matters? If, therefore, you have courts for everyday matters, do you seat as judges people of no standing in the church? I say this to shame you. Can it be that there is not one among you wise enough to be able to settle a case between brothers? But rather brother goes to court against brother, and that before unbelievers? Now indeed (then) it is, in any case, a failure on your part that you have lawsuits against one another. Why not rather put up with injustice? Why not rather let yourselves be cheated? (1 Cor. 6: 1-7)

Saint Paul first advocated that it is better for one to suffer the wrong rather than to go to court against a brother. However, if this is not possible, he strongly supported the idea that Christians should have their own framework in which to adjudicate their own disputes, rather than resort to using the pagan civil courts.

A few decades later, the gospel of Matthew gave a biblical foundation for the remedy of harm within a Christian context, and strong theological support for c. 128 of the CIC and c. 935 of the CCEO.³⁵ Chapter 5 of the gospel of Matthew requires that:

If you bring your gift to the altar, and there recall that your brother has anything against you, leave your gift there at the altar, go first and be reconciled with your brother, and then come and offer your gift (Mt. 5: 23-24).

³⁴ SCOTT, *Corpus juris civilis: The Civil Law*, vol. 1, p. 144.

³⁵ Since CIC c. 128 and CCEO c. 935 are virtually identical, for the purposes of this work the canon will be referred to by its number in the CIC, c. 128.

Note that the burden of becoming reconciled with one's neighbor is an affirmative duty of the person who committed the harm.³⁶ According to the scripture, as soon as one recognizes the harm that one has done, that person is required to take the initiative and remedy the harm committed against his neighbor before that person is allowed to offer one's gift to God.

The gospel of Matthew also gave the community guidelines to follow if a person refused to remedy the harm that he or she had committed.³⁷ The Matthean scripture provides a rudimentary blueprint setting out the proper procedures for airing a grievance against one's neighbor, beginning with a private process and proceeding to make the dispute public if the perpetrator does not make amends. Chapter 18 of Matthew's gospel counsels:

If your brother sins (against you), go and tell him his fault between you and him alone. If he listens to you, you have won over your brother. If he does not listen, take one or two others along with you, so that 'every fact may be established on the testimony of two or three witnesses.' If he refuses to listen to them, tell the church. If he refuses to listen even to the church, then treat him as you would a Gentile or a tax collector (Mt 18: 15-17).

The person who had been harmed had the obligation to attempt to work out the problem privately before bringing it before others within the community. If the perpetrator continued to refuse to cooperate, then one took the grievance to at least two witnesses,

³⁶ Canon 128 also states this obligation affirmatively, making the remedy of harm the responsibility of the person who inflicted it. The canon and the scripture verses are directed at the perpetrator, not at the person who has been harmed. CIC cc. 221 §1 and 1491 are the victim's canons for the remedy of harm, because they give one who has suffered from a violation of one's rights the right to petition an ecclesiastical forum for a remedy.

³⁷ The Gospel of Matthew was written primarily for Jewish Christians. Because of this, the author draws on the Jewish scripture and Mosaic Law, which would include the mandates and juridic tradition found in Deuteronomy, particularly chapters 17 and 19.

who were necessary to prove the case. In both the old and new testament, witnesses were an important and necessary part of the process.³⁸ St. Paul mentions witnesses two times, first in his letter to the Corinthians and later in his letter to Timothy.³⁹ Witnesses are also mentioned in the letter to the Hebrews.

It was only after these private options failed that the matter was taken before the community. The letter to Timothy gave judges within the community directions on how they should preside by telling them, "Reprimand publicly those who do sin, so that the rest also will be afraid. I charge you before God and Christ Jesus and the elect angels to keep these rules without prejudice, doing nothing out of favoritism" (1 Tm. 5:20-21). The community could remedy the dispute by facilitating a peaceful agreement between the parties or inflicting punishment on the wrongdoer.⁴⁰ It was only if that failed then, as a last resort, the person was to be expelled from the community. These scriptural

³⁸ See Deut. 19:15-20. "One witness alone shall not take the stand against a man in regard to any crime or any offense of which he may be guilty: a judicial fact shall be established only on the testimony of two or three witnesses. If an unjust witness takes the stand against a man to accuse him of a defection from the law, the two parties in the dispute shall appear before the Lord in the presence of the priests or judges in office at that time; and if after a thorough investigation the judges find that the witness is a false witness and has accused his kinsman falsely, you shall do to him as he planned to do to his kinsman. Thus shall you purge the evil from your midst. The rest, on hearing of it, shall fear, and never again do a thing so evil among you." Chapter 17 of Deuteronomy also states, "The testimony of two or three witnesses is required for putting a person to death; no one shall be put to death on the testimony of only one witness" (Deut. 17:6). The Gospel of John also mentions witnesses in chapter 8, "Even in your law it is written that the testimony of two men can be verified. I testify on my behalf and so does the Father who sent me" (Jn. 8:17-18).

³⁹ Saint Paul writes, "On the testimony of two or three witnesses a fact shall be established" (2 Cor. 13:1). Later he writes to Timothy, "Do not accept an accusation against a presbyter unless it is supported by two or three witnesses. Reprimand publicly those who do sin, so that the rest also will be afraid" (1 Tm. 5:19). This passage in Timothy is interesting because it allows persons within the community to challenge the actions of a presbyter or leader of the community. Finally the letter to the Hebrews states, "Anyone who rejects the law of Moses is put to death without pity on the testimony of two or three witnesses" (Heb. 10:28).

⁴⁰ See MATTHEWS, "The Development and Future of the Administrative Tribunal," p. 17.

guidelines were the only universal rules and procedures for the Church until its leaders started legislating in ecumenical councils.

1.3 – The First Three Centuries - Beginnings to Constantine

During the Church's first millennium, Christian theology and doctrine as well as the structures of Church law and procedure were being created, defined and refined. When the Christian community was in its infancy, there were no universal laws governing the various communities other than the Scriptural letters and gospels. In addition, there was no formalized process within the community to address the issue of harm committed against fellow Christians. Harm was remedied as a community through following the advice set forth in Saint Paul's letters and the Gospel of Matthew, presuming that the different Christian communities had access to these resources. The various copies of scriptural letters and gospels were being collected until the mid to late second century, and were not listed definitively until Athanasius did so in 367 CE.⁴¹

As the Christian communities flourished and different problems surfaced, it became necessary to establish more detailed processes for remedying the various types of harm committed. While the Scriptures provided a good basis, they were not adequate in and of themselves in addressing many of the specific and varied problems that arose as the community grew. To solve these problems, these early Christian communities began developing basic processes within their own community to resolve disputes. However,

⁴¹ See J.R. DONAHUE, "Bible," in R.P. MCBRIEN (ed.), *The Harpercollins Encyclopedia of Catholicism*, San Francisco, CA, HarperSanFrancisco, 1995, p. 163.

these procedures to resolve disputes and remedy harm were being developed in the individual communities, rather than on the universal level.

In the centuries that followed, the Church slowly began developing its own system of written law, as well as procedures for resolving disputes. The *Didache* (whose date of publication is disputed, but could be as early as the mid-first century to the late second century⁴²), an early Christian text crafted from a number of Christian sources, held that:

Furthermore, correct one another, not in anger, but in composure, as you have it in the Gospel; and when anyone offends his neighbor, let no one speak with him – in fact he should not even be talked about by you – until he has made amends.⁴³

Church fathers such as Tertullian (ca. 160- 225) established that the church elders, chosen because of their character, judged those brought before the community.⁴⁴ By the middle of the third century, bishops began to take on the role of judge in settling disagreements within their own communities.⁴⁵ The *Didascalia* (ca. 250) gives a detailed overview of the Church's legal system and gives bishop/judges advice ranging from dealing with a person falsely accused to not taking into account the status of a person

⁴² See "Didache," in R.P. MCBRIEN (ed.), *The Harpercollins Encyclopedia of Catholicism*, San Francisco, CA, HarperSanFrancisco, 1995, p. 416.

⁴³ *The Didache. The Epistle of Barnabas. The Epistles and the Martyrdom of St. Polycarp. The Fragments of Papias. The Epistle to Diognetus*, translated and annotated by J.A. KLEIST, Westminster, MD, Newman Press, 1948, p. 24; see also MATTHEWS, "The Development and Future of the Administrative Tribunal," p. 28.

⁴⁴ See L.G. WRENN, "Part I: Trials in General [cc. 1400-1500]," in *New Commentary on the Code of Canon Law*, J.P. BEAL, J.A. CORIDEN and T.J. GREEN (eds.), commissioned by the Canon Law Society of America = CLSA, New York, NY, Paulist Press, 2000, p. 1610.

⁴⁵ See *Didascalia Apostolorum*, II, 45-55, in F.X. FUNK (ed.), *Didascalia et constitutiones Apostolorum*, Paderborn, F. Schöningh, 1905, pp. 138-156.

when rendering a decision.⁴⁶ Later, Eusebius (ca. 260-339), the bishop of Caesarea and an early Church historian, wrote about the ecclesiastical procedures that bishops should use to judge disputes, as well as behaviors of bishops that were not acceptable when judging cases.⁴⁷ However, there were no universal edicts concerning canonical procedures until the Ecumenical Councils. These processes remained local and underground because Christianity was not a legal religion within the Roman Empire. Though it was during the third century that written canon law began to emerge, it was not until the second half of the fourth century that written Church law began to develop and flourish.⁴⁸

1.4 – Constantine through the Seven Ecumenical Councils

In 313 CE the Roman emperor Constantine (ca. 306-337) allowed the Church to emerge from being an underground movement to a legally recognized religion. Since the Church no longer had to be concerned with such basic issues as maintaining its existence in a hostile environment, it could now focus its attention on creating stable, formal, and public structures. As the Church began to develop its formal legal system it logically looked to the Roman legal system that was present and flourishing at the time. The Church modeled much of its own legal system upon the Roman example, while also introducing essential Christian elements.

⁴⁶ See WRENN, "Part I: Trials in General [cc. 1400-1500]," *New Commentary on the Code of Canon Law*, p. 1610.

⁴⁷ See *ibid.*

One way the Church began to develop its formal system was to create its own system of canons. The difference between the canons (*canones*) and laws (*leges*) was that, "The *canones* were distinguished from the *leges* from the earliest times after the establishment of Christianity.... The *canones* were meant to regulate the government of the church and to prescribe the habits of life appropriate for the clergy and all Christian people," whereas the laws were those measures enacted by the civil authority for a local community.⁴⁹ Now that the Church could exist publicly, bishops began to convene Ecumenical Councils to create canons for the Church that were binding for more than one community. These canons not only defined theological doctrine, but also set forth various procedural norms for compelling the remedy of harm.

The civil power of bishops was also significantly augmented by the Church's legitimate status, and the lines between temporal and ecclesiastical authority became increasingly blurred. The power of bishops began to resemble the power given to Roman senators in the temporal realm.⁵⁰ Though bishops had traditionally mediated disputes between the faithful, during Constantine's reign a bishop's power to adjudicate was enlarged because the Emperor decreed that the judgments of bishops were to have civil effects and be recognized and enforced by the state.⁵¹ Constantine granted bishops "the same authority as civil judges in cases brought before them by the mutual consent of the

⁴⁸ See P.E. L'HUILLIER, "The Making of Written Law in the Church," in *Studia canonica*, 31 (1997), p. 123.

⁴⁹ HELMHOLZ, *The Spirit of Classical Canon Law*, p. 3.

⁵⁰ See WRENN, "Part I: Trials in General [cc. 1400-1500]," p. 1611.

⁵¹ See MATTHEWS, "The Development and Future of the Administrative Tribunal," p. 34.

parties.”⁵² This power to adjudicate cases and have civil authorities enforce these decisions lasted for centuries and gave bishops considerable temporal as well as religious power.

The first Ecumenical Council of Nicea was convened in 325 CE and later published twenty canons. Between 325 and 787 CE the Church convened seven Ecumenical Councils, all of them producing canonical legislation applicable to the whole Church. Even though these councils were primarily convened to clarify fundamental doctrinal issues, it also promulgated laws creating the processes by which a person could have his harm remedied. The general principle supporting a process for the remedy of harm was also present, such as in this passage in c. 6 of the First Council of Constantinople, “It is wholly essential... that the one who alleges that he has been wronged, whatever his religion may be, should get justice.”⁵³

In the canons from the Ecumenical Councils, there is not as clear a distinction between trials dealing with contentious matters and those addressing penal matters as there is in the present Code. If one had a grievance, especially if that grievance was against a cleric or a bishop, one brought the matter to a bishop or synod of bishops to have it adjudicated.⁵⁴ The judge(s) could then adjudicate the case as he saw fit, and choose to remedy the harm and/or punish the offender so that justice was done. This was

⁵² WRENN, “Part I: Trials in General [cc. 1400-1500].” p. 1611; citing *Codex Theodosianus*. I 27, 1: Berlin, Mommson-Meyers. 1905, p. 62.

⁵³ *Decrees of the Ecumenical Councils Volume 1: Nicea I to Lateran V*, N.P. TANNER (ed.), London. Sheed & Ward LTD.. 1990, p. 33.

⁵⁴ See *ibid.*, p. 91.

all accomplished in one process whether the matter was a penal offense or merely a dispute between parties.

By the Council of Chalcedon in 451 CE, the Church had developed a basic appellate system that was codified into cc. 9 and 17 of the Council.⁵⁵ Canon 9 also required clerics who had a grievance against another cleric to bring the dispute before his bishop rather than to utilize the civil courts. It was evident that by this time the Church also allowed cases to be mediated by arbiters, who could be chosen by the parties to mediate the dispute.⁵⁶

When the Second Council of Nicea concluded in 787, it had promulgated rules concerning canonical contracts for land, and had mandated remedies for the violations of these rules.⁵⁷ For example, if diocesan or monastic property was wrongfully transferred, the Council declared these transactions to be null and void. The property was to be restored to its rightful owner, and the one who instituted the illegal transfer was to be punished.⁵⁸

The seven Ecumenical Councils were the first universal laws adopted for the whole Church. These councils, as well as the councils that followed them, produced

⁵⁵ See cc. 9 and 17 in *ibid.*, pp. 91, 95. See also, J.P. BEAL, "Administrative Tribunals in the Church: An Idea Whose Time Has Come or an Idea Whose Time Has Gone?" in *CLSA Proceedings of the Fifty-Fifth Annual Convention*, Washington, DC, CLSA, 1993, p. 40. This right to appeal was later mandated in the Fourth Council of Constantinople (869-870). A person had a right of recourse to challenge an unjust deposition from an office, as well as to challenge "any other injury" inflicted (*Decrees of the Ecumenical Councils* Volume 1, TANNER, p. 185).

⁵⁶ See *Decrees of the Ecumenical Councils* Volume 1, TANNER, p. 91.

⁵⁷ See *ibid.*, p. 148.

⁵⁸ *Ibid.*

numerous norms, which not only reflected the principle that harm must be remedied, but which also provided the means and the remedies for the norm's practical implementation.

1.5 – Early Canonical Compilations

After Christianity became legal in the Roman Empire, and bishops were given temporal authority, they needed a body of canons from which to govern. In addition to the laws of the Ecumenical Councils and the canons promulgated for local communities, Pope Gregory the Great (540-604) allowed Justinian's codification of the Roman civil law, the *Corpus juris civilis*, to be used to apply the laws of the Church.⁵⁹ This was the beginning of the formal integration of Roman law into the canonical law of the Church. In addition, popes were promulgating decretals, and local and ecumenical councils continued to promulgate canons. These canonical and theological works, originally in either Greek or Latin, were translated, copied and re-copied, and distributed among the various Christian communities. Unfortunately, there was no single collection or version of these texts. Christian communities may have had some of them, but due to transcriptional errors, even then the copies distributed varied in their accurate reflection of the original document.

In the early sixth century, the Pope commissioned a monk named Dionysius Exiguus to compile a reliable canonical collection for the papal chancery.⁶⁰ His compilation would be composed of the various collections of the laws from the local and

⁵⁹ See WRENN, "Part I: Trials in General [cc. 1400-1500]," p. 1611.

⁶⁰ See L'HUILLIER, "The Making of Written Law in the Church," p. 135.

Ecumenical Councils, as well as the decretal letters of fourth and fifth century pontiffs.⁶¹ These texts were gathered, the Greek texts were translated into Latin, and then they were all combined into one work.⁶² Over the next few centuries, subsequent canonists augmented this work. When the emperor Charlemagne (ca. 742-814) came to power, he wanted one consistent book of canons to be used by all the churches in his realm. Because it was the best and most complete compilation for its time, Pope Hadrian presented him with this text. This work became known as *Collectio Dionysio-Hadriana* and was adopted for Charlemagne's empire at the Diet of Aachen in 802.⁶³

Two other canonists, Bishop Burchard of Worms (ca. 965-1025) and Bishop Ivo of Chartres (ca. 1040-1115) also compiled collections of canonical texts. Burchard's twenty-book compilation was known as the *Decretum Collectarium* or the *Decretum Burchardus*. Ivo's works included his *Collectio trium partium*, the *Decretum*, and the *Panormia*, which is a short anthology of eight books compiled from the preceding two works. These compilations were used extensively until Gratian's work became available in the twelfth century.

⁶¹ See HELMHOLZ, *The Spirit of Classical Canon Law*, p. 3.

⁶² See P. GASPARRI, "Preface to the 1917 Code of Canon Law," in *Codex iuris canonici*, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, Romae, Typis polyglottis Vaticanis, 1917; English language translation: *The 1917 Pio-Benedictine Code of Canon Law*, E.N. PETERS (ed.), San Francisco, CA, Ignatius Press, 2001, p. 1.

⁶³ See *ibid.*

1.6 – The Classical Period - The Twelfth to Fifteenth Century

It is only during the second millennium of the Church's existence that an integrated and complete body of canon laws with commentaries and glosses⁶⁴ came into existence.⁶⁵ There are many reasons for this canonical renaissance. One reason is that it was during this time that Roman law was rediscovered and began to be studied in great depth at European universities such as Bologna. As this interest spread, it sparked a new interest in the study of canon law.⁶⁶ Not coincidentally, the University of Bologna was also the university where Gratian was said to have taught.⁶⁷ Before this time, canon law consisted of a body of sometimes confusing and contradictory canons that had been created and enacted by various councils, edicts, and papal decrees. These disparate works were in different languages and had numerous versions. Though these canons had been collected into single volumes before, they had never been compared, explained, or distinguished.

This renewed interest in the law was occurring across Europe and England.

However, the development of canon law was quite different from the common law

⁶⁴ In legal terminology, later interpretations of the law, whether they are academic or judicial interpretations, are known as a "gloss" on the law. A gloss is defined as "an interpretation, consisting of one or more words, interlinear or marginal; an annotation, explanation, or comment on any passage in the text of a work, for purposes of elucidation or amplification." ("Gloss," *Black's Law Dictionary*, p. 475.) Glosses were used extensively in canon law as annotations of the decretals. Within the common law, glosses generally occur within a judicial sentence.

⁶⁵ See HELMHOLZ, *The Spirit of Classical Canon Law*, p. 4.

⁶⁶ See GRATIAN, *The Treatise on Laws: Decretum*, dd. 1-20, translated by A. THOMPSON, with the Ordinary Gloss translated by J. GORDLEY and introduction by K. CHRISTENSEN, Washington, DC, The Catholic University of America Press, 1993, p. xi.

⁶⁷ See GRATIAN, *The Treatise on Laws*, p. xi.

system that was taking shape in England.⁶⁸ One primary difference between the evolution of canon law and the common law in England was the way in which the law was allowed to develop. There is a saying that, “whereas English common law grew from the cumulation of case law, Continental law was formed from authoritative texts and academic commentary.”⁶⁹ Generally speaking, canon law was systematically collected, compiled, compared and distinguished by academics and then promulgated by decree in its entirety. All distinctions, exceptions, or nuances in the law were defined by the academics prior to promulgation or as an official gloss promulgated by the legislator at a later time, rather than developing through the application of the law by the courts. It is for this reason that, during this classical period in canon law, the compilations of law setting out the rules and procedures governing the remedy of harm are so important, because it was within these collections that the law was developed, synthesized, and integrated.

In contrast, common law developed largely from the precedents set through judicial decisions that modified, nuanced or glossed the traditional statutory law. While the monarch, Parliament, and the lesser levels of government worked to enact and promulgate laws, the meaning and interpretation, as well as the nuances or glosses of these laws, were ultimately determined by the rulings of the courts. The result is that the common law develops as a result of the judicial interpretation of the law coupled with the

⁶⁸ For a study on how the common law was developing at this time, see Appendix I.

⁶⁹ HELMHOLZ, *The Spirit of Classical Canon Law*, p. 30.

binding precedential value of these decisions, whereas canon law develops through an academic interpretation that is then promulgated in its entirety by legislators.

The classical period in canon law also saw the refinement of various types of legal procedures available to remedy harm. It was during this time that the precursor to the oral contentious process was developed. Pope Clement V (1305-1314) unified and clarified various doctrines and processes to create a summary procedure in the decretal *Saepe contingit*.⁷⁰ This abbreviated procedure became, in practice, “the normal form of canonical procedure until the promulgation of the 1917 Code.”⁷¹

1.6.1 – Gratian

Little is known about Gratian, except that he was a scholar of canon law, probably a monk, who was thought to have taught canon law at the University of Bologna during the 1130s and 1140s CE.⁷² In approximately 1140 CE, Gratian realized the need for a single, integrated collection of canon law. What were available at that time were the various versions and collections of canon law that previously had been compiled. However, these compilations had no organization or commentary, and the texts were oftentimes contradictory. Gratian privately began organizing a single compendium of canon law that attempted to create a synthesis by reconciling contradictory canons. His

⁷⁰ Clem., V.11, 2. See S. KUTTNER, *Medieval Councils, Decretals, and Collections of Canon Law*, London, Variorum Reprints, 1980, p. 427.

⁷¹ J.P. BEAL, “Section II: The Oral Contentious Process [cc. 1656-1670].” in J.P. BEAL, J.A. CORIDEN and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, p. 1754.

work resulted in the *Concordia discordantium canonum*, or Concordance of Discordant Canons. After his death, his work simply became known as the *Decretum*.⁷³ This work compiled almost four thousand canonical rulings, which were organized into 101 *distinctiones* and 36 *causae*.⁷⁴ The commentary, or *Glossa Ordinaria*, was added to the text about three quarters of a century after the original body of material was compiled.⁷⁵ Though Gratian's work became a standard text in canon law, it was never formally promulgated either as a whole or in part even though the Holy See had it published and amended.⁷⁶ Gratian's work begins with this statement in Distinction 1, part 1:

The human race is ruled by two things, namely natural law and usages. Natural law is what is contained in the Law and Gospel. By it, each person is commanded to do to others what he wants done to himself, and prohibited from inflicting on others what he does not want done himself. So Christ said in the Gospel, "Whatever you want men to do to you, do so to them. This indeed is the Law and the Prophets."⁷⁷

While this statement does not directly mandate that harm must be remedied, it certainly suggests that a person is prohibited from inflicting harm on another that he would not wish to have inflicted on himself. Like c. 128 of the CIC, this distinction transformed the moral law into a juridical norm that could be enforced in a canonical forum.⁷⁸

⁷² See "Gratian," in R.P. MCBRIEN (ed.), *The Harpercollins Encyclopedia of Catholicism*, San Francisco, CA, HarperSanFrancisco, 1995, pp. 584-585.

⁷³ See GRATIAN, *The Treatise on Laws*, p. ix.

⁷⁴ See "Gratian," *The Harpercollins Encyclopedia of Catholicism*, pp. 584-585.

⁷⁵ See GRATIAN, *The Treatise on Laws*, p. x.

⁷⁶ See GASPARRI, "Preface to the 1917 Code of Canon Law," p. 3.

⁷⁷ GRATIAN, *The Treatise on Laws*, p. 3.

⁷⁸ See F. CACIOPPO, *La disciplina della riparazione dell danno nel diritto canonico del secolo XX*, JCD diss., Romae, Pontificium Athenæum Sanctae Crucis, Facultas Iuris Canonici, 1996, p. 23.

It is also evident from Gratian's work that over the centuries, ecclesiastical processes had been created specifically to address the settlement of disputes. Distinction 18, *causa* 15, which was taken from a Greek synod of Bishop Martin of Braga, called for a synod to be convened twice a year by the metropolitan bishop in each province so that priests, deacons, and anyone else who believed that he had been harmed, could have their cases heard.⁷⁹ There was also an appellate system in place if bishops were engaged in a dispute. Their cases were to be heard first by a greater See, then by a synod, and finally it could be taken to the Apostolic See to be judged.⁸⁰ Within Gratian's work were also a number of references concerning the necessity for restitution. Some of these specifically called for the reparation of harm,⁸¹ while others dealt with concrete norms concerning reparation.⁸² Clearly, the principles found in these texts espoused the notion that reparation for the harm that one caused was necessary and expected, especially under certain circumstances.

⁷⁹ See GRATIAN, *The Treatise on Laws*, pp. 75, 109.

⁸⁰ D. 17, c. 5, §2. *Ibid.*, p. 68.

⁸¹ "Quicquid de sacratis vasis vel ministeriis a quolibet clero usurpatum fuerit, ecclesiae restituatur" (C. 12, q. 2, c. 2); "Resarciantur detrimenta sacerdoti vel ecclesiae, que alterius occasione alter senserit" (C. 12, q. 4, c. 2).

⁸² "De induciis autem post restitutionem prestandis, et quo spatio temporis concedendae sint" (C. 3, q. 2, c. 1). "Ante litem contestatam violenter ablata restituantur" (C. 3, q. 2, c. 3). "Post restitutionem induciae prestandae sunt" (C. 3, q. 2, c. 6). "Ante restitutionem aliquis ad causam vocari non debet" (C. 3, q. 2, c. 8). "Si res aliena, propter quam peccatum est, reddi possit, et non redditur, penitencia non agitur, sed simulabitur. Si autem veraciter agitur, non remittetur peccatum, nisi restituatur ablatum: si, ut dixi, restitui potest" (C. 14, q. 6, c. 1).

1.6.2 – The Gregorian Decretals

During the almost one hundred years between Gratian's work and the pontificate of Pope Gregory IX (1227-1241), there were over ten pontificates as well as two Lateran Councils. In addition, during this time it was discovered there were important canonical works that Gratian had not included in his collection. Due to the need to include these additions and oversights, in the early 1230's Pope Gregory IX determined that these additional ecclesiastical laws needed to be collected, compiled, and codified. He commissioned St. Raymond of Peñafort, OP, to gather and organize an official codification of canon law. These texts were arranged into five books known collectively as the *Quinque Libri Decretalium*: the *Iudex*, *Iudicium*, *Clerus*, *Connubia*, and *Crimen*.⁸³ Each of these books was then subdivided into thirty titles. Interestingly, many of these titles were kept as exact repetitions in the Code of 1983.⁸⁴ The completed work was promulgated on September 5, 1234 with the bull *Rex pacificus*.⁸⁵ These works were also known as the *Extravagantes* or *Liber extra* because they excluded the works found in Gratian. This new collection abrogated all collections published after Gratian's *Decretum*.

The Gregorian Decretals enshrined canonical principles that remain in the current law, or have current applications. These principles apply to a broad range of subjects,

⁸³ See *Corpus iuris canonici, editio lipsiensis secunda*, Æ.L. RICHTER, curas ad librorum manuscriptorum et editionis Romanæ fidem recognovit et adnotatione critica instruxit, Æ. FRIEDBURG, Leipzig, B. Tauchnitz. 1879. Graz. Akademische Druck. 1959.

⁸⁴ See *ibid*.

⁸⁵ See GASPARRI. "Preface to the 1917 Code of Canon Law," p. 4.

such as presumptions, equitable principles, and imputability. Some of the most applicable are:

1. Doubtful obligations must be interpreted in the most favorable manner.
2. Truth should not be omitted in order to avoid scandal.
3. That which has its source in a clandestine fact, in one that is violent or is otherwise illicit, cannot truly subsist.
4. He who through fear acts otherwise than he should, is not said to act.
5. Ignorance does not excuse a prelate for the sins of his subjects. That is in a mystical and moral sense. The pastor is not excused for ignoring the sins of his flock and the ravages that the wolf causes.⁸⁶

Not only did these principles guide judges in the application of the law, but they also can still be used as principles to follow when the current Codes are silent on an issue.⁸⁷

In addition to his compilations, Gregory IX also addressed the necessity to remedy harm by promulgating the decretal *Si culpa tua* between 1227 and 1234 concerning the necessity to repair harm. This decretal was later enshrined in his *Liber extra*.⁸⁸ Title 36, in Book V is entitled *De iniuriis et damno dato*. Section IX of it states, "If by your fault you cause damage or injury, even if you do this by inexperience or negligence, you are bound by law to make satisfaction. Ignorance is no excuse, since you should have known that through your actions injury could have come to another

⁸⁶ 1. Cap. II. "Dubia in meliorem partem interpretari debent" (D. 50, 17, 35). 2. Cap. III. "Propter scandalum evitandum veritas non est omittenda" (D. 41, 3, 25). 3. Cap. V. "Quod latenter, aut per vim, vel alias illicite introductum, nulla debet stabilitate subsistere." 4. Cap. VIII. "Qui ex timore facit praeceptum, aliter quam debeat facit, ex ideo iam non facit." 5. Cap. X. "Ignorantia non excusat praelatum in peccatis subditorum. H. d. quoad mysticum et moralem intellectum. Non enim potest esse pastoris excusatio, si lupus oves comedit, et pastor nescit" (*Corpus iuris canonici*, FRIEDBURG, pp. 927-928; English translation in A. GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, 2nd edition, Ottawa, Saint Paul University, 1996, pp. 119-120).

⁸⁷ Cf. c. 19.

⁸⁸ See T.R. ZINCULA, *Vicarious Liability: An Analysis of Canon 128 and United States Civil Law*, Unpublished Master's Seminar Paper, Ottawa, Saint Paul University, Faculty of Canon Law, 1993, p. 3 [pro manuscripto].

person.”⁸⁹ This law is very similar to the principles found in c. 128, though this statute included harm inflicted accidentally as well as negligently or intentionally. In addition, it is very clear that ignorance of the law does not excuse the harm inflicted, or lessen the need for one to repair the harm caused. This text was critical in establishing a legal mandate for the need to make satisfaction for the harm that one unlawfully inflicted, and is certainly the canonical precursor of c. 128. Like c. 128, this canon transformed the natural law moral imperative into an enforceable legal norm, and it remained in force until the 1917 Code abrogated prior universal law.

1.6.3 – The *Liber Sextus*

The five books of the Gregorian decretals set the standard for official canonical texts. Nevertheless, like all legal compilations, it must be updated to include laws passed after the original compilation. After sixty-four years, Pope Boniface VIII (1294-1303) determined that the five books of the Gregorian decretals needed to be updated. However, rather than put together a new compilation, it was decided that a sixth book could be added to the original five.⁹⁰ Thus, the compilation he commissioned was known as the *Liber sextus*, or Sixth Book.

The *Liber sextus* was promulgated in 1298 and contained five books. Like the Gregorian Decretals, this compilation had a section entitled *De iniuriis et damno dato*,

⁸⁹ “Si culpa tua datum est Damnum vel iniuria irrogata, seu irrogantibus opem forte tulisti, aut haec imperitia tua sive negligentia evenerunt; iure super his satisfacere te oportet. nec ignorantia te excusat. si scire debuisti, ex facto tuo iniuriam verisimiliter posse contingere vel iacturam” (X. V. 36. 9). *Corpus iuris canonici*. FRIEDBURG, p. 880.

⁹⁰ See GASPARRI, “Preface to the 1917 Code of Canon Law,” p. 5.

though unlike the same title found in the earlier decretals, this section deals with loans or contractual matters rather than specifically addressing the remedy of harm.⁹¹ The *Liber sextus* also contained a number of general rules and legal principles known as the *regulae iuris*. Of the 88 *regulae* promulgated, the majority of these were taken from Justinian.⁹² There are many of these laws that continue to affect the interpretation of canon law and relate to various aspects concerning the remedy of harm.

There are a number of laws or principles in the *regulae* that directly apply to different aspects concerning the remedy of harm. Some of these principles are procedural, while others give guidance concerning such topics as legal interpretations, imputability, or equitable principles. One can see in the following sections how these principles have shaped the procedures and interpretation of present day canon law.

1.6.3.1 – General Legal Principles

The *regulae iuris* promulgated a number of general canonical norms and principles. Though applicable to a wide range of canonical issues, these principles have also shaped the different areas of canon law dealing with the remedy of harm. Many of

⁹¹ Book V, Title VIII. “Etsi pignorationes, quas vulgaris elocutio repressalias nominat, in quibus alius pro alio praegravatur, tanquam graves legibus et aequitati naturali contrariae civili sint constitutione prohibita, ut tamen earum prohibitio in personis ecclesiasticis tanto amplius timeatur, quanto in illis specialius inhihentur: eas concedi contra personas praedictas seu bona ipsorum, aut quantumcunque generaliter praetextu cuiusvis consuetudinis, quam potius reputamus abusum fore, concessas, ad illas extendi praesenti decreto districtius inhihemus. Illi autem, qui contra fecerint, adversus personas easdem pignorationes seu repressalias concedendo, vel extendendo ad eas, nisi praesumptionem huiusmodi revocaverint a concessionis vel extensionis tempore infra mensem, si personae singulares fuerint, sententiam excommunicationis incurrant, si vero universitas, ecclesiastico subiaceat interdicto.”

⁹² See GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, p. 10.

these principles are still cited by canonists and can give judges guidance in applying the law.

1. No one is obliged to the impossible.
2. Justice should be rendered without respect to persons.
3. It is fitting that odious things be restricted and favorable ones extended.
4. When something is prohibited, all that follows from it is also prohibited.
5. What is accessory ought to follow the condition of its principal.
6. Who is permitted more is permitted less.
7. That which is directly forbidden may not be done indirectly.
8. What is not allowed to the defendant is not allowed to the plaintiff.⁹³

These general principles gave judges some overarching guidelines concerning how the law should be applied, and how the behavior of the parties should be viewed legally, and these principles remain applicable today. For example, the first maxim cited above directly applies to the topic of the remedy of harm. If it is impossible to foresee harm and prevent it from occurring, then the infliction is not unlawful and c. 128 does not apply.⁹⁴

This codification also briefly addressed the issue of contracts. Law 86 states, "Contracts are known to receive their rule from the agreement of the parties."⁹⁵ This

⁹³ 1. Reg. VI. "Nemo potest ad impossibile obligari" (D. 50, 17, 185). 2. Reg. XII. "In iudiciis non est acceptio personarum habenda." 3. Reg. XV. "Odia restringi, et favores convenit ampliari" (D. 50, 17, 20 and 56). 4. Reg. XXXIX. "Quum quid probitetur, prohibentur omnia, quae sequuntur ex illo" (D. 50, 17, 129). 5. Reg. XLII. "Accessorium naturam sequi congruit principalis" (D. 50, 17, 129). 6. Reg. LIII. "Cui licet quod est plus, licet utique quod est minus" (D. 50, 17, 21 and 110). 7. Reg. LXXXIV. "Quum quid una via prohibetur alicui, ad id alia non debet admitti." 8. Reg. XXXII. "Non licet actori quod reo licitum non existit" (D. 17, 75). (*Corpus iuris canonici*, FRIEDBURG, pp. 1122-1124; English translations in GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, pp. 107-117.)

⁹⁴ The differences between an accident and negligence will be explored in greater detail in chapter 2, section 2.5.

⁹⁵ D. 50, 17, 203.

certainly is in accord with a common law understanding that a contract is made by the meeting of the minds of the parties, and that the parties are bound by what they agreed.

1.6.3.2 – Presumptions

The principles contained in the *regulae iuris* also included canonical presumptions, which can continue to be invoked to guide a judge in rendering a decision fairly and impartially. These principles give guidance concerning how a judge should render a judgment when the facts or laws are unclear. It also guides a judge concerning a party who maintains silence on a particular issue, as well as when one can presume that a party is ignorant of a law or fact.

1. When the rights of the parties are doubtful, the defendant is to be favored rather than the plaintiff.
2. In obscure matters, consideration must be given to what is more likely or what happens most often.
3. Ignorance is presumed where knowledge is not proven.
4. Who keeps silent is considered to consent.
5. He who is silent does not confess, nor does he appear to deny.⁹⁶

1.6.3.3 – The Nullity of an Act

These principles also provide guidelines concerning the nullity of an act, what makes an act null, and how null acts should be treated. Many of these principles are found in various forms in the current Codes. The first two principles are often applied in the area of marriage law, particularly in reference to invalid marriages. The third

principle states the fact that acts that go against the law are null. This is often true, though in the current Code it is possible for an act to be illegal, thus illicit, but not null. The fifth maxim is similar to c. 1620 1° concerning absolute incompetence. If a judge is absolutely incompetent to act, his acts are null.

1. What is null in law from the beginning does not acquire validity with the passing of time.
2. What has no juridical effect does not constitute an impediment.
3. That which is done against the law is to be considered not done.
4. An oath contrary to morality is not binding.
5. The act of a judge not related to his own office has no force.⁹⁷

1.6.3.4 – Imputability

Though most of the canons in the 1983 Code dealing with imputability are in the section concerning penal law, there are general principles on imputability cited in the *Liber sextus* that can be applied to contentious cases as well as to penal ones. Imputability, which will be addressed in further detail in Chapter 2, concerns whether a person can be held morally and legally responsible for his actions. The following maxims aid a judge in assessing whether a person should be held responsible for the harm that he has inflicted.

⁹⁶ 1. Reg. XI. “Quum sunt partium iura obscura, reo favendum est potius quam actori” (D. 50, 17, 125). 2. Reg. XLV. “Inspicimus in obscures quod est verisimilius, vel quod plerumque fieri consuevit” (D. 50, 17, 114). 3. Reg. XLVII. “Praesumitur ignorantia, ubi scientia non probantur” (D. 50, 17, 206). 4. Reg. XLIII. “Qui tacet, consentire videtur.” (D. 50, 17, 142). 5. Reg. XLIV. “Is, qui tacet, non fatetur, sed nec utique negare videtur” (D. 50, 17, 142) (*Corpus iuris canonici*, FRIEDBURG, pp. 1122-1124; English translations in GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, pp. 107-117).

⁹⁷ 1. Reg. XVIII. “Non firmatur tractu temporis quod de iure ab initio non subsistit” (D. 50, 17, 29 and 210). 2. Reg. LII. “Non praestat impedimentum quod de iure non sortitur effectum” (D. 42, 1, 4, 6). 3. Reg. LXIV. “Quae contra ius fiunt debent utique pro infectis haberi” (C. 1, 14, 5). 4. Reg. LVIII. “Non est obligatorium, contra bonos mores praestitum iuramentum” (D. 50, 17, 23). 5. Reg. XXVI. “Ea, quae fiunt a iudice, si ad eius non spectant officium, viribus non subsistent” (D. 50, 17, 145). (Ibid.)

1. Ignorance of fact, not of law, excuses.
2. What is done by order of a judge is not to be considered malicious.
3. Someone should not be held responsible for not doing what he ought to have done when it was not in his power to act otherwise.⁹⁸

Number 1 is a precursor of c. 15 of the CIC. Number 2 relates to harm inflicted lawfully. If harm results from a lawful order of a judge, then the harm is not inflicted unlawfully and c. 128 does not apply. Number 3 is the precursor to c. 125 of the CIC.

1.6.3.5 – Agency

Though the 1983 Code does not address vicarious liability as such, it certainly recognizes the possibility of an agent acting on behalf of another person.⁹⁹ These concepts have arisen from a canonical tradition that dates back to Roman law. The *regulae iuris* contain some of these principles, which can help a judge assess who is responsible for harm inflicted, and who must be responsible for remedying that harm.

1. What one may not do in his own name, he may not do either in the name of another.
2. One can do through another that which he can do by himself.
3. Who acts through another is considered to have acted by himself.¹⁰⁰

⁹⁸ 1. Reg. XIII. “Ignorantia facti, non iuris, excusat” (D. 22, 6, 9). 2. Reg. XXIV. “Quod quis de mandato facit iudicis, dolo facere non videtur” (D. 50, 17, 137 and 167). 3. Reg. XLI. “Imputari non debet ei, per quem non stat, si non faciat quod per eum fuerat faciendum.” (Ibid.)

⁹⁹ See Chapter 2, section 2.3.4.

¹⁰⁰ 1. Reg. LXVII. “Quod alicui suo non licet nomine, nec alieno licebit” (D. 50, 8, 1, 1). 2. Reg. LXVIII. “Potest quis per alium, quod potest facere per se ipsum” (D. 50, 17, 169 and 180). 3. Reg. LXXII. “Qui facit per alium, est perinde ac si faciat per se ipsum” (D. 50, 17, 180). (*Corpus iuris canonici*, FRIEDBURG, pp. 1122-1124; English translations in GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, pp. 107-117.)

1.6.3.6 – Equitable Principles

There are also many principles of equity found in the *regulae iuris*. Many of these principles were also adopted by chancellors and then judges of the chancery courts in the common law, and became maxims by which cases in equity were decided.¹⁰¹ These concepts continue to be equally important in canon law, because if decisions are not made taking into account these principles of justice and canonical equity, then the decision can be challenged as being illegitimate and illicit. This principle is found in the first maxim listed below. The second maxim is similar in spirit to c. 128 because it specifies that it is unjust for a person to be harmed through the malice of another. It logically follows that the harm resulting from this injustice must then be remedied. The third maxim concerns when harm can be considered unlawfully inflicted. Harm is not unlawfully inflicted on a person who knew about the harm and approved its infliction. As illustrated, these equitable principles address a broad range of issues, and many have influenced or are found in one form or another in the 1983 Code.

1. It is certain that he transgresses the law, who, while observing its letter, goes against its spirit.
2. It is not just to have a person suffer through the malice of another.
3. No injury or malice is done to the one who knows and approves.
4. One must attribute to himself, not to others, the harm he suffers through his own fault.
5. No one can change his mind to the detriment of another.
6. No matter how long the period of possession, prescription does not obtain for a possessor in bad faith.
7. He should be considered to possess who no longer holds maliciously.
8. One must not profit from that which he tries to oppose.
9. No one ought to obtain an advantage to the detriment of another.
10. What is prior in time has preference in law.
11. One delays to his own detriment.

¹⁰¹ See Appendix 1. Maxims of Equity, for a comparison between the principles found in the *regulae iuris* and those maxims adopted by the common law courts of equity.

12. He who does business contrary to the law is presumed not to be in good faith.
13. Good faith does not allow someone to demand the same thing twice.
14. Who bears the burden should receive the benefit, and vice-versa.¹⁰²

1.6.3.7 – Restitution

Finally, the *regulae iuris* have principles regarding the necessity of restitution, which is certainly a key element in the remedy of harm. One must at least attempt to remedy the harm one has inflicted, or one has not complied with the mandate of the natural law. Of the three principles listed below, two are stated in regard to forgiveness of sin, though all three principles concern the need for a person to amend his ways and make good that which he has damaged.

1. The sin is not forgiven, if what has been taken is not restituted.
2. Forgiveness for sin is only granted to the person who amends his ways.
3. It is deceitful to claim what must be given back.¹⁰³

These maxims found in the *regulae iuris* should be familiar to canonists because most of the principles they espouse are found in various forms in the current Codes.

¹⁰² 1. Reg. LXXXVIII. "Certum est, quod is committit in legem, qui, legis verba complectens, contra legis nititur voluntatem" (C. 1, 14, 5). 2. Reg. XXII. "Non debet aliquis alterius odio praegravari" (D. 50, 17, 74 and 155, 169). 3. Reg. XXVII. "Scienti et consentienti non fit iniuria neque dolus" (D. 50, 17, 145). 4. Reg. LXXXVI. "Damnum quod quis sua culpa sentit, sibi debet, non aliis, imputare" (D. 50, 17, 203). 5. Reg. XXXIII. "Mutare consilium quis non potest in alterius detrimentum" (D. 50, 17, 125). 6. Reg. II. "Possessor malae fidei ullo tempore non praescribit." 7. Reg. XXXVI. "Pro possessore habetur qui dolo desiit possidere" (D. 50, 17, 131). 8. Reg. XXXVIII. "Ex eo non debet quis fructum consequi, quod nisus existit impugnare" (D. 5, 2, 8, 14). 9. Reg. XLVIII. "Locupletari non debet aliquis cum alterius iniuria vel iactura" (D. 50, 17, 206). 10. Reg. LIV. "Qui prior est tempore potior est iure" (D. 50, 17, 98 and 165). 11. Reg. XXV. "Mora sua cuilibet est nociva" (D. 50, 17, 173). 12. Reg. LXXXII. "Qui contra iura mercatur, bonam fidem presumitur non habere" (C. 11, 48, 7). 13. Reg. LXXXIII. "Bona fides non patitur, ut semel exactum iterum exigatur" (D. 50, 17, 57). 14. Reg. LV. "Qui sentit onus, sentire debet commodum et e contra" (D. 50, 17, 10). (*Corpus iuris canonici*, FRIEDBURG, pp. 1122-1124; English translations in GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, pp. 107-117.)

¹⁰³ 1. Reg. IV. "Peccatum non dimittitur, nisi restituatur ablatum." 2. Reg. V. "Peccati venia non datur, nisi correcto." 3. Reg. LIX. "Dolo facit, qui petit quod restituere oportet eundem" (D. 50, 17, 53 and 173, 175).

They remain critical historical guidelines that help ensure a continuity of canonical legal and equitable principles and interpretations, and can be applied in concrete cases if the current Codes are silent on an issue (c. 19).

1.7 – The Council of Trent to the Code of 1917

After the codifications of the classical age of canon law, little happened canonically until the Council of Trent (1545-1563), which established norms for Catholic practice and theology. This Council was called primarily in response to the Protestant Reformation, and as such dealt almost exclusively with answering theological questions on sacraments, as well as other issues that had been challenged by the various Protestant movements. There is one short section dealing with trial practices, though it is in relation to the norms for criminal trials and appeals rather than for contentious trials.¹⁰⁴ Nevertheless, such a section continued to develop norms concerning the conduct of trials, appeals, the need for witnesses, and other such issues.

The next significant canonical development on the topic was not until the promulgation of the 1917 Code. The Code of 1917 was the first time that all the canon law of the previous centuries was condensed and codified into a single, manageable volume of canons, and, with some exceptions, abrogated all prior contrary universal and particular canonical legislation.¹⁰⁵ However, due to the surrounding historical circumstances, those responsible for drafting the 1917 Code were less concerned about

¹⁰⁴ See H.J. SCHROEDER, *Canons and Decrees of the Council of Trent*, Saint Louis, MO, Herder, 1941, pp. 81-85.

¹⁰⁵ See CIC/17 c. 6.

guaranteeing the rights of the faithful, and more concerned about protecting the rights of the Church, “especially the rights of the Holy See, the rights of bishops, [and] the rights of pastors.”¹⁰⁶ For this reason, there was no canon in the Code that explicitly required that persons who have caused harm must repair the harm that they have caused.¹⁰⁷ It would not be until the 1940’s that canonists began discussing the need for a canon that specifically mandated that one must remedy the harm one inflicts.

1.8 – The Process for the Creation of Canon 128

Though the concept of obliging persons to repair the harm that they cause is far from new, c. 128 is a new canon that was not found in the 1917 Code. Although there were a number of canons that concerned the reparation of harm in particular contexts, the 1917 Code did not have a general canon on the subject.¹⁰⁸ During the decades following the promulgation of the 1917 Code, it became increasingly evident that a canon of this type was needed, because:

In the atmosphere of the growing consciousness of the Church about herself as a community of the people of God and about subjective rights belonging to all Christians, it became clearer that damage done to one member of the Church community, at the same time violates the common good of the whole community.¹⁰⁹

¹⁰⁶ FOLMER, “The Canonization of Civil Law. Part II.” p. 47.

¹⁰⁷ See *ibid.*

¹⁰⁸ See CIC/17, cc. 1017, 1536, 1625, 1676-1678, 1681, 1687-1689, 1737, 1789, 1832-1833, 1851, 1857, 1910 §2, 2144, 2347, 2354, and 2355.

¹⁰⁹ KRUKOWSKI, “Responsibility for Damage,” p. 231.

Canonists were not the first to identify the need for such a canon in the Code. Similar laws requiring the reparation of harm had been enacted by various European countries including Italy, France, and Germany, and various jurisdictions in the United States also had similar statutes.¹¹⁰ Moreover, prior to the promulgation of the 1917 Code, canon law had such a canon in force in the *Liber extra*. Finally, the need for such a canon was recognized by the *coetus* responsible for drafting the new Code's section on General Norms. Willy Onclin, who was the *relator* of the *coetus* for the section on General Norms, recognized the need for its inclusion in the new Code. He wrote:

The obligation of repairing harm for the infliction of damage caused by a juridic act or indeed by any other act is affirmed in the proposed revised law. Such a prescription is lacking in the law of the Code on juridic acts, and it seemed to the consultors to be definitely required.¹¹¹

It is evident that the need for such a canon was widely recognized, but the challenge lay in its drafting and ultimate promulgation.

1.8.1 – From the 1917 Code to Vatican II

After the promulgation of the 1917 Code for the Latin Church, work began on the codification of a Code for the Eastern Catholic Churches. As work progressed, canonists became increasingly aware of some of the 1917 Code's shortcomings and omissions. These realizations led to various canons being proposed for the Latin Church that could

¹¹⁰ See FOLMER, "The Canonization of Civil Law, Part II," pp. 49-50.

¹¹¹ "Obligatio ad damna illata reparanda, quae per actum iuridicum, immo per alium quemvis actum, *illegitime* inferuntur, in iure recognito proposito affirmatur. Deficit tale praescriptum in iure codicis de actibus iuridicis, atque visum est consultoribus illud omnino requiri." PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, "Acta Commissionis, opera consultorum in parandis canonum schematibus: De personis physicis et iuridicis," in *Communicationes*, 6 (1974), p. 103.

also be included in the new Eastern Code.¹¹² In 1944 Pio Ciprotti published some of his recommendations and strongly suggested that the CIC/17 needed to add an additional canon that would mandate the reparation of harm.¹¹³ Not only did he suggest such a canon, but he also drafted four alternative possibilities. His four suggested canons are as follows:

I. §1. Any unjust damage must be repaired by the one who caused it with malice or negligence or by the one who must answer for that person [or: who otherwise is held to this obligation].

§2. If several persons together caused the damage, the obligation mentioned in §1 above obliges each one.

§3. The obligation to repair the damage done remains even if other sanctions are determined.

II. §1. Any unjust damage must be repaired by the one who caused it with malice or negligence, or by the one who must answer for that person according to the norms of canon law or the civil law in the place where the damage was done [or: or who otherwise is held to this obligation according to the norms of canon law or the civil law in the place where the damage was done.]

§2. If several persons together caused the damage, the obligation mentioned in §1 above obliges each of them together.

§3. The obligation to repair the damage done remains even if other sanctions are determined.

§4. The civil law in §1 above is to be observed only if there is nothing contrary to divine law or unless canon law provides otherwise.

III. §1. To obtain reparation for unjust damage an action [for damages] may be introduced against the one who caused it with malice or negligence, or by the one who otherwise has the obligation to repair the damage [or: who otherwise must answer for it.]

§2. If several together caused the harm, [or: if many together are obliged to repair the damage], an action for damages as in §1 may be introduced against each of them together.

¹¹² See P. CIPROTTI, "Il risarcimento del danno nel progetto di riforma del Codice di diritto canonico," in *Ephemerides Iuris Canonici*, 37 (1981), p. 166.

¹¹³ See P. CIPROTTI, *Osservazioni sul testo del "Codex iuris canonici,"* Città del Vaticano, Tipografia poliglotta Vaticana, 1944, p. 8. The English translation is based on a translation by FOLMER, "The Canonization of Civil Law, Part II," pp. 48-49.

§3. An action to obtain reparation for damages does not cease even though other sanctions are also determined.

IV. §1. To obtain reparation for unjust damages, an action [for damages] may be introduced against the one who caused the damages with malice or negligence, or by the one who otherwise is obliged to repair the damage according to the norms of canon law or the civil law in the place where the damage was done [or: by the one who otherwise answers for the person causing the damage according to the norms of canon law or the civil law in the place where the damage was done].

§2. If several together cause the damage [or: if many together are obliged to repair the damage], an action for damages as in §1 above may be introduced against each one.

§3. An action to obtain reparation for damages does not cease even though other sanctions are also determined.

§4. The civil law in §1 above is to be observed only if there is nothing contrary to divine law or provided differently in canon law.¹¹⁴

¹¹⁴ --I. §1. Quodlibet iniustum damnum resarciendum est ab eo, cuius dolo vel culpa illatum sit, vel qui de eo respondere debeat [vel: vel qui aliter hac obligatione teneatur].

§2. Si plures in damnum inferendum concurrerunt, obligatione de qua in §1 omnes in solidum tenentur.

§3. Obligatio resarciendi damna habetur etiamsi aliae quoque sanctiones statuuntur.

II. §1 Quodlibet iniustum damnum resarciendum est ab eo, cuius dolo vel culpa illatum sit, vel qui de eo respondere debeat ad normam iuris canonici vel legis civilis vigentis in loco ubi damnum datum est [vel: vel qui aliter hac obligatione teneatur ad normam iuris canonici vel legis civilis vigentis in loco ubi damnum datum est].

§2. Si plures in damnum inferendum concurrerunt, obligatione de qua in §1 omnes in solidum tenentur.

§3. Obligatio resarciendi damna habetur etiamsi aliae quoque sanctiones statuuntur.

§4. Lex civilis de qua in §1 tunc tantum servanda est, si iure divino contraria non sit neque aliud iure canonico caveatur.

III. §1. Ad iniusti damni reparationem obtinendam datur [laeso] actio adversus eum cuius dolo vel culpa damnum illatum sit, vel qui aliter obligatione resarciendi teneatur [vel: vel qui aliter de eo respondere debeat].

§2. Si plures in damnum inferendum concurrerunt [vel: vel si plures ad resarciendum damnum obligentur], adversus omnes in solidum datur actio de qua in §1.

§3. Actio ad obtinendum damni reparationem non ideo cessat quid aliae sanctiones praeterea statutae sint.

IV. §1. Ad iniusti damni reparationem obtinendam datur [laeso] actio adversus eum cuius dolo vel culpa damnum illatum sit, vel qui aliter obligatione resarciendi teneatur ad normam iuris canonici vel legis civilis vigentis in loco ubi damnum datum sit [vel: vel qui aliter de eo respondere debeat ad normam iuris canonici vel legis civilis vigentis in loco ubi damnum datum sit].

§2. Si plures in damnum inferendum concurrerunt [vel: vel si plures ad resarciendum damnum obligentur], adversus omnes in solidum datur actio de qua in §1.

§3. Actio ad obtinendum damni reparationem non ideo cessat quid aliae sanctiones praeterea statutae sint.

§4. Lex civilis de qua in §1 tunc tantum servanda est si iure divino contraria non sit neque aliud iure canonico caveatur."

It is important to note that these suggested canons address a number of issues that were not included when the final version of c. 128 was promulgated. Suggestion I requires individual accountability for harm caused by a group. It necessitates the reparation of harm even after the imposition of a canonical penalty. In addition, the canon specifically allows for a person (presumably a physical person because the canon speaks of “the one who must answer for that person”), to be held accountable for acts committed by another physical or juridic person. None of these issues is addressed specifically in c. 128.

Suggestion II adds that persons are obliged both by civil law as well as canon law to repair harm, as long as civil law does not conflict with divine or canon law. The issue of being bound by the civil law is not addressed in c. 128. Suggestions III and IV are similar to suggestions I and II; they are merely stated in a different way.

Despite strong recommendations for its addition, a canon concerning the general remedy of harm was never added to the CIC/17.¹¹⁵ Although during that time it does not appear that anyone had any philosophical objections to the addition of such a canon, none of Ciprotti’s suggestions was ever adopted in the CIC/17 due to the “steadfast resistance” of amending the 1917 Code.¹¹⁶ However, the inclusion of such a canon became important in the schemas for the revision of the 1917 Code, which eventually resulted in the 1983 Code.

¹¹⁵ See FOLMER, “The Canonization of Civil Law. Part II.” p. 50.

¹¹⁶ Ibid.

Throughout the 1940s and 1950s work continued on the drafting of the Eastern Code, which resulted in four apostolic letters being promulgated prior to the anticipated final Code.¹¹⁷ On June 2, 1957, the last *Motu proprio, Cleri sanctitati* was promulgated. It included c. 34, a canon that directly reflects Ciprotti's suggestions:

Canon 34: Any damage causing harm must be repaired by the one who may have caused it with malice or negligence.¹¹⁸

Ciprotti points out that this canon uses the expression *damnum iniuria datum* intentionally because it gives the legislator much leeway in determining what is "damage causing harm," though he also believes that this particular formula is too limited because it excludes the reparation of harm that is caused without negligence.¹¹⁹ Soon after the promulgation of this document, the final work on the Eastern Code was suspended due to the convocation of Vatican II. After the Council, work began on the revision of the CIC/17 and resumed on the creation of a new Eastern Code. Besides being included in the revised Code of 1983, such a canon eventually became part of the CCEO, which was promulgated in 1990.

¹¹⁷ The four apostolic letters are: *Crebrae allatae*, February 22, 1949, in *AAS*, 41 (1949), pp. 89-119; *Sollicitudinem nostram*, January 6, 1950, in *AAS*, 42 (1950), pp. 5-120; *Postquam apostolicis*, February 9, 1952, in *AAS*, 44 (1952), pp. 65-152; and *Cleri sanctitati*, June 2, 1957, in *AAS*, 49 (1957), pp. 433-603.

¹¹⁸ Pius XII, *Motu proprio, Cleri sanctitati*, June 2, 1957, in *AAS*, 49 (1957), p. 446. See also, *Nuntia*, 18 (1984), p. 23. "Quodlibet damnum iniuria datum resarciendum est ab eo cuius dolo vel culpa illatum sit."

¹¹⁹ See CIPROTTI, "Il risarcimento del danno nel progetto di riforma del Codice di diritto canonico," p. 167.

1.8.2 – Vatican II to the Promulgation of the 1983 Code

The Church first heard about the call for the revision of the 1917 Code at the same time that Pope John XXIII called for the convocation of the Second Vatican Council on January 25, 1959.¹²⁰ To implement his directive for the revision of the Code, on March 28, 1963, Pope John XXIII created the Pontifical Commission for the Revision of the Code of Canon Law, and began appointing members to serve on it. During the Commission's first session in November of 1963, the President, Cardinal Pietro Ciriaci, and the other members of the Commission decided that their activities should be suspended until the completion of the Council so that their work would reflect the changes coming from the Council.¹²¹

The Commission reconvened on November 20, 1965, just days before the end of Vatican II. By January of 1966, ten committees were formed to review and revise the different books of the Code. In May of 1968 these groupings were rearranged into thirteen categories to reflect the provisional, systematic arrangement of the new Code.¹²² There were two committees working independently that drafted two different versions of what would eventually be promulgated as c. 128: the *coetus* working on the section entitled, *De personis physicis et moralibus*, which later became known as the *coetus De personis physicis et iuridicis*, and the *coetus* working on the section entitled, *De processibus*. When the committees finally began merging their individual works into one

¹²⁰ See J.A. ALESANDRO, "The Revision of the Code of Canon Law: A Background Study," in *Studia canonica*, 24 (1990), p. 92.

¹²¹ See *ibid.*, p. 95.

¹²² See *ibid.*, p. 105.

compilation, it was discovered that both committees had been drafting essentially the same canon. At that time the committee on procedures agreed that the canon should remain in general norms rather than in the book on processes.¹²³

The creation of this canon was discussed in Session III of the *coetus De personis physicis et moralibus*, held November 5-9, 1968. At the end of the session, the original draft of this canon read:

Canon 5: Whoever inflicts damage on another by a juridic act, indeed by any other act freely placed, is obliged to repair the damage done.¹²⁴

The wording of this first draft is original and is not similar to any of Ciprotti's suggestions or to the canon promulgated in *Cleri sanctitati*. This first draft mentions only *actus libere positus*, and makes no mention of acts committed with *dolus* or *culpa*.

The text of the canon came up for discussion again during the next meeting of the committee. During Session IV, held March 25-28, 1969, the committee discussed whether the canon applied only to public juridic acts, or whether private juridic acts would also be covered by it. The committee ultimately agreed that the canon applied to both types of juridic acts.¹²⁵

In addition, it decided unanimously to add the word *illegitime* to the canon. The committee originally held the opinion that the addition of the word *illegitime* would suffice to cover many different kinds of unlawful harm, because "this word would refer

¹²³ See *Communicationes*, 11 (1979), p. 76.

¹²⁴ *Communicationes*, 21 (1989), p. 157: "Quicumque actu iuridico, immo quovis alio actu libere posito, alteri damnum inferat, obligatione tenetur ad damnum illatum reparandum."

¹²⁵ See *ibid.*, p. 175.

to the essence of the act as well as to the way it was performed.”¹²⁶ In other words, the commission believed that the word *illegitime* meant both that the act itself was illegitimate according to the positive law, as well as believing that the manner in which the act was performed could also be illegitimate, i.e., with wrongful intention or negligence. Therefore, it believed that the addition of the words *dolus* and *culpa* was not necessary. This would be changed in a future draft, and at that time it became clear that *illegitime* referred primarily to the way harm was inflicted.

The addition of *illegitime* was an important change, because it also added the concept that the infliction of the harm must be unlawful for the canon to apply. If harm is caused through a legitimate action or process, even if the person can prove that harm resulted, that person is barred from using this canon to demand reparations. By the time the committee met for Session V, held November 24-28, 1969, the canon had been changed to read:

Canon 6: Whoever unlawfully inflicts damage on another by a juridic act, indeed by any other act freely placed, is obliged to repair the damage done.¹²⁷

Five years later, during Session VIII, held May 13-17, 1974, the commission changed its name from the *coetus De personis physicis et moralibus* to the *coetus De normis generalibus deque personis physicis et iuridicis*. At this session, the *coetus* began preparing the *Schema Canonum Libri I, Normae Generales*. The canon concerning the reparation of harm was included in the Schema for Book One, General Norms, as c.

¹²⁶ PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 506.

¹²⁷ *Communicationes*, 21 (1989), p. 207. “Quicumque illegitime actu iuridico, immo quovis alio actu libere posito, alteri damnum inferat, obligatione tenetur ad damnum illatum reparandum.”

117.¹²⁸ The wording remained the same during Sessions VIII, IX, and X. When the Schema on general norms was published for review on November 15, 1977, the text remained as in the 1969 version.¹²⁹

During the 1970's, the committee responsible for revising procedural law had also been working on a somewhat similar canon. This canon read:

1978 Schema, c. 116: Any damage done must be remedied by the one who caused it with malice or negligence, or even, if civil law or equity should require it, from the one who without negligence gave cause for the damage.¹³⁰

In contrast to the committee working on the schema for general norms, this committee evidently based its canon on c. 34 in *Cleri sanctitati* (CS) because the first part of this canon is identical to it. Unlike c. 34 of CS, this draft includes a reference to the necessity of reparation of harm in cases where the civil law or equity requires it, even in cases where there is no negligence. These changes considerably broadened the scope of the canon. Finally, unlike c. 117 in the general norms schema of November 15, 1977, this draft did not mention the reparation of harm caused by juridic acts.

In 1980 the *coetus* working on general norms revised its canon after the two committees became aware of each other's work, and determined that the canon most

¹²⁸ See *Communicationes*, 23 (1991), p. 94.

¹²⁹ See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema canonum libri I: de normis generalibus*, Romae, Typis polyglottis Vaticanis, 1977, p. 38.

¹³⁰ *Communicationes*, 11 (1979), p. 75: "Quodlibet damnum iniuria datum resarciendum est ab eo cuius dolo vel culpa illatum sit, vel etiam, si ita ius civile vel aequitas postulet, ab eo qui sine sua culpa damno causam dederit."

properly belonged in the section on general norms.¹³¹ The *coetus* on general norms then asked that the *coetus* on procedures submit written opinions concerning the canon to them, and then they would reexamine the canon in light of these opinions.¹³² Upon the review of the suggestions made by the committee on procedures, the canon was redrafted to read:

1980 Schema, c. 125: Whoever unlawfully inflicts damage upon another by a juridic act, or indeed by any other act placed with malice or negligence, is obliged to repair the damage done.¹³³

This draft is clearly a blending of the work of the two committees. The draft canon retained the wording of the previous draft (c. 117) on the necessity to remedy harm caused by juridic acts. It omitted the phrase *libere posito*, and added the requirement from the procedural version that harm caused with *dolus* or *culpa* must also be remedied. It did not, however, include the necessity to repair harm in cases where the civil law or equity requires it in cases where there is no negligence. This means that, though the drafters had the opportunity to include a reference to acts committed without *culpa* that caused harm, they chose not to do so. This decision gives a good indication of what the intentions were of those drafting the canon and certainly should affect how this canon is interpreted. This will be discussed later in Chapter 2.

The new *Codex iuris canonici* was promulgated in 1983. The final text of the canon is as follows:

¹³¹ See *Communicationes*, 11 (1979), p. 76.

¹³² See *Communicationes*, 23 (1991), p. 246.

¹³³ *Ibid.*, p. 285. "Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum inferat, obligatione tenetur ad damnum illatum reparandum."

CIC c. 128: Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum infert, obligatione tenetur damnum illatum reparandi.¹³⁴

The only change between the 1980 Schema and the promulgated version was linguistic, not substantive. The Latin verb *inferre* (to cause) was changed from the subjunctive present *inferat* (may cause) to the present active *infert* (causes). The preposition *ad* was eliminated, and the future passive participle *reparandum* (having to be repaired) was changed to *reparandi*.

The CCEO's version of the canon, promulgated in 1990, had very few changes in the text. It does not appear that there was much discussion about this particular canon among the consultants revising the Eastern Code. The CCEO version of this canon reads:

CCEO c. 935. Whoever illegitimately inflicts damage upon someone by a juridic act or by any other act placed by fraud or negligence is obliged to repair the damage inflicted.¹³⁵

After a fairly lengthy discussion by the committee about whether to adopt c. 34 promulgated in *CS* or whether to adopt the version that was currently being discussed by its Latin counterpart, the committee decided not to adopt c. 34. It then decided that the canon needed more study.¹³⁶ The next direct reference to the canon in *Nuntia* is in the

¹³⁴ *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus*, Città del Vaticano, Libreria editrice Vaticana, 1983. American version of the English language translation: *Code of Canon Law, Latin-English Edition*, [CIC], new English translation prepared under the auspices of the Canon Law Society of America, Washington, DC, CLSA, 1999, pp. 37-38.

¹³⁵ CCEO c. 935. "Quicumque illegitime actu iuridico immo quovis alio actu dolo vel culpa posito alii damnum infert, obligatione tenetur damnum illatum reparandi." *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus*, Città del Vaticano, Typis polyglottis Vaticanis, 1990. American version of English language translation: *Code of Canons of the Eastern Churches, Latin-English Edition*, [CCEO], translation prepared under the auspices of the Canon Law Society of America, Washington, DC, CLSA, 2001, p. 349.

¹³⁶ See *Nuntia*, 18 (1984), pp. 23-24.

Schema for the CCEO that was published in October of 1986. This text remained the same for the rest of the process, with the exception of correcting a few misspellings.¹³⁷

There are only two differences between the CIC and the CCEO. The first is a linguistic change. The CIC uses the word *alteri* (another of two) whereas the CCEO chose to use the word *alii* (another). Since the English translation remains the same regardless of which word is used, this change was not significant. In addition, in the CCEO there are two commas left out of the text that were included in the CIC, which grammatically makes the phrase *dolo vel culpa* apply to all acts, including juridic acts.¹³⁸ During the drafting of the canon, which occurred after the promulgation of the Code of 1983, the punctuation was omitted at the same time the word *alteri* was changed. Both changes first appear in the Schema of 1986, which tends to indicate that the canon had been examined, the grammar changed, and the exclusion of the commas was an intentional omission.

1.9 – Conclusion

Though c. 128 in its present form is new, in that it did not appear in the 1917 Code, the natural law principle of c. 128 and its juridic adoption into canon law is centuries old. After briefly tracing the historical development of the principles and processes concerning the remedy of harm, it is evident that the Roman roots of c. 128 predate Christianity, and its Christian origins are founded in Scripture, as well as having

¹³⁷ See *Nuntia*, 24-25 (1987), p. 167.

¹³⁸ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 508, and F.J. URRUTIA, *Les normes générales*, Paris, Éditions Tardy, 1994, p. 207.

been previously adopted in different forms in several decretals and canons. The principle of the need to remedy harm, and the processes by which this could be accomplished slowly developed over the course of many years, and the results of this development are found in the Code of 1917 as well as in the Code of 1983 and the CCEO.

After the promulgation of the 1917 Code, it became evident that the exclusion of such a canon as c. 128 was a serious oversight that needed to be rectified in a subsequent Code. After many years and numerous versions, the Code committee adopted c. 128 in its current form. The Code committee drafting the Eastern Code made minor changes and ultimately c. 935 was promulgated, a canon which is substantially similar to its CIC/83 counterpart.

Now that the history of c. 128, as well as the process of its creation and promulgation has been explored, the canon itself must be examined. Chapter 2 will first explore the broad context in which c. 128 is situated. The first sections will investigate the nature of c. 128, its type of law and location in the Code, as well as its relation to the penal law. The next section will examine specifically the text of the canon to determine its meaning and applicability to the remedy of harm.

CHAPTER 2

THE TEXT AND CONTEXT OF CANON 128

Canon 17 of the CIC/83 states that “Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context.” To understand accurately c. 128, this chapter will first examine the location and context of the canon, to understand better its nature and scope. Then the specific wording of the canon will be carefully examined to determine the meaning of each term, as well as how these concepts relate to each other. This chapter will also study the development of c. 935 of the Eastern Code and examine any differences between it and c. 128 of the CIC.

2.1 – The Nature and Context of Canon 128

Having examined the historical basis of the remedy of harm in canon law in Chapter 1, as well as the code revision process that shaped the drafting of the canon, it is now necessary to examine c. 128 in its broader context. This will include an analysis of the canon’s location in the CIC, its nature, whom it binds, how it can be enforced, and its relation to other parts of the Code. This section will situate the canon in its broader context within the Code before a more detailed examination of the canon is conducted in the following section.

2.1.1 – Location

Canon 128 is the last of five canons in Title VII, Juridic Acts, which is in Book One on General Norms. The five canons in this section all concern different aspects of juridic acts. Though the canon's placement in this section is proper because it deals with the consequences of harm caused by a juridic act, it also has significantly broader applications. Canon 128's location in Book One of the Code is appropriate, however, because the canon is a general norm that impacts the entire law, especially in the areas of juridic acts, the rights of the faithful, contentious processes, administrative processes, and penal law.

2.1.2 – Type of Law

Canon 128 is an obligation of the natural law, which addresses a fundamental matter of natural justice and equity. It is a legal norm that is found in a multitude of legal systems and crosses the boundaries of time, culture, tradition, and religion.¹ Because it is based on the natural law, it is a universally binding moral precept.² When c. 128 was added to the 1983 Code, this universal moral imperative once again became a binding legal obligation enforceable through an administrative action, a contentious trial, or, according to c. 1729, as a concurrent separate, contentious issue in a penal trial.³

¹ See H. PREE, "On Juridic Acts and Liability in Canon Law: Part Two," in *The Jurist*, 58 (1998), p. 495. See also L. CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, 2nd edition, Roma, Edizione Dehoniane, 1996, vol. 1, p. 199.

² See J. PORTER, "Natural Law," in R.P. MCBRIEN (ed.), *The Harpercollins Encyclopedia of Catholicism*, San Francisco, CA, HarperSanFrancisco, 1995, p. 908.

³ This principle was first made a binding, legal norm when it was promulgated by Pope Gregory IX in his decretal *Si culpa tua*, and later included in his *Liber Extra*.

Since c. 128 formulates a moral norm into a legally binding obligation, it must then be determined who can be held legally accountable in an ecclesiastical forum for the unlawful infliction of harm. To do this, it is necessary to make the distinction between those individuals who are bound by the canon, and those individuals who can be held legally accountable in an ecclesiastical forum.

All human beings without exception are morally bound by c. 128 because it is of the natural law. However, given that most people live in societies that do not consider canon law to be enforceable by the civil authority, not everyone can be obliged by an ecclesiastical court to remedy the harm that they commit. Certainly, all members of the Catholic Church are legally bound by c. 128 of the CIC or c. 935 of the CCEO. This means that Catholics can both bring an action against another individual in an ecclesiastical court, as well as having an action brought against them. In addition, Catholics would be bound by any decision rendered by an ecclesiastical court, and local Church authorities have the duty to enforce these decisions.⁴

Are non-Catholics bound by the canon? Because the canon is of the natural law, theoretically all people are bound by the canon and are morally accountable for any harm that they unlawfully inflict. As a practical matter, however, it is virtually impossible to bring an action against a non-Catholic or non-Christian in most parts of the world. Because there is no way to compel a non-Catholic's participation in a case, nor is there a method to enforce an action for unlawful absence against a non-Catholic, canonical actions against a non-Catholic are at the very least non-productive. However, according

⁴ An example of the enforcement of such a decision would be a pastor denying a priest the use of his church for a public mass when that priest has been publicly declared suspended through an administrative process in accord with cc. 1732-1739.

to c. 221 a non-Catholic Christian, by virtue of baptism, has standing to bring an action for the violation of rights against a Catholic person in an ecclesiastical court. In some cases non-baptized individuals are also able to bring an action for reparation of unlawfully inflicted harm by virtue of c. 1476. The issue of standing will be addressed later in this chapter.

2.1.3 – The Nature of Canon 128

As distinguished from the many canons in the Code that protect the person harmed, c. 128 is principally addressed to perpetrators of harm, specifically stating that it is their obligation to remedy the harm that they commit. However, while c. 128 clearly states the norm, it does not specify what is to happen if one does not voluntarily comply with this norm and remedy the harm one inflicts, nor does it provide a vehicle by which the victim of the perpetrator can gain satisfaction if the person fails to remedy the harm. Cardinal Castillo Lara gives a very valid reason why a canon such as c. 128 would merely state the norm without specifying a penalty if the canon is violated. He states, “Canon law places more trust in personal responsibility than in threatening people with sanctions.”⁵ Castillo Lara then goes on to quote Pope Paul VI, who stated that “The purpose of all (canonical) legislation is to be a help which contributes to a spiritual life and the laws should be observed *because of one's own conscientious duty or personal responsibility* rather than because of the force of its precepts.”⁶ Canon 128 does not

⁵ R.J. CASTILLO LARA, “Some General Reflections on the Rights and Duties of the Christian Faithful,” in *Studia canonica*, 20 (1986), p. 22.

⁶ *Communicationes*, 9 (1977), p. 27. Translated by CASTILLO LARA, “Some General Reflections,” p. 22.

provide a mechanism for its own enforcement. If the perpetrator does not comply of his own accord, the victim must look elsewhere in the Code to find a means of enforcing this norm. For justice to be done it is critical that there be a means of enforcement of this canon because, as Roman law states, *Sine remedio, nullum est ius*; without a remedy, there is no right.⁷ Interestingly, in almost every circumstance the decision to ask for a remedy is left to the person harmed, rather than being imposed by the Church.⁸

Fortunately, other canons in the Code provide various avenues of recourse for a victim of harm in the event that no voluntary remedy is forthcoming. Canon 1476 allows anyone whether baptized or non-baptized to bring an action in a contentious process. It is also possible to have harm remedied through administrative recourse according to c. 57, c. 59, c. 1400 §2 and art. 123 §2 of the apostolic constitution *Pastor bonus*, if the harm took place in the form of an administrative act. If the harm occurred during the commission of a canonical crime, in accordance with c. 1729, the person harmed can introduce a contentious action during the penal trial.

If the harm is a violation of the victim's rights, c. 221 §1 is the principle by which the victim can have recourse:

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.

⁷ See V. VONDENBERGER, "Effective Due Process Is Possible in the Church," in *Studia canonica*, 30 (1996), p. 164.

⁸ CIC c. 1452 §1 states: "In a matter which concerns private persons alone, a judge can proceed only at the request of a party. Once a case has been legitimately introduced, however, the judge can and must proceed even *ex officio* in penal cases and in other cases which regard the public good of the Church or the salvation of souls."

It is the combination of c. 128 that mandates the obligation, and c. 221, which together supply victims with the legal basis to vindicate their rights. In addition to c. 221, cc. 1410, 1411, and 1413 imply that persons can request that disputes over property, contracts, inheritances, and pious legacies be adjudicated in a contentious process before a tribunal. Any accusation of harm by the parties in these cases could be adjudicated during the proceedings of a contentious trial.

2.1.4 – Relation to Penal Law

When a person commits a canonical delict, that same act in both canon law and civil law can be a violation of the penal law as well as cause damage that requires reparation in a contentious forum. Since the concept of reparation arises within both the penal and contentious contexts, it is proper to ask if there is a relationship between c. 128 and canonical penal law. Can the victims of a canonical crime look to the penal law to repair their harm?

Although c. 128 addresses the necessity for a perpetrator to remedy his or her harm, the remedy of this harm is not a canonical penalty. J. Arias defines a canonical penalty as “coercive deprivation of subjective rights imposed on a delinquent by lawful authority, for the defence of the fundamental juridical interests of the Church.”⁹ Canon 128 does not fit this category because the canon does not imply a deprivation of the perpetrator’s subjective rights, nor does it necessarily directly pertain to the fundamental

⁹ J. ARIAS, “Canons 1311-1399,” in E. CAPARROS, M. THÉRIAULT and J. THORN (eds.), *Code of Canon Law Annotated, Latin-English Edition of the Code of Canon Law and English Language Translation of the Spanish Language of the 5th Spanish Language Edition of the Commentary Prepared under the Responsibility of the Instituto Martin de Azpilcueta*, Montréal, Wilson & Lafleur Limitée, 1993, p. 819.

juridical interests of the Church, and it does not relate to the punishment of the delinquent.¹⁰ Rather, the obligation to repair one's harm is a moral and legal obligation existing between the party causing the harm and the victim, which may or may not involve the greater interests of the Church.¹¹ In addition, this obligation to repair one's harm exists in addition to and outside of any punishment that might be inflicted or declared by an administrative or a penal tribunal.¹² Support for this assertion is indicated in a number of ways.

First, if a victim wants reparation from a person currently standing trial in a penal action for the same offense, under c. 1729 the injured party is able to bring a separate but simultaneous contentious action for damages during the first instance penal trial.¹³ This action runs concurrently with the penal action; it does not become a part of the penal trial. In addition, according to c. 1730, a person can be acquitted of the penal charge, but still be under the obligation to repair the damage caused. This leads to the conclusion that the imposition of punishment and the necessity to remedy harm are complementary but not identical proceedings.

¹⁰ The remedy of harm may pertain to the fundamental juridic interests of the Church, especially if it concerns public juridic acts. However, the problem may be, for example, a simple dispute between a pastor and his parochial vicar over the ownership of a particular chalice. Issues such as these most likely do not pertain to the fundamental juridic interests of the Church.

¹¹ See J.A. ALESANDRO, and A.J. PLACA, "Church Agents and Employees: Legal and Canonical Issues," in *CLSA Proceedings of the Fifty-Eighth Annual Convention*, Washington, DC, CLSA, 1996, p. 38.

¹² See *Ibid.*

¹³ CIC c. 1729 §1. In accordance with Canon 1596, during a penal case a party who has suffered harm from an offence *can* bring (but does not *have* to bring) a contentious action for repairing the inflicted harm. A possible reason that the Church in penal cases leaves the decision to ask for the harm to be repaired up to the victim of the crime is that the victim may be satisfied with the imposition of a canonical penalty, and not feel the need to introduce an additional contentious action to petition for further reparation.

Second, the types of penalties listed in Book Six do not include imposing the reparation of harm as a punishment of the perpetrator. Censures, consisting of excommunication, interdict, and suspension, are intended to reform the offender. Expiatory penalties are intended to punish the offender by imposing, for example, a prohibition against residence or the exercise of various ecclesiastical powers. Neither of these penalties includes a provision requiring or allowing reparations to a person who has been harmed. Though c. 1312 §2 allows the imposition of an expiatory penalty not enumerated in the Code, in keeping with the definition of an expiatory penalty this penalty must be a deprivation of a spiritual or temporal good rather than obligating the perpetrator to remedy the harm inflicted.

Furthermore, this obligation is not a precept, except in the most general sense of putting all potential perpetrators of harm on notice that they can be legally accountable for the harm that they inflict. Finally, the canon is not a penance in the sense of c. 1340 because the purpose of a penance is primarily for “atonement made to God” rather than the reparation of the harm caused to another individual.¹⁴ In addition, the remedying of the harm one has caused is not a work in the external forum of piety, charity, or religion that a judge has the option of imposing. Though the CIC/83 is not specific on the subject of what constitutes an externally imposed penance, the CCEO (c. 1426) adopted c. 2313 of the CIC/17 when it defined these externally imposed penances as being certain prayers, a pious pilgrimage, a special fast, almsgiving or a spiritual retreat. None of these penances addresses the issue of reparation of the victim.

¹⁴ J. HUELS, “The Correction and Punishment of a Diocesan Bishop,” in *The Jurist*, 49 (1989), p. 520.

Although the reparation of harm is not imposed as part of a penalty, making reparation is one way for the perpetrator to show repentance for the crime so as to prevent a penalty from being imposed or to have a penalty lifted. Prior to a censure being imposed, if the person truly repents, and demonstrates this repentance by repairing the scandal and damage caused or seriously promising to do so, according to c. 1347 §2 the person is considered to have withdrawn from contumacy.¹⁵ If the censure has already been imposed, according to c. 1358 §1, the procedure for having the censure lifted is again to comply with c. 1347 §2. In removing censures, both cc. 1357 and 1358 allow for a suitable penance to be imposed along with requiring the reparation of both the damage and scandal. In both of these cases, repairing the unlawfully inflicted harm formally demonstrates that the person has truly repented, though it is not a punishment that is part of the imposition of the censure. Nevertheless, even if the person does not formally repent and the penalty is imposed, the person penalized remains obligated to repair any damage done.

The one instance in CIC Book Six, Part II, on Penalties for Particular Offences, where reparation is specifically mentioned in relation to a particular crime, is c. 1390 §3.¹⁶ This canon specifically states that in a case involving calumny, the calumniator can

¹⁵ CIC c. 1347 §2. "An offender who has truly repented of the delict and has also made suitable reparation for damages and scandal or at least has seriously promised to do so must be considered to have withdrawn from contumacy."

¹⁶ CIC c. 1390 §1. "A person who falsely denounces before an ecclesiastical superior a confessor for the delict mentioned in can. 1387 incurs a *latae sententiae* interdict and, if he is a cleric, also a suspension.

§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."

be ordered by the Court to make amends for his actions in addition to the imposition of a just penalty allowed in 1390 §2. This canon was in the CIC/17 as c. 2355, which also stated that the injuries caused by harmful speech or writing had to be repaired and due satisfaction given.¹⁷

Canon 1390 §3 is particularly noteworthy, because it gives the judge the specific authority to compel the person to repair the harm committed without the necessity of the victim bringing an action according to c. 1729. However, this judicial “option” is apparently not considered to be a just penalty consisting of censures, expiatory penalties, penal penances or precepts according to c. 1312. If it were, it would have been considered a part of the just penalty imposed by c. 1390 §2 and it would not have been necessary to list it separately in a subsequent section. Canon 1390 §3 is an anomaly because it is the only penal canon that bypasses the victim, and allows a judge to compel the perpetrator to make amends. However, even if §3 were removed from the canon it would not change the perpetrator’s obligation to repair the harm. It would require only the intermediate step of obliging the victim to bring a concurrent action in accord with c. 1729 so that the harm could be remedied in addition to the perpetrator being punished in a penal action.

Could this judicial “option” to require reparations be applied to other specific offences without the victim’s intervention? Given that c. 18 requires the strict

¹⁷ CIC/17, c. 2355. “Si quis non re, sed verbis vel scriptis vel alia quavis ratione iniuriam cuiquam irrogaverit vel eius bonam famam laeserit, non solum potest ad normam can. 1618, 1938 cogi ad debitam satisfactionem praestandam damnaque reparanda, sed praeterea congruis poenis ac poenitentiis puniri, non exclusa, si de clericis agatur et causa ferat, suspensione aut remotione ab officio et beneficio.”

interpretation of laws that prescribe a penalty, that contain an exception, or that restrict the free exercise of rights, it is unlikely that this one exception could be applied to other specified delicts. This leads to the conclusion that, as a general rule, a judge in a penal trial cannot mandate reparation as part of the defendant's punishment unless someone petitions for a concurrent contentious action in accord with c. 1729. In those cases, a person must bring the case to have the harm repaired at the same time as the penal process unless the perpetrator chooses to remedy the harm on his own.

Reparation is mentioned one other time in Book Six, Part II, but in reference to a non-specific violation rather than to a specific crime. Canon 1399 states that other external violations can be punished with a just penalty if the violation is especially grave and if "there is an urgent need to prevent or *repair* scandals (emphasis added)." The canon is clear that a just penalty can be imposed on the perpetrator in these cases. However, this canon is not clear about how the scandal caused by the perpetrator's actions is to be repaired, and unlike c. 1390, it does not specify who is to repair them.

It is possible that in these cases the scandal can be repaired by swift and decisive action by the Church rather than by the perpetrator, and still be in keeping with c. 1399. In his book, *Ecclesiastical Sanctions and the Penal Process*, William Woestman uses the example of a cleric publishing anti-Semitic literature denying that the Holocaust occurred

to highlight what sort of act might require the use of this canon.¹⁸ In this case, the reparation of the scandal could occur through the action of the Church, e.g. the Church publishing a strong statement denouncing the actions and opinions of the cleric in question, in addition to instituting swift disciplinary action against the cleric. This action by the Church to repair the scandal caused by the cleric's actions in no way mitigates the cleric's own responsibility to remedy the harm that he caused in accord with c. 128.

The penal law and c. 128 are clearly related, just as criminal cases and civil cases are related in the common law. Both *fora* compel a person to act or not to act, though the penal law's emphasis is on punishment and reformation, whereas the enforcement of c. 128 in a contentious action mandates the remedy of the harm caused to the victim of the injury. Both systems use the same type of criterion to determine guilt or fault and imputability. In some cases, the enforcement of c. 128 requires that one look to the penal law to find complementary norms (c. 19) that are not supplied in the procedural laws governing contentious processes. This interconnection will be examined in the following sections, as well as in Chapter 4. Both systems are distinct yet complementary, and work together to protect the Church and the people of God.

¹⁸ See W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, Ottawa, Saint Paul University, Faculty of Canon Law, 2000, p. 152. However, this example also raises the question whether anyone would have standing to file a contentious action if the cleric refused to remedy the harm that he caused. Jews are not part of the *christifideles*, and as a community would not have standing under c. 221. It is possible that in these circumstances, when the harm is great but the person harmed has no standing, according to c. 1430 the promoter of justice could intervene to protect the public good. The public good in this case is not the public good of the Church, but "the general good of the community." (G. SHEEHY et al. (eds.), *The Canon Law: Letter & Spirit: A Practical Guide to the Code of Canon Law*, prepared by the Canon Law Society of Great Britain and Ireland in association with the Canadian Canon Law Society, Collegeville, MN, Liturgical Press, 1995, p. 830.)

2.2 – The Text of Canon 128

After situating c. 128 in its wider context, the remainder of this chapter will concentrate on the text of the canon. The following sections will examine what the canon specifically states and the meanings of the terms that were chosen to relate these concepts. This study will also include the examination of other concepts and questions that directly relate to the terms in the canon.

2.3 – Who Must Repair Harm

In examining c. 128, one must first identify who is responsible for repairing unlawfully inflicted harm. An examination of this canon will determine who can inflict harm and who can be held responsible for repairing it. Though this may seem to be a rather unambiguous question, it has some interesting ramifications that will be explored in the following sections.

2.3.1 – To Whom Does *Quicumque* Refer?

Canon 128 begins with the word, *quicumque*. The Latin word *quicumque* translates into English as “anyone” or “whoever.” Given that this canon is of the natural law and binds all people, the definition of “whoever” is very broad. Since this word has such a broad scope, it is helpful to break it down into its various components. In c. 128, “whoever” refers to Catholics and Protestants, baptized and non-baptized, physical and juridic persons, those that represent juridic persons, and agents of juridic persons.¹⁹ The

¹⁹ See CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, p. 199.

category of physical persons includes, “The one or ones who do the act, as well as any accomplices before or after the fact.”²⁰ The category of juridic persons includes both an “individual physical person who acts within the context of his or her responsibility as the agent of a juridic person,” and “that juridic person which causes damage while pursuing its own interests through the acts of its agents.”²¹ Any person who possesses the use of reason is included under this canon.

There is widespread agreement that the term *quicumque* is to be read in very broad terms, and there does not seem to be much disagreement over the application of this canon to all people, both physical and juridic.²² The only difficulty with such a broad application is that the canon binds all people, and the Church does not possess the coercive power to enforce this canon in such a broad fashion.

2.3.2 – Causality

Once it is shown that a person has been harmed, one must next demonstrate that whoever has been accused of causing the harm did, in fact, do so. This is because the law assigns responsibility only to those persons who are guilty of causing an act that caused the harm, and mandates reparation from those persons who in fact inflicted it. The sequence of events that link the harmful act to the fault of the perpetrator is what is

²⁰ J.J. FOLMER, “The Canonization of Civil Law, Part II: The Law of Personal Injury,” in *CLSA Proceedings of the Forty-Sixth Annual Convention*, Washington, DC, CLSA, 1984, p. 53.

²¹ *Ibid.*

²² See CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, p. 199; PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 505; FOLMER, “The Canonization of Civil Law, Part II,” p. 53.

known as causality. Causality in canon law is the same as the concept of proximate cause in common law. It is defined as:

That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred. . . . The proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.²³

There must be a causal connection between the damage that actually occurs and the act that caused the damage.²⁴ In both canon law and the common law, if the causal link is severed the person cannot be held responsible for the harm. Though most of the time there must be a direct link between the person causing the damage and the person damaged, the Rota on a few occasions has deemed that an indirect link can be sufficient for a person to be required to remedy the harm caused.²⁵

The following example illustrates how complicated the concept of causality can be. It also illustrates how difficult it can sometimes be to determine specifically who is responsible for the harm caused. Fr. O'Connor just returned from a trip to Ireland and

²³ J.R. NOLAN et al., "Causality," *Black's Law Dictionary*, 6th edition, Saint Paul, MN, West Publishing Company, 1991, pp. 852-853.

²⁴ See *c. MANY*, August 5, 1913, in *TRIBUNAL APOSTOLICUM SACRAE ROMANAE ROTAE DECISIONES SUA SENTENTIAE* = *SRR Dec.*, 5 (1913), p. 526; *Decision c. MANY*, March 30, 1914, in *SRR Dec.* 6 (1914), p. 154; *c. MASSIMI*, January 5, 1920, in *SRR Dec.*, 12 (1920), p. 3; *c. MASSIMI*, December 22, 1926, in *SRR Dec.*, 18 (1926), pp. 429-434; *c. PASQUAZI*, July 12, 1962, in *SRR Dec.*, 54 (1962), pp. 366-369.

²⁵ See *c. PRIOR*, April 4, 1916, in *SRR Dec.*, 8 (1916), p. 76. See also PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 505. An example of indirect causality is a case in which a person spreads a rumor that a school principal made a number of inappropriate remarks to his secretary. The secretary's husband hears the rumor, comes to the school and physically assaults the principal. While the husband is certainly the direct cause of the assault, there is an indirect causal link between the harm committed and the person who maliciously started the rumor.

brought back a hand-woven wool sweater. He has it on his desk to show to the parish secretary, but he is called to help in a distant parish for the weekend and did not show it to her. The secretary goes in to get some papers and sees the sweater. She notices that there is a stain on it and decides on her own accord to send it to the cleaners to remove the stain. She calls in the parish custodian and asks him to take the sweater to the cleaners. Thinking he can do a better job, he attempts to remove the stain himself but unfortunately makes the stain larger and considerably worse. The custodian then takes it to a cleaners owned by a prominent parishioner, who unthinkingly assigns his new employee the task of removing both the original stain and the handyman's cleaning attempt. The new employee, who is also a parishioner, accidentally uses bleach instead of cleaner and permanently ruins the new sweater.

This example illustrates how difficult it is to determine precisely whose action caused the harm: the secretary who decided without permission to have the sweater cleaned, or the custodian who without permission attempted to remove the stain himself, or the parishioner who assigned an inexperienced employee to clean the sweater without proper supervision, or the new employee who applied bleach instead of cleaner? While such a case would not likely be processed in an ecclesiastical forum, it illustrates that c. 128 does not give any indication how a situation like the one envisioned above could be resolved. In fact, c. 128 only addresses causality in a very general, non-nuanced fashion, stating the general principle that persons who cause the harm should remedy the harm that they cause. The development of specific causal doctrines stating precisely how this general principle should be interpreted and applied is left up to jurisprudence, doctrine,

and particular law.²⁶ Given that the common law has very developed doctrines on causality, these doctrines could be adopted, if necessary and in a particular case (cf. c. 19), and used to sort out the difficult problem of who in a chain of events can be held responsible for the damage caused by a given act.

2.3.3 – Imputability or Legal Responsibility

After it has been shown that a person has caused damage, an assessment must then be made to determine his or her level of imputability. This is accomplished by determining whether the person, either physical or juridic, can be held legally responsible for the harm caused. Black's Law Dictionary defines imputability as, "the state or condition rendering one chargeable for an act," and "liability or responsibility for conduct or omission."²⁷ Imputability is assessed only after it has been determined that the person actually committed the act which caused the harm.

In the penal law, imputability is presumed once it has been determined that there has been an external violation according to c. 1321 §3. This means that upon determination of the commission of an external violation, the judge or superior presumes that the act resulted "from someone's deliberate intention or (in a proper case) from his or her negligence."²⁸ This presumption is present "unless it appears otherwise," which

²⁶ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 505.

²⁷ "Imputability," *Black's Law Dictionary*, p. 520.

²⁸ M. HUGHES, "The Presumption of Imputability in Canon 1321 §3," in *Studia canonica*, 21 (1987), p. 24.

means that it is a rebuttable presumption. This concept is similar to what is practiced in the common law.

For, in common law civil courts as well as in the criminal courts, once the person has either confessed to the crime, or it has been proven that the person committed the act, it then becomes the burden of the guilty party or the attorney to present an “affirmative defense.” This means that the guilty party and attorney must prove that 1) he should not be held accountable for his actions; or 2) he should be held accountable to a lesser degree than would normally be assessed. The reasons for lessened imputability in the common law are similar to those described in CIC cc. 1323 and 1324.

In canon law there are a number of factors that affect one’s level of imputability. For physical persons, there are levels of imputability depending on the circumstances surrounding the person and the act. Canons 1323 and 1324 of the CIC recognize two different levels of imputability. Canon 1323 lists various reasons why persons cannot be held legally responsible for their actions. For example, a child or person of diminished mental capacity is not held to the same level of imputability as an adult of average mental capacity. Additionally, c. 1324 lists factors that partially mitigate imputability for a person’s harmful actions. Like the common law, in canon law it is the responsibility of the guilty party or the advocate to rebut the presumption of imputability and to prove that the damage was committed during a time of diminished imputability.

The CIC does not address imputability in the context of c. 128. However, since principles of justice and equity require that all mitigating circumstances be considered in assessing a person’s legal responsibility for his or her actions, it is reasonable to apply the penal law standard of imputability as a rebuttable presumption to c. 128. In this way, the

same mitigating or negating factors that apply in a penal case can be used in the application of c. 128 to determine the level of legal responsibility a person must take for his or her actions that cause harm to others. This, in turn, could affect a judge or administrator's decision in determining how the unlawfully inflicted harm must be remedied. However, the code gives judges no guidance on how various levels of imputability could or should affect their ultimate judgment. This is an area in which c. 19 could be applied to concrete cases. The common law has extensive jurisprudence concerning imputability, and these principles could be applied to a given case in the event that canon law is silent on the subject.

A juridic person can also be imputable for actions committed in its name. However, it is evident that acts committed by a juridic person can occur only by the action or inaction of a physical person who is the agent of the juridic person.²⁹ In attempting to assess imputability when harm has been committed by an administrative act, the difficulty is in determining whether the person acting is a "physical person performing functions of an organ of ecclesiastical authority or is an ecclesiastical corporate body in whose name the above physical person performs juridical acts."³⁰

The CIC gives juridic persons special protection, much like the common law protects, or used to protect, non-profit corporations under charitable immunity laws.³¹

²⁹ See ALESANDRO, "Church Agents and Employees," p. 36.

³⁰ J. KRUKOWSKI, "Responsibility for Damage Resulting from Illegal Administrative Acts in the Code of Canon Law of 1983," in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law, organized by Saint Paul University and held at the University of Ottawa, August 19-25, 1984*, Ottawa, Saint Paul University, Faculty of Canon Law, 1986, p. 232.

³¹ See W.W. BASSETT, *Religious Organizations and the Law*, vol. 2, Deerfield, IL, Clark Boardman Callaghan, 1997, p. 7/15.

Because of this, the Code tends to favor assessing imputability personally to the administrator who performs the act rather than to the juridic person. For example, c. 1281 §3 generally protects the juridic person and holds the physical person acting for the juridic person imputable for his or her invalid acts committed in the juridic person's name. Canon 133 §1 provides that a delegated person acts invalidly if that person exceeds the limits of his or her mandate. Finally, c. 639 §3 protects the religious institute from the unlawful contracts of its members.³² In Chapter 3, the assignation of legal responsibility either to the juridic person or the person acting for the juridic person will be explored in greater depth.

2.3.4 – Is Vicarious Liability Applicable?

In recent years, much has been written on the subject of the Church and vicarious liability in civil law, especially in relation to holding bishops and dioceses liable for the behavior of the priests in that diocese, or holding religious institutes liable for the acts of their members.³³ These discussions and the court cases from which they arose have prompted a few canonists to question whether this doctrine is also applicable in canon law. This is a large and complex topic both in canon law and civil law and could be the subject of its own dissertation. However, since the subject does relate to who can be held accountable for unlawfully inflicted harm, it will be addressed briefly.

³² See FOLMER, "The Canonization of Civil Law. Part II," p. 55.

³³ For articles concerning vicarious liability and the common law courts in relation to canon law, see K.E. FISCHER, "Respondeat superior redux: May a Diocesan Bishop be Vicariously Liable for the Intentional Torts of his Priests?" in *Studia canonica*, 23 (1989), pp. 119-148; ALESANDRO, "Church Agents and Employees," p. 44; and M. DIPIETRO, "Canonical and Civil Liability for Lay Ministers," in *CLSA Proceedings of the Forty-Ninth Annual Convention*, Washington, DC, CLSA, 1987, pp. 183-184.

Occasionally, a person who is acting on behalf of an employer unlawfully causes harm. In many cases, these persons for various reasons are unable to remedy the harm that they have caused. In the common law, there are certain circumstances in which the law holds the employer of the person accountable for the acts of the employee. Common law has a doctrine known as *respondeat superior*, literally meaning, “Let the master answer.” Under certain circumstances this doctrine holds a master (who can be either an employer or a principal³⁴) liable for the wrongful acts committed by a servant (who can be an employee or agent) if these acts are committed within the scope of the servant’s employment.³⁵ The doctrine of *Respondeat superior* holds an employer liable for

...injury to the person or property of another proximately resulting from acts of the employee done within the scope of his employment in the employer’s service. The doctrine applies only when a relation of master and servant existed between the defendant and wrongdoer at time of injury sued for, in respect to the very transaction from which it arose. Hence, the doctrine is inapplicable where injury occurs while an employee is acting outside legitimate scope of authority. But if the deviation be only slight or incidental, the employer may still be liable.³⁶

Holding one person liable for the actions of another is known as vicarious liability, which is defined as, “the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons” or “indirect or imputed legal responsibility for the acts of another.”³⁷ Vicarious liability became a part of the common law because society determined as a matter of justice that it is better

³⁴ “The term ‘principal’ describes one who has permitted or directed another...to act for his benefit and subject to his direction and control, such that the acts of the agent become binding on the principal.” (“Principal,” *Black’s Law Dictionary*, p. 827.)

³⁵ See “Respondeat Superior,” *Black’s Law Dictionary*, p. 909.

³⁶ *Ibid.*

³⁷ “Vicarious Liability,” *Black’s Law Dictionary*, p. 1084.

for employers to assume responsibility for the harm caused by their employees or agents who are acting within the scope of their authority. This is because these agents often risk causing damage in amounts much greater than their own personal ability to remedy.³⁸ Generally, the employer is not held accountable for intentionally harmful actions (actions with *dolus*) of the employee, but only the negligent actions of the employee that occur when the employee is carrying out his duties.³⁹

Though canon law clearly recognizes the existence of agency relationships within the Church, neither c. 128 nor the rest of the CIC generally addresses the issue of whether canon law recognizes the legal doctrine of vicarious liability. There are two canons that apply vicarious liability in very specific circumstances. Canon 1281 §3 allows a juridic person to be held responsible for the invalid actions of its administrators to the extent that it benefited from the invalid action. In addition, c. 639 §2 holds a religious institute responsible for the actions of its individual members if the business conducted was on behalf of the institute on the mandate of the superior. These are the only two examples in the Code where a juridic person is held directly responsible for the acts of another. However, there is no general canon in the CIC recognizing vicarious liability and specifying the circumstances in which this doctrine could be applied.

The omission of a canon generally addressing the issue of vicarious liability (either specifically to allow it or to prohibit it) is unfortunate, because there are a number of canons that specifically speak of oversight, supervision, and authorization over certain

³⁸ See FOLMER, "The Canonization of Civil Law. Part II," p. 55.

³⁹ See ALESANDRO, "Church Agents and Employees," p. 44.

persons in the Church.⁴⁰ For example, cc. 300, 305, and 323 all speak of various kinds of oversight in dealing with associations of the faithful. Canon 394 concerns the Bishop's oversight of the different apostolates in his diocese. Canon 780 requires local ordinaries to ensure that catechists are duly trained to properly carry out their office. In addition, there are a number of agency relationships created by the Code in which one person is acting in a legal capacity on behalf of another. This raises the question whether, if one of these persons who is specifically responsible for the oversight or authorization of another is remiss in his duty and damage is unlawfully inflicted, the person responsible for oversight should be held accountable for the action or lack of action. One could also ask whether this would be vicarious liability or the direct violation of a canonical duty, which would be directly actionable rather than vicariously actionable.

The problem is compounded by the fact that specifically in regards to the relationship between a diocesan bishop and the priests or deacons of the diocese, there is no comparable category in common law that defines the relationship adequately. It is easier to explain what the relationship is not (it is not master/servant, principal/agent, employer/employee or employer/independent contractor) than to try to define in common law terms what the relationship is. Because of this, it is doubtful that a common law understanding of vicarious liability would ever be applicable to these particular relationships in canon law.

In dealing with the issue of vicarious liability in regards to other types of employment relationships, canonists disagree on its applicability in canon law. One

⁴⁰ See DiPIETRO, "Canonical and Civil Liability for Lay Ministers," pp. 183-184.

opinion, expressed by John Folmer, is that the civil law in this area could be canonized and therefore could be used in a contentious process.⁴¹ Michael Hughes disagrees and states that, while those who drafted c. 128 may have used the civil law for their inspiration, the legislator chose to enact c. 128 rather than to canonize the civil law.⁴² He goes on to state that, although the Code gives no direction in this area, common sense would suggest the possibility of applying *respondeat superior*. Indeed, c. 19 allows for the use of general principles of law (*gereralia principia iuris*) to be applied with equity, and this includes principles of the civil law.⁴³

Until the Church would have a new Code in which this doctrine has been explicitly defined or rejected, the doctrine of vicarious liability is most likely not applicable in canon law, except to fill a *lacuna* in particular cases according to c. 19.⁴⁴ As a practical matter, this is not a serious problem because most cases in which vicarious liability would be applicable are heard in the civil courts rather than in a canonical

⁴¹ See FOLMER, "The Canonization of Civil Law. Part II." pp. 55-57.

⁴² See M. HUGHES, *Persons in General and Juridic Acts*, (DCA 5202a, Class Notes for Private Use of Students), Ottawa, Saint Paul University, Faculty of Canon Law, 1989-1990, p. 99.

⁴³ See *ibid.*

⁴⁴ If the doctrine were ever adopted, the following rules should be added as well. The employer is liable only 1) if the tortious actions of its employee occur within the scope of the employee's employment; 2) the servant's conduct was of the type he was specifically employed to perform; 3) the master himself was somehow negligent; 4) the tort occurred within the authorized time and space requirements of the employment; and 5) the injury resulted from the action performed (at least in part) with a specific intent to serve the ends of the employer. See FISCHER, "*Respondeat superior redux*," p. 124.

forum.⁴⁵ However, vicarious liability is a matter of justice that apportions fault to an entity that is as responsible for the harm as the person who actually committed it, and who is in a better position to remedy that harm. As such, a more in-depth study needs to be done on the subject to see if vicarious liability can be applied to specific cases under the present Code, and if not, whether this doctrine should be adopted in a future Code.

2.4 – What is *Damnum*

The word *damnum* can be translated into English in a number of ways, including “harm,” “damage,” “loss,” and “injury.” The two terms most commonly used in English translations are “harm” and “damage.” The word “injury” is also frequently used, but use of the word injury can be confusing because of the connotation of bodily injury, which is not necessary for *damnum* to occur. There is little consistency concerning which term is the most appropriate English translation. This thesis will use either the word “harm” or “damage” when referring to *damnum*, but one must keep in mind that “harm,” “damage,” “loss,” and “injury” are largely interchangeable in English and that various authors use one or more of these terms depending on their own personal preference.

⁴⁵ Though this might not pose a serious problem in the sense that an aggrieved party has another avenue in which to seek reparations, it does mean that civil jurisdictions are hearing these cases and awarding large financial judgments. Because dioceses are the entities bearing the brunt of these verdicts, it is sometimes hard from a practical standpoint to see the justice in this doctrine. However, the doctrine of vicarious liability does arise from an equitable tradition. If canon law formally was to recognize this doctrine in particular and limited circumstances and use it to adjudicate cases and award just remedies (or even better to recognize this doctrine and offer to help the victim without needing to resort to a canonical forum), then maybe the Church could avoid the very large verdicts awarded by common law courts.

The word *damnum* is used frequently throughout the Code, and its definition is similar to the common law understanding of damage.⁴⁶ The common law defines damage as the “loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter’s person or property.”⁴⁷ However, this should not to be confused with the common law term “damages,” whose definition would be closer to the canonical definition of reparation than to *damnum*. The term *damnum* in canon law is used quite broadly. Folmer defines it as:

The damage done, the harm endured, the injury received. [I]t can be any damage whatsoever: it can be physical, moral, psychological, or spiritual. It can arise from breach of contract, from non-contractual personal injury, what the common law calls “torts,” from the commission of a crime, from the improper exercise of administrative authority, from the unjust infliction of a penalty. The possibilities are only limited by imagination and opportunity.⁴⁸

The concept of damage or harm is interpreted very broadly in this canon, and it can occur in a number of different ways from a number of different sources. It must be noted, however, that in c. 128, the only kind of harm that is remedied is unlawfully inflicted harm. Harm that is legitimately inflicted by an administrative act or a penal process is not actionable, even if one can prove that harm has indeed been inflicted.

Harm can also be divided into two categories: tangible harm, which is, for example, physical harm or harm to property, and non-tangible or moral harm, which is, for example, the harm to someone’s reputation or the harm resulting from a person’s

⁴⁶ *Damnum* is used in cc. 540, 1062, 1201, 1209, 1281, 1284, 1289, 1293, 1323, 1324, 1328, 1347, 1357, 1389, 1448, 1457, 1496, 1498, 1499, 1515, 1546, 1645, 1649, 1650, 1718, 1729, 1730 and 1741.

⁴⁷ “Damage,” *Black’s Law Dictionary*, p. 270.

⁴⁸ FOLMER, “The Canonization of Civil Law. Part II,” p. 53.

rights being violated.⁴⁹ Usually, tangible harm can be assigned a monetary value, whereas moral harm does not lend itself to being assessed in monetary terms, and often requires that the harm be remedied in another way.

2.4.1 – Standing

It is evident that the harm done must cause damage to another individual. The Latin word *alteri* means “to another.” Various individuals qualify as “others.” Canon 96 of the CIC recognizes the juridic identity of physical persons, who according to c. 204 are members of the *christifideles* incorporated into Christ’s Church by baptism. Obviously, all those who are baptized into the Catholic Church have the right to have harm unlawfully inflicted upon them remedied in an ecclesiastical forum (c. 221). This potentially gives them standing to bring a contentious action or lodge administrative recourse if they have directly suffered harm.

Baptized, non-Catholic Christians also have standing if their rights are violated. First, they are recognized as being part of the *christifideles* by virtue of their baptism, even if they are in imperfect communion. Second, the Church recognizes that they have rights, though they do not have all the rights and obligations that one in perfect communion possesses. Nevertheless, if the Church accords them rights, they must somehow be able to vindicate these rights if they are to have any meaning.⁵⁰ Finally, if

⁴⁹ See F. CACIOPPO, *La disciplina della riparazione dell danno nel diritto canonico del secolo XX*, JCD diss., Romae, Pontificium Athenæum Sanctae Crucis, Facultas Iuris Canonici, 1996, pp. 219-223.

⁵⁰ Catholic chanceries, hospitals and schools typically hire non-Catholic Christians who have rights, and should be able to vindicate those rights if they have been violated.

the Church recognizes all of the baptized as being *christifideles*, then they, too, fall under the biblical mandate that it is better for disputes to be resolved among Christians rather than to take the matter to civil court. As a practical matter, the only time non-Catholic Christians would know about, much less want to utilize, an ecclesiastical court is if they have some sort of connection to the Church, most likely either through employment or marriage. In either case, if they submit themselves to the jurisdiction of an ecclesiastical forum, it is generally better for all involved if the matter is resolved within the Church rather than before a civil court.

Canon 113 of the CIC also recognizes juridic persons, which are subject to rights and obligations in accordance with their nature.⁵¹ Because it is possible to cause harm to a juridic person, that juridic person must be able to have the harm done to it remedied. Therefore, it also can have standing to bring action against one who has caused it harm. However, the person who acts as the representative of the juridic person must be the one to petition for a remedy, since the entity cannot act for itself.

There is one other group of individuals who can be harmed, and they are the unbaptized.⁵² Given the number of unbaptized people that present marriage cases before various tribunals, or who work in Catholic schools, hospitals, and other institutions in various parts of the world, it is not difficult to imagine a circumstance in which an

⁵¹ See A. GAUTHIER, "Juridical Persons in the *Code of Canon Law*," in *Studia canonica*, 25 (1991), pp. 77-92.

⁵² Sometimes using the term "persons" in its technical sense can lead to the uncomfortable necessity of finding a way to refer to the unbaptized without implying that they are somehow non-persons. The term "persons" will be used in its technical sense to refer to physical or juridic persons. The terms "individuals" or "people" will refer to human beings that are unbaptized.

unbaptized individual could suffer from the unlawful infliction of harm by a person in the Church.

It is clear that both kinds of persons, as well as other individuals, are all able to suffer from unlawfully inflicted harm, and in all these cases the moral obligation to repair that harm binds the perpetrator. But is it possible for all three categories to have the standing to approach an appropriate ecclesiastical forum if a perpetrator refuses to repair his harm? To have standing to approach an ecclesiastical forum, two things must be proved. First, one must have experienced an actual injury or be threatened with an injury as a result of the act under challenge.⁵³ Second, the law must recognize the individual as being someone who has either the implicit or explicit right to approach the forum.

Both physical and juridic persons have standing to approach an ecclesiastical forum and have their rights vindicated (c. 221), presuming that they can prove the harm was unlawfully inflicted. However, c. 221 applies only to *christifideles*. Canon 1400, which concerns the objects of a trial, speaks of pursuing and vindicating the rights of persons, both physical and juridic. The canons on administrative recourse (cc. 1732-1739) refer to persons, not *christifideles*, so it is not as clear that the non-baptized are excluded from taking recourse. Because the canon uses the word “persons,” one must assume that the Code is using the word in its technical sense, which would exclude the non-baptized from taking recourse. However, c. 1476 gives all individuals whether baptized or unbaptized the right to bring an action to trial. This raises the question whether an unbaptized individual who has the right to bring an action before a court has

⁵³ See J.P. BEAL, “Protecting the Rights of Lay Catholics,” in *The Jurist*, 47 (1987), p. 159.

standing to have a right vindicated, since this appears to be excluded by cc. 221 and 1400. For the unbaptized, these rights would have to be natural rights or contractual rights since they do not have ecclesial or ecclesiastical rights. It also raises the question whether the unbaptized have a right to administrative recourse.

There are circumstances in which an unbaptized individual clearly has standing. If an individual has been harmed because of a violation of a law or has been a victim of a canonical crime, that individual does not have to be a *christifidelis* to have standing before an ecclesiastical court. In addition, if the unbaptized have a civil employment contract that provides for recourse for various types of actions, or if a juridic person has special statutes concerning recourse for its employees (e.g. in a school, hospital or nursing home), again unbaptized individuals are able to take recourse in those circumstances. Finally, if the case involves a matter of the public good, the promotor of justice could bring a contentious action on behalf of unbaptized individuals, if they are denied standing in a contentious case (c. 1430).

A category of harm that c. 128 does not address is harm caused to a community of persons that is not a juridic person. This community could be the general society, an ethnic community, another ecclesial community, a parish committee or organization, or members of a juridic person who already have an official representative (e.g. members of a parish). The question then arises whether c. 128 can be extended to cover harm done to a community of persons rather than to a specific physical or juridic person.

Using the word *alteri* implies that the canon refers only to harm unlawfully inflicted on “one or more *determined* (physical or juridical) persons.”⁵⁴ If harm is caused to the greater community, or to a group without juridic personhood, the harm to the group as a group is not actionable under c. 128. The fact that only physical or juridic persons may bring an action is affirmed by a ruling of the Pontifical Council for the Interpretation of Legislative Texts, which holds that a group of faithful that does not have juridic personhood cannot legitimately make hierarchical recourse as a group against their bishop. However, members of groups who are unable to have the harm remedied as a group do have another option. They can act in their capacity as individual physical persons to take recourse and sign the same petition as individuals.⁵⁵

2.4.2 – Harm Caused by a Violation of the Law

Both in canon law and common law, laws are enacted to protect the well-being of the people for whom they were enacted, as well as to provide for order and discipline within society. Canon law has the added responsibility of aiding in the salvation of souls. How can one break a canonical law? Persons break the law when they do not observe a “formal, positive norm.”⁵⁶ This can be non-adherence to “any binding norm, whether it

⁵⁴ PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 509.

⁵⁵ See the authentic interpretation of c. 299 dated April 29, 1987, in AAS, 80 (1988), p. 1818. English translation in W.A. SCHUMACHER and L. JARRELL, (eds.), *Roman Replies and CLSA Advisory Opinions*, Washington, DC, CLSA, 1990, p. 111. For a good article concerning not only juridic persons, but also addressing the issue of the rights of groups in the Church that do not have juridic status, see GAUTHIER, “Juridical Persons in the *Code of Canon Law*,” pp. 77-92.

⁵⁶ M.R. MOODIE, “Defense of Rights: Developing New Procedural Norms,” in *The Jurist*, 47 (1987), p. 437.

be a promulgated law, a legal custom, [or] a principle of natural law.”⁵⁷ When a law is broken, in varying degrees it inherently damages the society for which it is in force.⁵⁸ There are a number of ways that this damage manifests itself. Sometimes it is to the greater society, and sometimes to a particular person or persons.

In the Church, the harm can be unlawfully inflicted on the various organs of the Church itself, and it can also specifically affect individuals as well as juridic persons. When a law has been violated, either intentionally or negligently, the harm that it causes must be remedied according to c. 128 because, if the act is *per se* a violation of the law, the harm arising from that act is by definition, unlawful. This applies to illegal acts that are invalid as well as to illegal acts that are merely illicit. It also applies to illegal, criminal delicts committed by a perpetrator. This unlawful harm must be remedied in addition to any judicial or administrative action to remedy the damage that was caused to the Church in general.

Are the victims of the particular criminal delicts enumerated in the penal law able to have their harm remedied under c. 128? Canon 1729 specifically gives parties harmed by criminal acts the right to have their case heard at the same time that a penal trial is

⁵⁷ Ibid., p. 439.

⁵⁸ This damage can range from something as small as providing a bad example for others in the society or decreasing the respect for the law in general, to causing catastrophic harm. The level of damage depends on the laws that are violated and the degree of violation. This statement, like all general statements, does have some exceptions. There are laws that, for whatever reason, remain “on the books” long after the need for them has passed. This is certainly true of antiquated laws in the common law, which remain on the books because no one has taken the time to repeal them. There are also laws passed that have never been received by the communities for which they are applicable and are universally ignored, though this non-reception arguably can cause damage to the greater society. However, in general, laws are passed for a reason, and when violated cause harm to the society that enacted the law, to a person, or to both.

being held.⁵⁹ Note that c. 1729 refers to the victim as the “party,” not the “person,” so presumably all victims, whether baptized, unbaptized, or a juridic person,⁶⁰ have a right to petition for reparation. It would then stand to reason that if a person accused of committing a penal offence for whatever reason does not stand trial for that penal offence (e.g., the person admits guilt, or the offence is handled administratively), victims of that person could still bring a contentious action against the perpetrator for the harm committed against them. This means that anyone harmed by a delict can petition to have that harm remedied. This includes harm arising from: perjury (c. 1368); the publication of material through various means of social communication that gravely harms public morals or incites hatred or contempt for the Church (c. 1369); the physical injury of a cleric, bishop, or the pope (c. 1370); a person disobeying the lawful command of an Ordinary or a Superior (c. 1371);⁶¹ the unlawful alienation of ecclesiastical goods (c. 1377); a person trafficking for profit in mass offerings (c. 1371); the bribery of an ecclesiastical official (1386); the abuse of ecclesiastical power or position (c. 1389); persons who negligently perform or neglect to perform an act of ecclesiastical power (c. 1389); calumny (c. 1390); the publication of false ecclesiastical documents (c. 1391);

⁵⁹ CIC c. 1729 §1. “Pars laesa potest actionem contentiosam ad damna reparanda ex delicto sibi illata in ipso poenali iudicio exercere, ad normam can. 1596.”

⁶⁰ This issue becomes more difficult and complicated if the person committing the delict that harms the juridic person is also the person who is the juridic representative of the juridic person. This problem will be discussed in Chapter 3.

⁶¹ One can envision any number of cases that could involve a priest or religious who continues engaging in destructive behavior after having been warned by a lawful Ordinary or Superior. Such cases could be: a religious who has been told to get professional assistance because she has a problem with alcohol, using a community vehicle while under the influence of alcohol and injuring a person or property; a cleric being required to pay hospital expenses and child support to a woman having his child after he has been ordered to refrain from seeing her; or a religious having been lawfully told to resume residence at a designated place (like a monastery), refusing that order and subsequently getting into some legal trouble.

sexual crimes, including harm caused from concubinage, the sexual abuse of minors, and from other offences against the sixth commandment of the Decalogue (c. 1395); or homicide, abduction, or grave wounding of another person (c. 1397).

2.4.3 – Harm Caused by a Violation of a Right

Although c. 128 does not mention the concept of rights, one of the principal ways that one can unlawfully inflict harm is through the violation of a person's rights. In fact, it is meaningless to give people rights explicitly if there is not an adequate, working, and efficient mechanism to protect and promote these same rights.⁶² The Code recognizes this fact in c. 221 by specifically giving the *christifideles* the ability to have their rights vindicated before a competent ecclesiastical forum so that the harm caused can be repaired. Both physical and juridic persons enjoy certain rights, including those enumerated within the 1983 Code, as well as other natural, civil, contractual, ecclesial, ecclesiastical, and acquired rights. These rights will be discussed in great detail in Chapter 4, as well as the process for remedying the harm that occurs when these rights are unlawfully violated.

2.4.4 – Harm Caused by a Violation of a Duty

In the Code, rights and duties go hand in hand. When one is given rights, one is also given corresponding duties. In addition, the Code specifies many duties that are the

⁶² See T.J. PAPROCKI, "Rights of Christians in the Local Church: Canon Law Procedures in Light of Civil Law Principles of Administrative Justice," in *Studia canonica*, 24 (1990), p. 430; and Z. GROCHOLEWSKI, "Aspetti theologici dell'attività giudiziaria della Chiesa," in *Monitor ecclesiasticus*, 110 (1985), p. 492.

responsibility of the person to whom the duty is assigned. These result from one's state in life, office, role,⁶³ or by vicarious assignation. While the Code has a specific canon allowing a person to vindicate one's rights if they have been violated (c. 221), there is no canonical provision for recourse for one who has been unlawfully damaged by a person who has violated a duty.

Generally, a violation of a duty is at the same time a violation of a specific law requiring persons to fulfill that duty, or a violation of a right that corresponds with a person's duty. However, there are cases in which harm is unlawfully inflicted even though there is no specific violation of canon law, nor could one claim that a specific right has been infringed upon. In other words, a person has a legal duty that does not have a corresponding reciprocal right. For example, a pastor of a small church is overseeing his youth group's building of a shed for the parish rectory. The teenagers are inexperienced with building and are relying on the pastor's guidance for the project. The pastor is called into the rectory to take a phone call, and while he is inside, one of the young men ascends a ladder that was not properly extended and he falls and breaks his arm. In this case, the pastor had the duty of overseeing the young people. Because the pastor was not supervising the young people at the time of the young man's fall, he was negligent in his duty of oversight. However, this negligence does not constitute a violation of the law, nor is it a violation of the young man's rights.

Under c. 128, is the violation of a duty considered a harm that must be remedied? It follows that the answer must be yes because, but for the negligence (*culpa*) of the

⁶³ This would be, for example, the role of a parent.

pastor, the harm would not have occurred. The damage is unlawfully inflicted due to the negligent performance of the pastor's duty to oversee the young people. Therefore, the unlawfully inflicted harm caused by the negligent failure to perform a duty could be considered an "other act" as described in c. 128 and is theoretically actionable. This question will be examined in greater detail in Chapter 4.

2.4.5 – Anticipated Harm

Canon 128 is intended to oblige a person to repair the unlawfully inflicted harm that he or she has caused. But what if the harm is only anticipated, i.e., one knows that an event or action that will unlawfully inflict harm is imminent, but it has yet to occur. For example, a parish priest has made a decision to preside at an invalid wedding ceremony for a couple the following Saturday, knowing that the Catholic party has just petitioned the tribunal for a declaration of nullity, and that the non-Catholic party knows nothing about the annulment process or its ramifications; or a pastor has gotten approval to build a new gymnasium, and a week before the construction begins, a next-door neighbor discovers that the intended building will be three inches over the parish's property line and on to her property (an "other act" that will be either intentional or grossly negligent). Must the harm have already happened for it to be actionable under this canon, or is it possible to extend the canon to apply to acts that have not yet occurred? Canon 128 does not address this problem, nor does any other canon directly do so in its entirety. However, there are a few canonical means to prevent harm before it begins, or to halt damage that is already in process.

An administrative method of preventing harm is the precept (c. 49). Precepts can be used formally to prohibit certain acts or behaviors from occurring, or to prevent a person from being put in a position or situation where they can potentially inflict harm. Precepts can be issued by a bishop or others with executive power. Though often one thinks of a precept as a warning, they can function like a common law injunction or temporary restraining order to prevent the infliction of harm. These singular administrative acts can be requested by a person who has been harmed, or imposed *ex officio* by an executive authority, and can be issued outside of either an administrative procedure or a contentious action.

In regards to juridic acts that already have been enacted, c. 1734 automatically petitions for the effects of the juridic act to be suspended when the administrator is petitioned to revoke or amend his decree. In cases where this request is not granted and the decree is not suspended by the law itself, the aggrieved person can petition the hierarchical superior to suspend the effects of the juridic act (c. 1736). However, there is no specific penalty, or emergency recourse available if the administrator ignores the administrative suspension and continues to enforce the decree. This problem might have been remedied had a system of administrative tribunals been created. However, since this was not done, this problem remains unresolved.

In contentious actions, cc. 1496 and 1497 allow for objects to be handed over or sequestered by the competent authority while there is a dispute over possession, or for them to be used as security for an unpaid debt. This is so that the object will not be disposed of, damaged, or sold before proper ownership is determined or before a creditor

can repossess the object. In addition, c. 1496 §2 allows for a judge to restrain another person's exercise of a right in certain circumstances. This little used action is much like a common law injunction, in that it is a "temporary prohibition of exercising a disputed right because of probable infringement on the prevailing right of someone else."⁶⁴ However, this canon does not address an emergency situation that requires temporary but immediate relief, nor does it address injunctions needed as a permanent remedy.

Unfortunately, there are no specific penalties attached for either the violation of a canonical injunction or the violation of the suspension of a juridic act. The only remedy that specifically can have a particular penalty attached is the precept. Precepts are not only able to act as a warning, but bishops can attach a particular penalty to the precept that can be canonically enforced if it is violated. It is evident that the potential applications of these methods to prevent harm have yet to be fully explored or utilized. However, a judicious use of these remedies, particularly the use of precepts, has the potential to be a significant tool in preventing harm.

2.5 – Unlawfully Inflicted

The English language commentaries generally translate *illegitime* as "unlawfully" or "illegitimately."⁶⁵ Canon 128 requires not only that there be harm caused, but that the harm must be illegitimately or unlawfully inflicted. Unlawfully inflicted harm can result

⁶⁴ L.G. WRENN, "Part I: Trials in General [cc. 1400-1500]," in J.P. BEAL, J.A. CORIDEN and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY: Paulist Press, 2000, p. 1652.

⁶⁵ *Illegitime* is also used in cc. 154, 220, 395, 665, 1044, 1281, 1333, 1384-86, and 1389.

when either a public or private act causes harm by violating the law.⁶⁶ Harm also is unlawfully inflicted when it is caused by the abuse of the rights of another physical or juridic person or an unbaptized individual, by incompetence, and by the abuse of or excessive use of power by people in positions of authority.⁶⁷ Harm is unlawfully inflicted when it violates a legal duty to act or not to act originating in legislation, or customary law, administrative acts, juridical acts, *statuta vel ordines* (cc. 94-95), *ius proprium*, or rights of third parties.⁶⁸ Finally, harm can be unlawfully inflicted through acting while intentionally or negligently ignoring the principles of justice and canonical equity.

In writing about this canon, some authors try to make the word *illegitime* refer to invalid or illicit acts rather than to the unlawful infliction of harm.⁶⁹ This is not correct.⁷⁰ Though the underlying act *can* be illegal by being invalid or illicit, especially in regard to juridic acts, it does not *have* to be illegal for the canon to apply. All that is required is that the *harm* be unlawfully inflicted.⁷¹ In fact, applying the word *illegitime* only to invalid or illicit acts limits the canon in an unintended fashion, because it eliminates

⁶⁶ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 503.

⁶⁷ See *ibid.*

⁶⁸ See *ibid.*

⁶⁹ See KRUKOWSKI, "Responsibility for Damage," p. 235. He maintains that, "the harm or damage must result from an illegal act."

⁷⁰ *Illegitime* is an adverb, so it can modify only another adverb, an adjective, or a verb. Grammatically, it cannot modify the noun *actus*.

⁷¹ See G. R. BACARDI, "Pautas para una concepción canónica del resarcimiento de daños," in *Fidelium iura*, 4 (1994), p. 127.

recourse for other acts committed negligently or with an intent to harm that cannot be described as either invalid or illicit.⁷²

The word *illegitime* encompasses harm resulting from invalid, illicit, or illegitimate juridic acts.⁷³ It also includes harm resulting from acts that violate a law; harm resulting from acts that violate a person's rights; and acts that violate a duty that a person is bound to fulfill if any of these acts are performed with either *dolus* or *culpa*. These acts can be positive acts that were negligently performed, as well as non-acts by a person who had a duty to perform, but who either intentionally or negligently failed to perform them.

The second part of c. 128 clearly specifies that both negligent acts that cause harm (*culpa*) and acts committed with intent to cause harm (*dolus*) produce unlawfully inflicted harm that must be remedied. However, it is less clear how unlawfully inflicted harm can result from a juridic act. Juridic acts can be invalid, valid but rescindable, or valid. If harm results from an invalid juridic act, then plainly this harm is unlawfully inflicted and requires a remedy. One does not have to prove that an invalid act is committed either intentionally or negligently for it to be actionable. The harm is actionable *per se* because the underlying act that caused the harm is invalid. An act also can be valid but rescindable according to the positive law due to the circumstances surrounding the

⁷² For example, if a bishop makes a defamatory statement about a person in the local newspaper, that act can be described as unlawful, immoral, and a violation of the person's rights. However, that act is not generally described as being either invalid or illicit.

⁷³ An illegitimate juridic act will be defined later in this section.

placing of the act (cc. 125-126). If the act is rescinded it is rendered null, and any harm resulting from that act prior to its rescission must be remedied.

If the juridic act is valid, there are three ways in which it can be placed in which unlawfully inflicted harm results. The first way is a juridic act that is illicit according to ecclesiastical law, meaning that the juridic act has clearly violated a juridic norm.⁷⁴ If an act is valid but illicit according to ecclesiastical law, one must first examine whether unlawfully inflicted harm has occurred. If no harm has occurred, then there is no need for a remedy.⁷⁵ However, if harm results from a valid but illicit juridic act according to ecclesiastical law, then, because the act is overtly illicit, the resulting harm is *per se* unlawfully inflicted and must therefore be remedied.

It is also possible for a valid juridic act that on its face appears to be licit to inflict harm unlawfully. This is because for a juridic act to be licit, it cannot be contrary to the natural law principles of justice and canonical equity. If the principles of justice and canonical equity, either by design or by neglect, are not observed, and a person places a juridic act that causes harm, then the act that appears both valid and licit is, in actuality, illicit. In these cases, because all of the proper procedures and requirements

⁷⁴ See F. D'OSTILIO, *Il diritto amministrativo della Chiesa*, Città del Vaticano, Libreria editrice Vaticana, 1995, p. 353.

⁷⁵ For example, a first time mother is concerned that her newborn baby has not yet been baptized. Even though the child is in perfect health, she validly but illicitly baptizes the infant during the baby's bath. Even though the mother intentionally baptized her child without having an ordinary minister present, and the child was not in imminent danger, the child has not suffered any harm from her illicit baptism. Therefore, since there was no harm done to the child, there is no need for reparation to occur. Though an illicit act such as this may have moral consequences, these issues are best resolved in the internal, not external forum.

appear to have been followed, the act must be proven to be illicit by contesting it within an ecclesiastical forum.

Canonical tradition has generally used the word “illicit” to refer only to juridic acts that are illicit according to the positive law. It has not used the term illicit to refer to acts that must be proven to be illicit because they are illegitimate due to a violation of the natural law principles of justice and canonical equity. But the concept of liceity goes beyond merely the violation of ecclesiastical law and can refer to any illegal or illegitimate juridic act. Proving within a canonical process that *dolus* or *culpa* exists in regards to the application of principles of justice and canonical equity results in the determination that the act is illegitimate, and therefore, illicit. However, because the canonical meaning of the word “illicit” is so closely associated with a violation of ecclesiastical law, to prevent confusion this work will refer to acts proven to be illicit due to *dolus* or *culpa* as being illegitimate. Illegitimate juridic acts in this work are defined as juridic acts that have been proven in a canonical forum to be illicit due to either *dolus* or *culpa*.

There are only two ways one can assert that a valid and apparently licit juridic act is in fact illegitimate and has unlawfully inflicted harm. Either the perpetrator intended to inflict harm by not following the requirements of justice and canonical equity, or, by not following the requirements of justice and canonical equity, the perpetrator negligently

inflicted harm.⁷⁶ In both instances, once it has been proven in an ecclesiastical forum that justice and canonical equity was not followed due to the intent to harm (*dolus*) or negligence (*culpa*), the juridic act is proven to be illegitimate. Therefore, the harm was unlawfully inflicted and must be remedied.

In this analysis, the intent to harm or the negligent infliction of harm are necessarily a part of the determination concerning whether the harm resulting from a juridic act must be remedied. This is because the only two ways that a person can fail to observe the required principles of justice and canonical equity in placing a juridic act are either to ignore them intentionally, or to neglect to follow them. Therefore, the concepts of *dolus* and *culpa* apply both to juridic acts and the “other acts” mentioned in the second half of c. 128. To summarize: the five ways that unlawfully inflicted harm caused by a juridic act is actionable by virtue of c. 128 are:

1. If the juridic act is invalid, the resulting harm is *per se* unlawfully inflicted; or
2. If the juridic act is valid but rescindable, the resulting harm from the rescinded act is unlawfully inflicted; or
3. If the juridic act is valid but illicit according to ecclesiastical law, the resulting harm is *per se* unlawfully inflicted; or

⁷⁶ An example of a valid juridic act that unlawfully inflicts harm in this manner is the following. Because of financial problems, a Catholic hospital is forced to close a satellite clinic. The hospital's administrator was responsible for closing the clinic and disposing of its contents. The hospital did not need most of the clinic's expensive medical equipment, so the hospital's administrator decided to sell it to another hospital's administrator and either 1) offered her the equipment for 30% less than its appraised value because they are friends (*dolus*), or 2) because the first administrator does not have the time to have the equipment appraised, she made up a price which is 30% less than its appraised value (*culpa*). The procedures for the sale are followed and the sale was valid, but because of the unlawfully reduced price the hospital lost thousands of dollars in badly needed funds. Because this transaction would generally appear to be valid and licit on its face, it would require the plaintiff to prove that the administrator's actions were placed with either *dolus* or *culpa* for the act to be illicit. However, if the administrator can prove that she had a good reason for selling the equipment at below appraisal value, e.g. there was a glut of this type of equipment on the market and she could not get a better price, then the below-value sale is both valid and licit.

4. If the juridic act is valid but is illegitimately placed with intent to harm (*dolus*), then the resulting harm can be proven to be unlawfully inflicted; or
5. If the juridic act is valid but is illegitimately placed with negligence (*culpa*), then the resulting harm can be proven to be unlawfully inflicted.

Other canonists have not agreed with the analysis stated above. There has been an ongoing discussion whether the phrase *dolo vel culpa* in c. 128 refers only to “other acts” and not to juridic acts, and also precisely what kind of juridic acts are actionable.⁷⁷ Pio Pinto’s view does not differentiate between other acts and juridic acts. He holds that “Juridic acts, therefore, placed in good faith and that cause harm, do not require reparation.”⁷⁸ Helmuth Pree holds that, “Due to the punctuation in canon 128, the phrase *dolo vel culpa* is connected only with *quovis alio actu*, not however with *actu iuridico*.”⁷⁹ He further states that the harm inflicted “is not to be regarded as unlawful if the... action [is] performed in a lawful manner at the public as well as the private level.”⁸⁰

Józef Krukowski speaks of “illegal” acts, which apparently encompass both invalid and illicit acts according to the positive law. He does not believe either *dolus* or *culpa* are necessary for an act to be illegal, though it is not clear whether these categories can make a juridic act illegal.⁸¹ He writes that, because the obligation to repair harm

⁷⁷ PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 508.

⁷⁸ “Atti giuridici, dunque, posti in bona fede e che causassero danni, non richiedono riparazione.” P.V. PINTO, *Commento al codice di diritto canonico*, 2nd edition, Città del Vaticano, Libreria Editrice Vaticana, 2001, p. 78. English translation by HUGHES, *Persons in General and Juridic Acts*, p. 98.

⁷⁹ PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 508.

⁸⁰ *Ibid.*, p. 504.

⁸¹ See KRUKOWSKI, “Responsibility for Damage,” pp. 235-236.

arises from “a juridic act, or indeed (*immo*) by any other act which is malicious or culpable,” then, “the relationship between the performance of an illegal juridical act, which among other things is an administrative act, and the damage does not require that the author of this act perform in a committed manner.”⁸² Krukowski evidently does not require that the harm be intentionally inflicted for an act to inflict harm unlawfully. Later, he states that the administrator is even more responsible for the damage caused (*immo*) “if the illegal administrative act was undertaken by him through intentional or unintentional guilt.”⁸³ This would seem to indicate that he holds administrators even more accountable for intentional or negligent violations of the positive law that inflict harm. It is not clear if he considers categories of intentional or negligent juridic acts that are not clear violations of the positive law to be illegal, or if he believes that *dolus* or *culpa* can make a juridic act illegitimate, thus, illegal.

Krukowski’s view could be considered compatible with our own when he states that if a juridic act is illegal, *dolus* and *culpa* are not necessary.⁸⁴ However, he does not clearly define whether his definition of an illegal act takes into account acts that do not violate the positive law, but because of either *dolus* or *culpa* are illegitimate, and therefore, illegal. Both Krukowski and Pree hold that the unlawfully inflicted harm must stem from an illegal act to be actionable. This would certainly hold true for juridic acts that are invalid or illicit according to the positive law. However, neither canonist

⁸² Ibid.

⁸³ Ibid., p. 238.

⁸⁴ See *ibid.*, pp. 235-236.

addresses the issue of remedying the unlawful infliction of harm stemming from valid juridic acts that can be proved to be illegitimate due to their being placed with either *dolus* or *culpa*.⁸⁵ When such a juridic act is not illicit according to the positive law and is performed in a procedurally correct fashion, it would have to be proven to be illegitimate in an ecclesiastical forum for the harm to be remedied.

Pinto would appear to agree that the intentional infliction of harm must be remedied because an act placed with the intent to harm cannot be placed in good faith, but he does not appear to believe that the negligent infliction of harm is actionable.⁸⁶ Given that the canon specifically mentions the need to remedy harm stemming from both *dolus* and *culpa*, it does not seem reasonable to allow acts that are intended to harm to be actionable while denying a person a remedy for negligent ones. One should be consistent and allow either both or neither of the actions listed in the canon.

Finally, Pree argues that the addition of the punctuation, namely the commas in the canon, affects its meaning.⁸⁷ However, in the above-mentioned analysis of how unlawfully inflicted harm relates to juridic acts, the addition or exclusion of the two commas does not change the relationship that *dolus* and *culpa* have with juridic acts. Even if the second part of the canon that specifically mentions *dolus* and *culpa* is not directly applied to juridic acts, for harm resulting from a valid act that is not illicit by positive law to be unlawfully inflicted, it must be done with either the intention to harm

⁸⁵ See *ibid.*, p. 235.

⁸⁶ See PINTO, *Commento al codice di diritto canonico*, p. 78.

⁸⁷ Canon 935 of the CCEO omits these commas.

or by negligently offending against justice and canonical equity. There are no other options.

Finally, there are at least four ways in canon law in which harm can result, yet not be inflicted unlawfully. Even though these inflictions of harm do not require a legal remedy, this does not relieve the person of the moral obligation to at least apologize for the harm inflicted if the circumstances warrant this. First, if harm results as the unavoidable consequence of a valid and licit act, it is not actionable under this canon.⁸⁸ This of course presumes that the act was performed without *dolus* or *culpa*. An example of this would be the case of someone's reputation being damaged as a result of the application of a penalty following a penal trial. Harm would certainly result, but the damage is the result of a lawful and licit action. Second, there is no obligation to remedy harm in circumstances that fall outside a person's reasonable control, e.g., the harm is caused by what the common law would call an unavoidable accident. This is defined as an event, "which occurs while all persons concerned are exercising ordinary care, which is not caused by the fault of any persons and which could not have been prevented by any means suggested by common prudence."⁸⁹ This category would also include an "act of God," which is defined as an act that occurs through a direct, immediate, and exclusive act of nature's forces, which are not controlled or influenced by human power. Accidents occur without human intervention, and cannot be prevented or escaped by any amount of

⁸⁸ See E. MOLANO, "Canons 113-128," in *Code of Canon Law Annotated*, p. 144.

⁸⁹ "Unavoidable Accident," *Black's Law Dictionary*, p. 9. See FREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 506.

foresight or prudence, or by any reasonable degree of care or diligence.⁹⁰ The *coetus* drafting c. 128 clearly chose to exclude accidental harm when determining what types of harm had to be remedied according to this canon. Third, if the harmed person had prior knowledge of the act being committed and agreed to its being placed, then the resulting harm is not unlawful.⁹¹ This means that one cannot agree to an act and then complain about its effects at a later date. Finally, if one causes damage while acting in self-defense, as long as the response is reasonable, the harm inflicted is not unlawful.⁹²

This section has so far addressed who can inflict harm, what is harm, and what it means for that harm to be unlawfully inflicted. The next section will examine what constitutes a juridic act.

2.6 – Juridic Acts

The separate section in the CIC on juridic acts is a new section that was not in the CIC/17.⁹³ However, the notion of a juridic act is not new. The concept of a juridic act was born within the European civil law, and was adopted by the canon law.⁹⁴ In fact, the

⁹⁰ See "Act of God," *Black's Law Dictionary*, p. 21.

⁹¹ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 504. This principle has been part of the Roman tradition since Justinian and the canonical tradition since the *Liber Sixtus*. "No injury or malice is done to the one who knows and approves" (D. 50, 17, 145). A. GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, 2nd edition, Ottawa, Saint Paul University, 1996, p. 110.

⁹² See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 504.

⁹³ See M. WILENS, "Title VII: Juridic Acts," in *New Commentary on the Code of Canon Law*, p. 177.

⁹⁴ See M. HUGHES, "A New Title in the Code: On Juridical Acts," in *Studia canonica*, 14 (1980), p. 398.

notion of a juridic act is somewhat foreign to both canon lawyers as well as civil lawyers who come out of a common law tradition because the concept of a juridic act does not have an equivalent common law counterpart.⁹⁵

The first part of c. 128 addresses the harm caused by a juridic act. Chapter 3 will examine the remedy of harm caused by a juridic act in great detail. For this section, however, it is important to have a general idea of the definition and scope of a juridic act to understand how it relates to the rest of the canon. This section will also define and examine “non-acts” to determine if the omission of an act can have juridic consequences, and whether non-acts are included in the scope of c. 128.

2.6.1 – Definition of a Juridic Act

Nowhere does the 1983 Code define what precisely a juridic act is. However, many canonists writing on the subject choose to use Odis Robleda’s definition of a juridic act. Robleda defines a juridic act as “an externally manifested act of the will by which a certain juridical effect is intended.”⁹⁶ Rather than putting forward a definition of a juridic act, the CIC merely states what is necessary for the juridic act to be valid:

CIC c. 124 §1. For the validity of a juridic act it is required that the act be placed by a qualified person and includes those things which essentially constitute the act itself as well as the formalities and requirements imposed by law for the validity of the act.

§2. A juridic act placed correctly with respect to its external elements is presumed valid.

⁹⁵ See H. PREE, “On Juridic Acts and Liability in Canon Law: Part One,” in *The Jurist*, 58 (1998), pp. 41-42.

⁹⁶ O. ROBLEDA, “De concepto actus iuridici,” in *Periodica*, 51 (1962), p. 419.

With both Robleda's definition and c. 124, it is possible to define a juridic act's major elements. First, the person must have the capacity to place the act. The person must know what he or she is doing and know the implications of that decision. Second, there must be an intention of the will to perform the act, which consists of two elements. As the interior, subjective element, the person must have the intention to act.⁹⁷ As the exterior, objective element, the person acting must externally manifest the will to act, i.e., a decision to act was made and received by the addressee according to the requirements of law.⁹⁸ Fundamentally, a juridic act is a social act that requires some form of expression for it to be valid. In general, purely internal intentions have no juridic effects, unless those intentions have been externalized.⁹⁹ In addition, the act must be externalized while observing the proper formalities required for the act, or the juridic act is invalid.

The person placing the act must also intend to bring about certain juridic effects.¹⁰⁰ Juridic acts are to be distinguished from other acts that have no "legal character" because they have no legal consequences.¹⁰¹ Juridic acts must also be distinguished from juridic facts, which are facts or actions that have legal consequences

⁹⁷ See PREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 46.

⁹⁸ See *ibid.*

⁹⁹ See HUGHES, "A New Title in the Code: On Juridical Acts," p. 394. However, in some cases, especially in regards to the internal forum, an internal decision of the will can have a legal effect. An example of this would be c. 1101 §2, when an internal intent to simulate can invalidate marriage consent. See PREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 46.

¹⁰⁰ See WJLENS, "Title VII: Juridic Acts," p. 177.

¹⁰¹ See *ibid.*

by the law itself and for which no act of the will is required.¹⁰² Put another way, juridic facts have juridic effects not because of the intention of a person, but because the law specifies that this particular fact will result from a particular event.¹⁰³ Examples of juridic facts would be one's age or gender, the dates of one's birth or death, and one's mental capacity.¹⁰⁴

When c. 128 requires the reparation of unlawfully inflicted harm caused by a juridic act, this refers to all juridic acts whether they are private or public. It is also important to realize that c. 128's mandate applies to the various types of illicit juridic acts as well as to juridic acts that are invalid.¹⁰⁵ As long as the harm was unlawfully inflicted, it must be remedied.

In general, there are two categories of acts that can have effects: positive acts in which one decides to commit the act and then follows through with that decision, and the decision not to act or the neglect to act, which also has consequences. The first kind of act will subsequently be referred to as a positive act, whereas the decision not to act will be referred to as a non-act, even though the decision not to act can be made by a positive act of the will. Canon 128 specifically refers to positive acts, so the definition of a positive act will be examined first. The following section will examine whether unlawfully inflicted harm stemming from non-acts should also be included under c. 128.

¹⁰² See *ibid.*

¹⁰³ See HUGHES, "A New Title in the Code: On Juridical Acts," p. 393.

¹⁰⁴ See WILENS, "Title VII: Juridic Acts," p. 177.

¹⁰⁵ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 501.

2.6.2 – Positive Juridic Acts

As discussed previously, the *coetus* on General Norms had an extensive discussion on whether both kinds of positive juridic acts, namely public and private juridic acts, were covered under this canon. It is clear from their discussions that the canon includes both public as well as private ones.¹⁰⁶ Since the *coetus* decided that both kinds of juridic acts were included in the canon, both types acts will be examined.

2.6.2.1 – Public Juridic Acts

The concept of a public juridic act in canon law is somewhat similar to the concept of public law in the common law tradition. A public juridic act can be defined as an administrative, legislative, judicial or penal act¹⁰⁷ that has to do with the organization of the Church, the relations between persons and the Church, and the responsibilities of persons of authority to the Church, to each other, and to the people that they serve. Most public acts are unilateral, issued by a person in a position of authority without any kind of cooperation with the person or persons that are affected by the juridic act.¹⁰⁸

By their nature, public juridic acts are “authoritative, binding acts, issued in the name of the Church in view of the Church’s public interest.”¹⁰⁹ In general, public juridic acts can affect both laws and rights. Public juridic acts can be used to enact, modify,

¹⁰⁶ See *Communicationes*, 21 (1989), p. 175.

¹⁰⁷ A penal act can be either a judicial sentence or an administrative decree that imposes or declares a penalty.

¹⁰⁸ See PREE, “On Juridic Acts and Liability in Canon Law: Part One,” p. 46.

¹⁰⁹ *Ibid.*

cancel, or revoke a law. They can also be used to create, alter, nullify, rescind, or terminate a right.¹¹⁰ The issuance of public juridic acts is common and widespread, and applies to large numbers of acts within the Church.

2.6.2.2 – Private Juridic Acts

The definition of a private juridic act in canon law is so similar to the concept of private law in the common law tradition that the same definition can be applied to both concepts. A private juridic act is similar to a private law in that it “defines, regulates, enforces, and administers relationships among individuals [and] associations.”¹¹¹ The act results from the will and initiative of individual physical or juridic persons who are acting in their own name, and not in the name of the Church.¹¹² Although these acts are not in the name of the Church, some of these private juridic acts need some Church authority’s involvement to provide such things as recognition, confirmation, approval, consent, or permission.¹¹³

2.6.3 – Non-Acts

Canon 128 refers to unlawfully inflicted harm caused by two kinds of positive acts - juridic acts and any other acts that intend to cause harm or are negligent. On its face, it is difficult to see how not acting could be considered an act that would be

¹¹⁰ See *ibid.*

¹¹¹ “Private Law,” *Black’s Law Dictionary*, p. 830.

¹¹² See PREE, “On Juridic Acts and Liability in Canon Law: Part One,” p. 46.

included under this canon. However, upon further examination the idea is not implausible.

Several canons in the Code illustrate that the non-performance of a juridic act can have juridic effects. For example, in c. 57, the non-action of the competent authority has specific juridic consequences. After three months, non-action results in a presumed negative answer. Furthermore, the canon specifically mandates that any harm incurred by not acting must be repaired. So, in this case, a non-issuance of the singular decree is considered to be a type of act that has specific juridic consequences. Pree has elaborated on the necessity to include non-acts as well as positive acts under c. 128. He states:

Despite the wording of canon 128 *actu posito*, the responsibility for damage arises from illegally *placed* acts as well as from unlawful *negligence* or *failure*. An administrator may fail to place a juridical act necessary according to canon 1284 §2, 1-4°, e.g., he fails to conclude an insurance contract, and as a consequence of this failure, damage is caused to the juridical person. The liability for an unlawful omission of an administrative act is established in canon 57 §3, which refers explicitly to canon 128; moreover, canon 1389 §2 ('...*cum damno alieno ponit vel omittit*') sanctions harmful omissions in the context of abuse of authority or office.¹¹⁴

Another indication that non-acts should be included in this canon is that there are specific references to the affirmative duties that are required of an administrator in c. 1284. It stands to reason that if the administrator neglects his duty, and if this act results in harm to the juridic person, the administrator would be obliged to remedy the harm

¹¹³ See *ibid.*, pp. 46-47.

¹¹⁴ PREE, "On Juridic Acts and Liability in Canon Law: Part Two," pp. 502-503.

caused.¹¹⁵ In fact, an administrator's negligence to fulfill his or her duties is recognized as a punishable offense in the 1983 Code. Canon 1389 says that a person who, "through culpable negligence, illegitimately places *or omits* an act of ecclesiastical power, ministry, or function with harm to another is to be punished with a just penalty (emphasis added)." The canon clearly indicates that a person can be held criminally responsible for an omitted act. If the non-performance of a juridic act is designated specifically as a crime, it follows logically that the harm stemming from this negligence must also be remedied according to c. 128. Since c. 128 does not address the issue of non-acts, the canonical principle, "when the reason is the same, the disposition of law must be the same" can be used to fill this *lacuna*.¹¹⁶

A final question is whether a non-act relating to "any other act" that is negligent is covered in c. 128? The answer is certainly yes, because the canon specifically mentions *culpa*, which can be translated as "negligence." When a person has been negligent, it means that the person has failed to act in such a manner as to prevent foreseeable harm. The very definition of negligence includes non-acts that unlawfully inflict damage on another person.

¹¹⁵ For example, an administrator is responsible for filling out the paperwork necessary to maintain the diocesan health insurance policy for the next year. The person neglects to return the paperwork in a timely fashion. Because of the administrator's neglect, the policy lapses for a few weeks. During the lapse, an employee, who has paid all her premiums, has an emergency and is forced to undergo emergency surgery. Much to the employee's surprise, she discovers that her policy has lapsed and her surgery is not covered. This is certainly a negligent non-act that would require that reparation be made to the employee.

¹¹⁶ "*Ubi eadem est ratio, ibi eadem iuris dispositio.*" PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 503.

2.7 – By Any Other Acts, or *Quovis Alio Actu*

Besides juridic acts, c. 128 refers to *quovis alio actu* i.e., by any other act that is not a juridic act. This category covers a broad range of acts that must be committed with *dolus* or *culpa* for them to be actionable. Generally, these acts can be categorized as acts that violate the law, a right, or a duty. Because these acts are committed either with intent to harm or negligently, the resulting harm is unlawfully inflicted and c. 128 is applicable. These acts can include acts of administrators that do not qualify as juridic acts, acts of agents, acts of private individuals, acts of juridic persons that do not qualify as juridic acts, and acts that are delicts.¹¹⁷ Because this category includes negligent acts, it can also include negligent non-acts as well as positive but negligent acts. Reparation for acts that intend to harm or negligent acts that cause harm may be sought in a contentious forum or through a form of alternate dispute resolution. These “other acts” will be examined in great detail in Chapter 4.

2.8 – Intent to Harm, or *Dolus*

Dolus is a concept recognized in both canon law and civil law. *Black's Law Dictionary* defines it as “guile, deceitfulness, and malicious fraud.”¹¹⁸ Though the civil law generally defines *dolus* as having deceit as an element of its definition, canon law

¹¹⁷ See *ibid.*, p. 502.

¹¹⁸ “*Dolus*,” *Black's Law Dictionary*, p. 558.

utilizes at least two definitions of the word *dolus*.¹¹⁹ Like the civil law, many canons equate *dolus* with the concept of deceit.¹²⁰ Deceit is defined as “a deliberate act of deception involving forethought (*astutia*) on the part of the deceiver [that] is perpetrated to effect an error in another party which will cause that party to act in accordance with the will of the deceiver.”¹²¹

However, in the context of c. 128 as well as in cc. 182 §2, 1321 §1, and 1457 §1, canon law equates the term *dolus* with what the common law would refer to as “intent” or “malice.” In fact, some English translations of the 1983 Code use the word “malice” or “malicious” in translating the word *dolus*.¹²² Malice in both canon law and common law is defined in a technical sense and does not mean behaving in a spiteful or vicious fashion. Rather, malice is defined as “the deliberate violation of a law or a precept,” and “the voluntary commission of a delict.”¹²³ Albert Gauthier defines *dolus* as “evil intent.”¹²⁴ Both the CIC/17 and the CIC/83 use *dolus* in this sense. In the penal law section of the CIC/17, c. 2200 §1 defined *dolus* as a voluntary and deliberate intention to

¹¹⁹ See C.C. SALVADOR et al. [*Nuovo dizionario*], *Nuovo dizionario di diritto canonico*, 2nd edition, Milano, San Paolo, 1996, p. 426; and J. WERCKMEISTER [*Petit Dictionnaire*], *Petit dictionnaire de droit canonique*, Paris, Cerf, 1993, p. 87. See also K.W. VANN, “*Dolus*: Canon 1098 of the Revised Code of Canon Law,” in *The Jurist*, 47 (1987), p. 372.

¹²⁰ See cc. 69, 125 §2, 172 §1 1°, 188, 643 §1 4°, 656, 1098, 1191 §3, 1200 §2, and 1204.

¹²¹ P.T. SUMNER, “*Dolus* as a Ground for Nullity of Marriage,” in *Studia canonica*, 14 (1980), p. 178.

¹²² See BEAL, *New Commentary on the Code of Canon Law*, p. 177; MOLANO, *Code of Canon Law Annotated*, p. 144; and SHEEHY, *The Canon Law: Letter & Spirit*, p. 75.

¹²³ *Petit Dictionnaire*, p. 87; and C.C. SALVADOR et al., *Diccionario de derecho canónico*, Madrid, Universidad Pontificia Comillas Tecnos, 1989, p. 227.

¹²⁴ GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, p. 73.

break the law.¹²⁵ In the CIC/83, c. 1321 allows for the punishment of an offender if the act is gravely imputable by reason of *dolus*. Finally, c. 1457 §1 allows for judges to be punished if they cause harm to the litigants through *dolus*.

There is widespread agreement that the *dolus* of c. 128 means having formed an intention to commit a wrongful or harmful act rather than acting deceitfully. Luigi Chiappetta defines *dolus* as acts committed “con volontà deliberata e cosciente, oppure colposamente, per l’omissione della debita diligenza e prudenza.”¹²⁶ Michel Thériault states that, “In the context of c. 128, the Latin *dolus* must be translated as ‘malice’ and not by ‘fraud,’ because otherwise the scope of this norm would be too restricted.”¹²⁷ John Folmer roughly equates *dolus* with common law’s intentional torts when he defines *dolus* as “an intentional or deliberate act, whatever the motive for acting.”¹²⁸ He goes on to say that the perpetrator could be intending violence, like murder or mayhem, or possibly is intending to defraud or deceive. Alternatively, the person may have completely harmless or constructive motives. Regardless of the motive, if the person acts consciously and deliberately, and harm results, then there is no justification for his act.¹²⁹ Finally, Pree states that in the context of c. 128, *dolus* means “the act causing damage

¹²⁵ CIC/17 c. 2200 §1. “*Dolus heic est deliberata voluntas violandi legem, eique opponitur ex parte intellectus defectus cognitionis et ex parte voluntatis defectus libertatis.*”

¹²⁶ CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, p. 199.

¹²⁷ “En el contexto del c. 128, el latín ‘dolus’ debe traducirse por ‘malicia’ y no por ‘fraude’ porque de otro modo el alcance de esa norma sería demasiado restringido.” M. THÉRIAULT, “Comentario [cc.124-128],” *Comentario exegetico al Código de derecho canónico, segunda edición*, A. MARZO, J. MIRAS and R. RODRÍGUEZ-OSCAÑA (eds.), Pamplona, Ediciones Universidad de Navarra, S.A., 1997, pp. 835-836.

¹²⁸ FOLMER, “The Canonization of Civil Law. Part II.” pp. 53-54.

¹²⁹ See *ibid.*

was performed consciously and intentionally, with the person foreseeing and personally approving the damage in clear consciousness of the unlawfulness of the act.”¹³⁰ Since c. 128 equates the concept of *dolus* with either acting with intent to harm or choosing to act while knowing that harm will inevitably result, this thesis will define *dolus* as an “intent to harm” rather than “malice” because it provides a clearer understanding of how the word should be defined in this context.

As previously stated, the concept of *dolus* applies to both parts of c. 128. In regards to juridic acts, *dolus* exists when the actor knew that his act violated the principles of justice and canonical equity and that the action would inflict harm on another person. Yet the actor intentionally chose to ignore this knowledge and perform the juridic act, with harm resulting from the act. The *intentional* unlawful infliction of harm also is actionable for “other acts” that are mentioned in the second half of c. 128. For these “other acts,” it means that the actor knowingly engaged in an action that was intended to cause harm to another through the violation of a law, a duty, or a person’s rights, and that the act did, in fact, cause harm. In both of these cases, it is necessary that the intent to harm must be proven before reparations can be required due to *dolus* on the part of the perpetrator.

2.9 – Negligence, or *Culpa*

Culpa is a term that in English is usually defined as culpability, fault, or blame. This definition suggests that *culpa* refers to whether one is culpable or blameworthy for a

¹³⁰ PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 506.

harmful act. However, in canon law the word *culpa* has two meanings: the first defines *culpa* as fault or blameworthiness,¹³¹ and the second defines *culpa* as negligence.¹³² Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. In defining c. 128, the English translations of the Code use the second meaning of *culpa*, using either the term “culpability” or “negligence” to translate *culpa*. To avoid confusion, rather than using the term “culpability” as the translation of *culpa*, this thesis will use the term “negligence,” because it best reflects the nature of *culpa* in c. 128.

The concept of negligence is applicable to both parts of c. 128. Negligence in regards to juridic acts is an offense against the natural law principles of justice and canonical equity in performing or failing to perform a juridic act, which results in harming another person. In regards to “other acts,” it means that in performing an act, or in neglecting to perform an act, the person breaches a duty of care that results in causing harm to another. Canon 128 requires that the harm resulting from these acts must be remedied.

2.10 – The Obligation of Repairing Harm

Once it has been established that someone has unlawfully inflicted harm to another by either a juridic act, or by any other act committed with *dolus* and *culpa*, the

¹³¹ The term *culpa* used to mean fault or blame is found in cc. 949, 992, 1152, 1324, 1401, 1521, 1593, 1600, and 1740.

¹³² *Culpa* is defined as negligence in cc. 128, 1310 and 1321. The CIC also refers to negligence in cc. 155, 436, 1279, 1389, 1452, and 1741.

competent forum must address the problem of repairing that harm. Pree gives a broad definition of what *dammum reparandi* means. He states that this phrase means that reparation entails compensating for “all kinds of damage and disadvantages unlawfully and culpably caused” as well as “replacement or indemnification in a broad sense.”¹³³

Understanding the concept of repairing the harm one inflicts is critical to the implementation of c. 128, though it is more complicated than it initially seems. There are many issues concerning the methods by which one can repair harm, or what one must do if the harm is not reparable. This is a difficult and complicated issue that will be examined more thoroughly in Chapter 4, section 4.4.

2.11 – The Eastern Code

As has been stated before, CCEO c. 935 is substantially similar to CIC c. 128. The only difference is the absence of two commas that are present in the CIC. However, in light of the previous examination of how *dolus* or *culpa* applies to CIC c. 128, it does not appear that there is in fact any substantial difference between the two Codes. The absence of the two commas only strengthens the connection between *dolus* or *culpa* and juridic acts. Therefore, these two canons of the two Codes do not have any substantive differences between them.

¹³³ PREE, “On Juridic Acts and Liability in Canon Law: Part Two.” p. 510.

2.12 – Conclusion

This chapter situated c. 128 within its context, and defined its text. Even after this examination, c. 128 leaves one with more questions than answers. Since the canon is a general norm, it fails to provide the reader with many details necessary for the practical application of the canon. Though situating the canon contextually and defining its terms provides a necessary foundation for understanding c. 128, it does not give a complete roadmap on how one can or should implement its directives. It may take future developments in canonical scholarship and practice before a full picture of the implementation of c. 128 can emerge.

There are many questions that c. 128 raises, and a great number of them are procedural in nature. Some questions can be answered by looking to the penal law and using its standards, and others may require borrowing standards of procedure in individual cases from various civil law jurisdictions (cf. c. 19). Some examples of these questions are as follows. What are the appropriate canonical standards for such important factors as imputability and causality in determining fault, and how should these factors affect a final judgment? What circumstances should be considered mitigating, and how would they affect a remedy? What types of rights are ecclesiastical courts competent to adjudicate? How does protection of the common good affect one's right to have one's unlawfully inflicted harm remedied (c. 223)? These are important questions that need to be examined in understanding how c. 128 should be implemented.

One of the biggest questions this canon raises concerns the issue of the reparation of damages within the context of Church. This context provides unique problems and

requires special considerations when making determinations on how one can remedy harm. Though this will be discussed in detail in Chapter 4, one of the options is to award money damages to people who have been injured. This option is significantly curtailed when many of the parties who could appear in ecclesiastical courts have taken vows of poverty or earn a minimum amount of money. This reality requires great flexibility and creativity from bishops, judges and superiors, who must attempt to fashion a fair and equitable remedy without necessarily resorting to awarding money damages. Even though this is a difficult task, because the requirement of the remedy of harm is of the divine natural law, it is critical that the Church at least attempt to find creative ways to remedy harm and to make peace within the community and society.

The fact that many of the persons in the Church are personally “judgment-proof”¹³⁴ raises the issue of vicarious liability. If a Church administrator, or employee, or person in a religious community harms someone within the scope of their professional duties, and if they financially are unable to compensate the victim, should the diocese, parish, or religious community step in and cover the costs under certain circumstances as a matter of justice? To what extent (if at all) could the church adopt vicarious liability and still remain true to other conflicting theological principles? These questions are not simple, and will require further study and reflection.

¹³⁴ This is a legal term of art meaning that the person has few personal assets, and does not make enough money to garnish a wage for any significant amount. Since no one can be held to the impossible, a large financial judgment against people in this circumstance is pointless because it is literally impossible for them ever to pay it.

In the following two chapters this thesis will address these and other questions and attempt to flesh out some of the details of the practical applications of c. 128. These chapters will attempt to determine how c. 128 can be practically applied to remedy unlawfully inflicted harm. Chapter 3 will examine harm caused by a juridic act, while Chapter 4 will examine the harm caused by other acts.

CHAPTER 3

HARM CAUSED BY A JURIDIC ACT

Now that the text and context of c. 128 has been examined, it is the task of Chapter 3 to build on this foundation and specifically examine the remedy of unlawfully inflicted harm in regard to the performance of juridic acts. A description of the elements required for a juridic act was given in Section 2.8 of Chapter 2, but it is important briefly to determine what makes a juridic act valid and licit. Then these lawful acts can be distinguished from juridic acts that unlawfully inflict harm.

It should be recalled at the beginning of this chapter that there is no concept equivalent to a juridic act in Anglo-Saxon common law. Instead, the concept originated in theological reflection, nineteenth century philosophy, and various European civil codes.¹ It is a notion that is foreign to the practitioners of common law.² Therefore, it is not possible to compare harm that is unlawfully inflicted by a juridic act with a comparable type of act in the common law.

¹ See H. PREE, "On Juridic Acts and Liability in Canon Law: Part One," in *The Jurist*, 58 (1998), pp. 41-43.

² See M. HUGHES, "A New Title in the Code: On Juridical Acts," in *Studia canonica*, 14 (1980), p. 391.

As seen in the previous chapter, this work will use Robleda's definition of a juridic act, which is "an externally manifested act of the will by which a certain juridical effect is intended."³ In addition, c. 124 requires that a juridic act be placed by one who is *habilis* to place the act, whose act includes all its constitutive elements, and who has followed all the proper formalities and requirements. So, for a juridic act to be valid it must be 1) an act of the will, 2) voluntarily manifested, 3) by a person who is *habilis*, 4) who has followed all the requirements necessary for the act, and 5) the act must achieve a juridic effect. Furthermore, to be licit the juridic act must 1) comply with ecclesiastical law, and 2) be placed in accord with the divine positive and natural law, and in particular, with justice and canonical equity. This necessarily excludes valid acts placed with either *dolus* or *culpa*. If the principles of justice and canonical equity, either by design or by neglect, are not observed, then the juridic act is illegitimate,⁴ and therefore, illicit.

After determining that the underlying act is either invalid or illicit, thereby making any inflicted harm unlawful, the next step is to determine the appropriate process to be used to provide a remedy for any unlawfully inflicted harm incurred by the juridic act. Of course, if a perpetrator voluntarily complies with c. 128 and remedies the harm, then there is no need for a formal process. However, in the likely event that the damage is not voluntarily repaired, a canonical process will be necessary to compel the perpetrator to remedy the harm that he has unlawfully inflicted.

³ O. ROBLEDA, "De concepto actus iuridici," in *Periodica*, 51 (1962), p. 419.

Chapter 3 is not intended to be an in-depth analysis of the nature of juridic acts, for that is a complicated subject already explored in other works.⁵ Rather, the purpose of this chapter is to examine how harm can be unlawfully inflicted by a juridic act, with the emphasis being on the unlawful infliction of harm rather than on the concomitant juridic act. Since c. 128 requires that harm be unlawfully inflicted for it to be remedied, the competent authority must first make a determination that the juridic act is unlawful. However, the purpose of c. 128 is to remedy unlawfully inflicted harm, which does not necessarily require the revocation or amendment of the underlying act. Although a juridic act may be nullified or rescinded for the purpose of the remedy of harm, the focus of c. 128 remains on the remedy of the harm rather than on the invalidation or rescinding of the act. The determination that an act is unlawful is the means by which one proves that harm was unlawfully inflicted so that the harm can be remedied.

To determine whether a juridic act unlawfully inflicts harm, this chapter will specifically examine what types of juridic acts can unlawfully inflict harm and how those acts are to be remedied in a canonical forum. This chapter first will examine the various categories of juridic acts that can unlawfully inflict harm. Then the chapter will analyze

⁴ Chapter 2 section 2.5 contains the definition of an illegitimate juridic act, which is a juridic act that has been proven in a canonical forum to be illicit due to either *dolus* or *culpa*. Even though a juridic act committed with either *dolus* or *culpa* obviously is morally illegitimate, for canonical purposes it is more importantly legally illegitimate, in that a determination of either *dolus* or *culpa* results in the juridic act being illicit.

⁵ For works on juridic acts, see J.M. KUZIONA, *The Nature and Application of Juridical Acts According to Canon 124 of the Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, Faculty of Canon Law, 1998; PREE, "On Juridic Acts and Liability in Canon Law: Part One," pp. 41-83; and H. PREE, "On Juridic Acts and Liability in Canon Law: Part Two," in *The Jurist*, 58 (1998), pp. 479-514.

the canonical processes available to remedy the unlawfully inflicted harm caused by juridic acts. Public juridic acts will be treated first, followed by private juridic acts.

3.1 – Juridic Acts that Unlawfully Inflict Harm

Chapter 2 section 2.5 made the distinction between acts that unlawfully inflict harm and unlawful acts. Clearly, c. 128 refers broadly to all acts that unlawfully inflict harm rather than limiting the canon to unlawful acts. However, this chapter specifically deals with juridic acts that are either invalid or illicit and cause harm. In this particular case, it is because the acts are unlawful or are determined to be unlawful that the resulting harm is unlawfully inflicted. Therefore, in this particular context and chapter, one can equate an unlawful juridic act with the unlawful infliction of harm.

There are six categories of juridic acts that may unlawfully inflict harm.⁶ The first category consists of invalid acts; they are juridically non-existent or null. These are acts that have been attempted, but for some reason have no efficacy whatsoever. Harm resulting from an invalid juridic act is *per se* unlawfully inflicted because the act itself is unlawful due to the fact that it violates a divine or ecclesiastical law required for validity. The second category consists of acts that are valid but rescindable and can be declared invalid if and when an action is brought to challenge the act. Harm resulting from a rescinded juridic act is *per se* unlawfully inflicted because an act can only be rescinded

⁶ See also J. KRUKOWSKI, "Responsibility for Damage Resulting from Illegal Administrative Acts in the Code of Canon Law of 1983," in M. THERIAULT and J. THORN (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law*, organized by Saint Paul University and held at the University of Ottawa, August 19-25, 1984. Ottawa, Saint Paul University, Faculty of Canon Law, 1986, p. 233.

due to its violating the natural or ecclesiastical law. The third category is a non-act or juridic omission, which is when a person fails to perform a required or requested juridic act, and harm results.

The fourth, fifth and sixth categories all involve juridic acts that are illicit. The fourth category involves acts that are overtly illicit in that they are a violation of ecclesiastical law. Finally, the fifth and sixth categories consist of juridic acts that are valid, but have been performed with either *dolus* or *culpa*, making them illegitimate and illicit. Harm caused by an illicit juridic act is also *per se* unlawfully inflicted, because even though the legal irregularity of an illicit juridic act is not so grave that it invalidates the act, the act remains legally flawed. Illicit juridic acts are either a positive violation of a legal norm, or the perpetrator either intentionally or negligently caused harm by violating the norms of canonical justice and equity.

3.1.1 – Invalid Juridic Acts

Though the Code does not give a clear definition of a juridic act, it does clearly state what is necessary for a juridic act to be valid. Among the general norms on juridic acts, c. 124 sets out the requirements for a valid juridic act.

§1. For the validity of a juridic act it is required that the act be placed by a qualified person and includes those things which essentially constitute the act itself as well as the formalities and requirements imposed by law for the validity of the act.

§ 2. A juridic act placed correctly with respect to its external elements is presumed valid.

Given this definition, it is also easy to determine what makes a juridic act invalid.

Generally speaking a person invalidly places a juridic act if he ignores the proper and necessary legal formalities or requirements, or he ignores or fails to include a constitutive element of the act, or the person is neither naturally nor canonically capable of acting (c. 10).⁷ In addition, ecclesiastical law establishes specific steps that must be taken for an act to be valid; the failure to do so invalidates the juridic act.⁸

An invalid juridic act is one that has been positively placed, yet for some reason it has no efficacy whatsoever. This kind of invalid juridic act does not need revocation, because it is null from its outset and has no juridic effect. However, though the act is null from its inception, it is necessary to prove that the juridic act was null before a competent ecclesiastical authority who has the power to declare it null. According to c. 124 §2, properly performed juridic acts are presumed valid unless proven otherwise, e.g., formal marriage cases before a tribunal.⁹ In these cases the ecclesiastical tribunal does not take action to annul the act; rather it declares that the juridic act has been null from the outset.

A juridic act is null if the positive law states that it is null.¹⁰ It is null if the person performing it lacks the proper legal capacity (c. 124). This capacity can be either a lack

⁷ See HUGHES, "A New Title in the Code: On Juridical Acts," p. 394.

⁸ For example, see cc. 272, 485, 1108 §1, 1291, 1292 §§2 and 3.

⁹ Juridic acts that manifestly lack an essential formality or requirement for validity do not have the presumption of validity, so that one does not have to overcome that presumption in an ecclesiastical tribunal. This is seen in the difference between a formal marriage case and a case of a lack of form. Once one can prove the lack in the form, there is no presumption of the validity of the juridic act that must be overturned.

¹⁰ For example, see cc. 149 §3, 1620, and 1622.

of human capacity, e.g., a nine-year-old child attempting marriage, or of canonical capacity, e.g., a non-ordained person attempting to consecrate the Eucharist. The act is null if the person lacks the requisite intention, e.g., simulation cases in marriage law, where a person does not intend fidelity, permanence or openness to children. An act is null if it either 1) does not comply with any formalities that are required by law for validity, e.g., a bishop's failure to sign a decree; or 2) does not comply with the requirements that for validity are prescribed by law, e.g., non-compliance with c. 1292 §2, which requires the permission of the Holy See for the valid alienation of certain goods (c. 124 §1).¹¹ An act can be null if it is placed as a result of an irresistible force that is externally imposed (c. 125 §1), e.g., being forced to perform a marriage ceremony at gunpoint. It can also be null if a person acts out of ignorance or error concerning the substance of the act, or it amounts to a *sine qua non* condition (c. 126). An act is null if it lacks an essential element for validity. The act is null if it is performed without seeking the requisite advice or consent required by the Code (c. 127). Finally, an act can be null if it violates a divine law requirement for validity, whether or not the divine law is expressly mentioned.¹²

For example, a bishop receives a letter that makes allegations of sexual misconduct against one of the diocesan priests. The bishop immediately sends a letter to

¹¹ See P. HAYWARD, *Administrative Justice According to the Apostolic Constitution "Pastor bonus,"* Roma. Pontificium Athenaeum Sanctae Crucis, Facultas Iuris Canonici, 1993, p. 164.

¹² See J.M. HUELS, "Title I: Ecclesiastical Laws [cc. 7-22]," *New Commentary on the Code of Canon Law*, pp. 62-63. Because certain requirements are of the divine law, they are not subject to c. 10 and do not have to be expressly stated. Huels gives examples both of express and non-express divine law requirements for validity. Canons expressly referring to divine law requirements are: cc. 842 §1, 849, 864, 889 §1, 900 §1, 1003 §1, 1024, 1084 §1, and 1085. Canons not expressly mentioning the divine law requirements are cc. 845 §1, 880, 924, 960, 965, 987, 998, 1000, 1009 §2, 1057 §1, and 1141.

the priest telling him that he is suspended, that he is to vacate the rectory within 24 hours, and that his salary and other benefits will be cut off at the end of the month. This action is invalid for a number of reasons, not the least of which is that the bishop did not follow any administrative or judicial process prior to his attempt to suspend the priest. Such an action is clearly an unlawful infliction of harm, which can be remedied in virtue of c. 128.

In addition to an act being referred to as either invalid or null, there is another way the Code speaks about an invalid juridic act, and that is by saying that an act would “be regarded as not having taken place” at all. Canon 125 uses this language specifically in regards to acts performed as a result of irresistible physical force. Though the strong language underscores the point that physical force cannot be used validly as a means to gain a particular juridic end, the effect of this language is the same as a juridic act being null without any presumption of validity, in that the juridic act never even had the appearance of efficacy. It differs from the standard invalid act in that this type of invalid act cannot be convalidated, and “there is no possibility of dispensation, suppletion, or ratification; prescription cannot be applied to the rights or duties of a non-existent juridic act.”¹³ It also does not have the presumption of validity according to c. 124 §2.¹⁴

Clearly, the performance of a juridically non-existent juridic act can cause harm that is unlawful. For example, tribunals frequently encounter a case where a public marriage ceremony is performed in a Catholic church prior to one of the parties either

¹³ PREE, “On Juridic Acts and Liability in Canon Law: Part One,” pp. 50-51.

¹⁴ See *ibid.*, p. 70.

submitting a petition to the tribunal for or receiving a declaration of nullity. Such a union is non-existent from the outset, cannot be sanated, and requires a new exchange of consent for validity. However, many well meaning Catholic couples are ignorant that they are living in a bigamous union, because some representative of the Church told them that this was a valid option. The spiritual, emotional, and financial harm from such an act can be both deep and lasting, and according to c. 128 the harm inflicted from such an act requires a remedy.

3.1.2 – Valid but Rescindable Acts

A juridic act that is valid may be rescindable. It can be annulled only when an action is brought to challenge the act. In these cases the act has force up until the time it is rescinded, because “the rescission has a constitutive character; i.e. it produces the nullity of the act (in contrast to the mere declaration of nullity).”¹⁵ Unlike many secular legal systems, according to CIC c. 10, an act is not considered to be invalid unless the specific requirements for the validity of the act or the *habilitas* of the person acting are not met. In other words, ecclesiastical laws must expressly state that they are invalidating

¹⁵ Ibid., p. 48.

or incapacitating for the act to be invalid.¹⁶ All other invalid acts are rescindable but are not null from their inception by virtue of cc. 10, 125 §2 and 126.¹⁷

Canons 125 §2 and 126 provide rules regarding efficacious but rescindable acts. According to c. 125 §2, an act performed as a result of fraud¹⁸ or grave and unjustly inflicted fear is valid but rescindable in an ecclesiastical forum if injured parties or their successors in law initiate an action, or an action is initiated *ex officio*.¹⁹ The act is not invalid from its inception because the act's validity is founded on the principle that fraud and grave fear do not substantially deprive a person of their ability to evaluate various possibilities and make a free decision. These external elements create a defect of the will only because of their unjust influence.²⁰ A juridic act placed under the influence of fraud or grave and unjustly inflicted fear can be rescinded by a judge in a contentious action upon the petition of the person who was coerced to make the decision, or by the

¹⁶ See J.G. OTADUY and P. LOMBARDIA, "Canons 1-95," *Code of Canon Law Annotated*, p. 86. "Expressly stated" encompasses both explicit and implicit statements.

¹⁷ Paul Hayward makes an interesting point when he states that a *caveat* must be applied in regards to the nullity of administrative acts. He points out that not only must an administrative act be declared to be null in an administrative or judicial forum, but it must also be done within the requisite time limits. If a challenge is not made within the prescribed time, the act in effect sanates itself with the running of the statute of limitations. The act itself is no longer challengeable. See HAYWARD, *Administrative Justice*, p. 165. However, one can argue in virtue of c. 128 that even though the act itself is now unchallengeable, harm has still illegally resulted and should be remedied. What might be challenged in a canonical court would be the resulting illegally inflicted harm, and not the underlying juridic act. In this way a remedy could be imposed by a court without invalidating the original act. It would seem to be against the canonical principle of justice and equity not to require a perpetrator of harm to repair the damage caused simply because of a technicality of the law.

¹⁸ Canon 125 uses the word *dolus* to mean fraud, but this is not the same *dolus* of c. 128. In the context of c. 125 *dolus* means deceit or fraud, which is not the same as c. 128's meaning of an intentional violation of the law with the intent to harm.

¹⁹ See PREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 74.

²⁰ See *ibid.*, p. 73.

competent hierarchical superior, or by the promotor of justice, or it can be rescinded *ex officio* if the public good is at stake.²¹

Fraud is the “deliberate concealment of facts or the deliberate assertion of what is untrue precisely in order to persuade someone to act in a certain manner.”²² For a fraudulent act to be rescindable, the fraud must lead to “an essential error on the part of the one acting concerning the juridic act.”²³ In other words, the act must be a direct result of the fraud. For example, a parishioner holds himself out to be an expert in financial affairs and because of his supposed qualifications he is appointed financial administrator of the diocese. The bishop then learns that the person lied about his qualifications and has been stealing money from the diocese. Because his appointment to his office was a juridic act, that act can be rescinded due to the person’s deceit. However, any administrative act performed by the person prior to the act of appointment being rescinded is valid.

In addition, according to c. 126, acts done as a result of substantial ignorance or substantial error are invalid by their very nature. If the ignorance or error is only accidental but amounts to a *sine qua non* condition, the act is also invalid. However, juridic acts resulting from ignorance or error that do not amount to a *sine qua non* condition are valid but rescindable in an ecclesiastical forum. These are cases in which

²¹ See *ibid.*, p. 74. See also E. MOLANO, “Canons 113-128,” *Code of Canon Law Annotated*, p. 142; M. WILENS, “Title VII: Juridic Acts,” in *New Commentary on the Code of Canon Law*, p. 179.

²² FREE, “On Juridic Acts and Liability in Canon Law: Part One,” p. 72. See also G. MICHIELS, *Principia generalia de personis in Ecclesia: commentarius libri II Codis iuris canonici, canones praeliminares 87-106*, 2nd edition, Paris, Desclée, 1955, p. 660.

²³ WILENS, “Title VII: Juridic Acts,” p. 179.

ignorance or error is only accidental or incidental rather than being substantial.²⁴ The 1917 Code had the same provisions for substantial ignorance, error, and *sine qua non* conditions, but the clause concerning the rescindability of the act was applicable only to contracts.²⁵ The primary difference between c. 125 and c. 126 is that the former protects against injustices caused by external forces, whereas the latter protects a person from the consequences of the internal defects of his or her own intention, which can be produced by either internal or external sources.²⁶

3.1.3 – Juridic Non-Acts, or Juridic Omissions

Both invalid acts and valid but rescindable acts can unlawfully inflict harm. However, one can also be held responsible for the damage caused by the one who is obliged to issue a juridic act but neglects to do so. Because these neglected acts would have been juridic acts that were to have had juridic effects, and because the non-action also can have juridic effects, this specific type of non-action will be referred to as a juridic omission. There are several canons in the Code illustrating that a juridic omission can have juridic effects and that these effects can be harmful. For example, in c. 57, the non-issuance of a decree of the competent authority has specific juridic consequences, both in supplying a presumptive answer to the recourse as well as for allowing damages to be assessed. Canon 57 states:

²⁴ See *ibid.*, p. 180.

²⁵ See CIC/17 cc. 104, 1684; WJLENS, "Title VII: Juridic Acts," p. 180.

²⁶ See PREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 67.

§1. Whenever the law orders a decree to be issued or an interested party legitimately proposes a petition or recourse to obtain a decree, the competent authority is to provide for the matter within three months from the receipt of the petition or recourse unless the law prescribes some other time period.

§2. When this time period has passed, if the decree has not yet been given, the response is presumed to be negative with respect to the presentation of further recourse.

§3. A presumed negative response does not exempt the competent authority from the obligation of issuing the decree and even of repairing the damage possibly incurred, according to the norm of can. 128.

In the case of c. 57, the non-issuance of a singular decree is considered to be a type of act that can have harmful juridic effects. Section 3 of c. 57 specifically recognizes this and requires that any damage caused by the non-issuance of a decree be repaired.

The principle of c. 57 is also applicable to a rescript, which according to c. 59 is a juridic administrative act.²⁷ Even though rescripts consist of privileges, dispensations, permissions, and favors, which are not acts that parties have a right to have granted, nevertheless, parties apparently at least have a right to a timely answer. Eduardo Labandeira writes that, "The doctrine of administrative silence is applicable also to a petition for a rescript since it is a singular administrative act, against which (or against a lack of which) recourse can be taken by someone who feels himself harmed (c. 1732)."²⁸ Not only would the silence result in a presumed negative answer, but also this type of

²⁷ See OTADUY, "Canons 1-95," *Code of Canon Law Annotated*, p. 110.

²⁸ "La doctrina del silencio administrativo es de aplicación también a la petición de un rescripto, ya que éste es un acto administrativo singular contra el cual (o contra cuya falta) se puede interponer recurso por alguien que se sienta perjudicado (cfr. c. 1732)." E. LABANDEIRA, *Cuestiones de derecho administrativo canónico*, Pamplona, Ediciones de Universidad de Navarra, S.A., 1992, p. 449.

juridic omission is subject both to recourse and to the remedy of any harm that the juridic omission may have caused.²⁹

Javier Canosa argues that not only are the petitioners able to have the harm done to them remedied, but also third parties can petition to have the harm caused by the non-issuance of a juridic act remedied.³⁰ It is arguable that, as long as persons have standing to make recourse, then they also are eligible to have any harm remedied that has been unlawfully inflicted upon them.³¹

In another area concerning juridic omissions, the Code provides specific references to affirmative duties that are required of an administrator in c. 1284, which include the issuance or performance of various sorts of administrative juridic acts, especially contracts. If an administrator neglects his duties and fails to issue the necessary juridic acts, and this failure results in harm to the juridic person he represents, the administrator is obliged to remedy the harm caused (c. 1281).

Though neglect to issue a juridic act is not a juridic act in the technical sense, it is equivalent to a juridic act that unlawfully causes harm.³² However, this raises the question of where one would petition to have the harm resulting from a juridic omission

²⁹ See OTADUY, "Canons 1-95," *Code of Canon Law Annotated*, pp. 110-111.

³⁰ See J. CANOSA, "De rescriptis," in *Comentario exegetico al Código de derecho canónico*, segunda edición, A. MARZOA, J. MIRAS and R. RODRÍGUEZ-OSCAÑA (eds.), Pamplona, Ediciones Universidad de Navarra, S.A., 1997, pp. 597-598.

³¹ Since there are no canons concerning third party interventions during administrative recourse, but CIC c. 1596 allows third parties to intervene in contentious matters, c. 19 could be invoked to suggest that these third parties ought to be able to have the same right as third parties in contentious cases and have their harm remedied as well. See Chapter 2, section 2.5.1 concerning issues of standing.

³² See M.R. MOODIE, "The Administrator and the Law: Authority and Its Exercise in the Code," in *The Jurist*, 46 (1986), p. 67.

remedied. Since a juridic omission is not technically a juridic act, much less an “act of administrative power” or an “administrative act,” harm resulting from a juridic omission could be remedied in a contentious trial. However, if a juridic omission is the result of a non-response to a request for a decree or rescript, then one would take hierarchical recourse to have the harm remedied.

3.1.4 – Illicit Juridic Acts

Besides acts that are invalid, rescindable acts, and non-acts or juridic omissions, there is another category of juridic acts that can unlawfully inflict harm. These are juridic acts that are valid but are illicit in virtue of the ecclesiastical law or because they were placed with *dolus* or *culpa*. This unlawfulness does not result in the invalidity of the act, though the act is illegal. Nevertheless, any harm caused by an illicit act is *per se* unlawful, because the underlying act is unlawful, even if it is unlawful to a lesser degree than an invalid act.

What makes a juridic act illicit? Francesco D’Ostilio gives three elements necessary for an act to cause harm illicitly. The first element is objective, in that the act must cause harm, and this harm must be caused by a person who is capable of the intent or desire to harm. It is not an “act” if the person does not have the capacity of intending or wanting at the moment of the action.³³ The second element of an illicit act is juridic: the act must be illegal and unjust. The obligation to repair the harm one inflicts rests on two presuppositions: that there is damage and that the infliction of this damage is

³³ See F. D’OSTILIO, *Il diritto amministrativo della Chiesa*, Città del Vaticano, Libreria editrice Vaticana, 1995, pp. 353-354. This capacity must be both the natural and the juridic capacity.

unjust.³⁴ This second element requires both illegality of the conduct and illegality of the infliction of damage. The third element of the illicit act is subjective: the act must be imputable to the perpetrator.³⁵ If there is no imputability, then the act is not illicit.

When the above elements are present, there are three ways that a juridic act can be illicit. The first type of illicit juridic act is one that is illicit according to the positive law. The second is an act proven to be illegitimate due to an intention to harm on the part of the perpetrator. The third is an act that is proven to be illegitimate due to negligence on the part of the perpetrator. The following sections will examine these types of acts.

3.1.4.1 – Illicit Acts According to Ecclesiastical Law

One way that a juridic act can be deemed to be illicit is to determine that an ecclesiastical law was violated in performing the act. Because ecclesiastical law specifies that particular acts be performed in a certain manner, under certain circumstances, or by fulfilling certain requirements, if it is not performed in that fashion the act is illicit, though valid.³⁶ Sometimes the Code states explicitly that an act is illicit, and sometimes the illicitness of the action is tacitly understood. In both cases the juridic act is unlawful, and the harm caused by the act must be repaired.

There are many actions that the Code specifically designates as illicit. For example, c. 1281 §3 holds a juridic person responsible for the illicit acts of its

³⁴ See *ibid.*

³⁵ See *ibid.*

³⁶ See PREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 48.

administrator if the juridic person benefited from the act. There are other acts that are not specifically designated as illicit, but are understood to be illicit if ecclesiastical law is not followed.³⁷ For example, c. 50 states that before a person in authority can issue a singular decree that person is to seek the necessary information or proof and consult those whose rights could be harmed by the issuance of the decree. If a person intentionally ignores c. 50 or if the authority neglects to follow the canon, the singular decree is illicit, though the canon does not explicitly state this. Whether the illicit nature of the juridic act is stated or not, in either case if the act violates ecclesiastical law, and the act causes harm, that harm is *per se* unlawfully inflicted and therefore may require a remedy according to c. 128.

3.1.4.2 – Valid Acts Placed with *Dolus*

Though one generally expects that actions taken within a juridic context, especially those acts considered to be public juridic acts, would be performed in good faith, for moral reasons and with the highest degree of integrity, this is unfortunately not always the case. There are times when people act for insufficient reasons, or for reasons based on power, dislike, greed, revenge, or out of a desire to punish another person. Unfortunately, just as in civil society, this behavior sometimes occurs within the communities of the Church.

To combat the possibility of acts being placed for an evil motive or contrary to Christian morals and values, the canonical tradition affirms the requirement that all

³⁷ E.g., cc. 1071 and 1124.

juridic acts be performed in accord with justice and canonical equity, and that they be performed in good faith.³⁸ These principles obviously exclude any action taken that is not placed in good faith and that is not for the common good of the Church, the good of the people of God, or the salvation of souls.³⁹ If one intentionally ignores these principles and chooses to act, knowing that it will cause harm to another, that act is illegitimate even if the act conforms to all the external formalities and requirements.

There are times when a person performs a juridic act while deliberately ignoring principles of justice and canonical equity, and he or she knows that someone will be harmed by the result. These actions are not taken with the best interests of the Church in mind; rather they are generally committed to further the person's own agenda. Because the external elements of these juridic acts are properly performed, the acts are valid and appear to be licit. Nevertheless, because they are performed with an intention to act that ignores the principles of justice and canonical equity, and will result in harm to another, they are in fact illegitimate and illicit. This intent to harm is known as *dolus*, which in the sense of c. 128 means "the act causing damage was performed consciously and

³⁸ See cc. 198, 1049 §1, 1061 §3, 1333 §4, and 1515 concerning the necessity for acts to be placed in good faith. It is clear that the "principle of good faith is...inherent in canon law," and that this principle is "based on Christian ethics and on the fundamental requirements of the consistency and reliability of human actions." FREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 64.

³⁹ Canonists agree that administrators' actions must be based on the common good. See G. RAAB, *Rechtsschutz gegenüber der Verwaltung*, Roma. Libreria editrice dell'Università Gregoriana, 1978, p. 260; K. MATTHEWS, "The Development and Future of the Administrative Tribunal," in *Studia canonica*, 18 (1984), p. 120; J.P. BEAL, "Protecting the Rights of Lay Catholics," in *The Jurist*, 47 (1987), p. 131; I. GORDON, "De tribunalibus administrativis propositis a commissione Codice I.C. recognoscendo et suffragatis ab Episcoporum Synodo," in *Periodica*, 57 (1968), p. 610; MOODIE, "The Administrator and the Law," p. 46; D. STAFFA, "Supremus organismus contentioso-administrativus in Ecclesia: introductio. Praesupposita recursus ad Alteram Sectionem Signaturae Apostolicae," in *Periodica*, 67 (1978), p. 525; and MOLLOY, "Administrative Recourse in the Revised Code of Canon Law," in *CLSA Proceedings of the Forty-Fourth Annual Convention*, Washington, DC, CLSA, 1983, p. 263.

intentionally, with the person foreseeing and personally approving the damage in clear consciousness of the unlawfulness of the act.”⁴⁰ Therefore, any harm inflicted by such an act is illegitimate and must be remedied according to c. 128. However, because the illegitimacy of the act may not be readily apparent, it must be proven in a canonical forum before the harm can be remedied.

Though there is no question that unlawful acts performed with an intention to harm are illegitimate, of the types of juridic acts that cause harm this type is the most difficult to prove. This is so for several reasons. First, the juridic act is placed validly, with the person placing it having followed all the necessary external formalities and requirements. Second, the act does not violate the positive law, so it is not overtly illicit. Therefore, to prove the harm was unlawfully inflicted, one must prove to an ecclesiastical tribunal or superior that the other person intentionally acted while ignoring necessary principles of good faith, justice and canonical equity. Proving what has motivated another person’s mind is inherently difficult, and even more so if the person is in a position of authority. This is especially true if the person in authority can provide alternative, justifiable reasons for his actions. Often these cases concern a person who is a subordinate of the decision-maker, which may dissuade the person from taking recourse. However, regardless of the difficulty, if a person can prove that a juridic act was issued with the intent to harm, then that harm must be remedied according to c. 128.

⁴⁰ PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 506. In discussions concerning the intent to harm, canonists have pointed out that sometimes one performs a legitimate act, such as the infliction of a penalty, in which one knows that harm will result to the person being punished. However, the intention of the person inflicting the penalty is not to unlawfully or unjustly harm but to validly punish or reform the person for his own benefit, and for the good of the Church. Intending to harm necessarily implies that the person’s intent is wrongfully motivated rather than being properly motivated.

An example of this type of act would be the following case. It was known throughout a seminary that over the course of six years one of the professors had a serious and sustained personality conflict with one of the students. Over time, the professor made it clear that he did not believe that the seminarian should be ordained. However, over the objections of the professor, the student was ordained and returned to his diocese. Because of a nervous condition, the new priest was assigned only to smaller, rural parishes.

A few years later, the professor was named bishop of the diocese of his former student. The conflict began resurfacing immediately, and the two men had a number of violent disagreements witnessed by other clergy over the course of the next few years. When it was time for new assignments, the bishop, who was aware of the priest's nervous condition, acted against the recommendations of the vicar for clergy, moved the priest from his small, rural parish, and assigned him as pastor of a large, financially troubled inner city parish that also ran a school, a food kitchen and a homeless shelter. The priest objected, saying that he did not have the skills or the health necessary to care for the parish adequately, but nevertheless he was validly assigned over his objections.

Over the course of the next two years, the bishop received repeated letters from the priest, asking for a reassignment. The letters were ignored. After two years in the parish the priest had a nervous breakdown and was hospitalized for a few months. Additionally, his replacement discovered that the parish was in severe financial trouble. If it can be proved that the bishop made this assignment with an intention to harm or punish the priest, and intentionally ignored his later pleas for help, the bishop should be

compelled to remedy the harm he caused, not only to the priest himself but also to the parish that suffered because of the bishop's actions.

Possible remedies should include adequate medical treatment for the priest and a formal apology, as well as helping the priest to either facilitate his return to ministry in whatever capacity he can manage, or to give him adequate financial support in the event that the priest decides to leave active ministry. The bishop could also formally apologize to the parish, assign them a pastor who can adequately care for their needs, and aid them in whatever way the diocese can to get them out of financial trouble. Since the bishop is at fault for the parish's troubles, closing the parish would just compound the harm already inflicted on this parish.

3.1.4.3 – Valid Acts Placed with *Culpa*

The previous section dealt with juridic acts that were placed after the perpetrator intentionally ignored the principles of justice and canonical equity. There is another category of illegitimate juridic acts that also inflict harm, but in this case the harm is negligent rather than intentional. There are times when persons, including persons in positions of authority in the Church, act without being fully informed of the surrounding circumstances. They make hasty, careless, impulsive, uninformed or misinformed decisions which unintentionally cause harm. However, these actions are not just a mistake, because in these circumstances the person placing the act is in a position of responsibility. By virtue of this position, the person has a duty to examine all the circumstances surrounding the decision and to ensure that the decision is in keeping with

principles of justice and canonical equity before issuing a juridic act. If a person who has this duty of care fails to do this, then the juridic act is issued negligently. If harm is inflicted from a negligent juridic act, that act is illegitimate. The harm is therefore unlawfully inflicted and requires a remedy according to c. 128.

In the common law, there are four elements that must be present for an action to be deemed negligent.⁴¹ These elements are easily related not only to canon law in general but also specifically to juridic acts. First, for a juridic act to be negligent, the person placing the act must have a duty of care, which means that the person is responsible for making an informed decision and performing the act in accordance with the principles of justice and canonical equity. Second, the person must have breached that duty of care in some way. Third, that breach must have been the proximate cause of the harm. Finally, there must be some sort of harm inflicted, and this harm must be able to be measurable or provable in some way. All of these elements must be present for an act to be deemed negligent.

This type of illegitimate juridic act is less difficult to prove, because it is easier to prove that a person should have known about the circumstances surrounding an act but for some reason failed to take them into consideration rather than trying to prove a positive intent to harm. In this instance, one is not trying to prove what was another person's intention, just that harm has occurred and that the person making the decision

⁴¹ See J.R. NOLAN et al., "Negligence." *Black's Law Dictionary*, 6th edition, Saint Paul, MN, West Publishing Company, 1991, pp. 716-717.

should have known about the circumstances that inflicted the harm prior to making the decision to act.

An example of this type of act is a bishop who fails to read a sentence of marriage nullity issued by his own tribunal concerning an older seminarian who is about to be ordained. The sentence contains strong and uncontradicted evidence that the man is a pedophile. The bishop neglects to read the sentence, ordains the man, and assigns him to a parish with a school. The newly ordained priest proceeds to abuse a number of children before being arrested by the civil authorities.

This is clearly a case in which the two juridic acts of ordination and assignment are illicit due to the negligence of the bishop. The bishop had a duty to investigate thoroughly the suitability of his candidates, which includes determining why the man's previous attempted marriage was unsuccessful. The bishop also has a duty not to put his priests in situations where they could harm someone, as well as a duty to protect the children of the diocese from harm caused by his priests. The bishop breached these duties, which were the proximate cause of the serious harm that was inflicted. But for the bishop's actions of ordination and assignment, the harm inflicted by the man would not have occurred, at least not by his taking advantage of a trusted position in the Church.⁴²

⁴² One cannot say generally that, but for the bishop's actions harm would not have occurred, because the man very well may have abused other children as a layperson. However, he would not have been a priest of the diocese, and the bishop would not have any personal responsibility for the man's actions. However, by ordaining the man and putting him in direct contact with children, the bishop was negligently responsible for the harm that the priest caused.

3.2 – Processes to Remedy Unlawfully Inflicted Harm Caused by Juridic Acts

Now that what constitutes unlawfully inflicted harm caused by a juridic act has been explored, the next step is to decide how best to remedy the inflicted damage. One must first examine whether the juridic act is a public act or a private act to determine how one must proceed. A basic distinction between the two kinds of acts is that public juridic acts are performed in the name of the Church, while private juridic acts are performed in one's own name. Establishing whether the juridic act is public or private gives a good indication whether one proceeds administratively or contentiously. Next one must examine what specific processes can be utilized to remedy this harm.

There are various processes in the Church that can be used to remedy the unlawfully inflicted harm caused by a juridic act. However, for the harm to be properly remedied, it is critical to know which process is appropriate for each type of juridic act. If the wrong process is attempted, at the very least one loses valuable time and energy. At the worst, it is possible to lose one's ability to have the harm remedied because the time limit for recourse has been exceeded.

Of course, before beginning a formal process, the parties are always encouraged to attempt to settle their differences themselves, or through the use of a conciliatory process such as mediation. In regards to administrative recourse, an attempt at mediation is strongly suggested by c. 1733 §1 prior to any formal action.⁴³ However, since this is not always possible, there are a number of norms both in the Code and in *Pastor bonus*

⁴³ See T. J. PAPROCKI, "Part V: The Method of Proceeding in Administrative Recourse and in the Removal and Transfer of Pastors [cc. 1732-1752]," in *New Commentary on the Code of Canon Law*, pp. 1826-1828.

that dictate which procedure should be used to vindicate the various types of harm inflicted.

Canon 1400 outlines two options available to remedy unlawfully inflicted harm.

Canon 1400 §1 enumerates the objects of a trial, but then in §2 it distinguishes what kind of actions must be heard in an administrative process:

§1. The object of a trial is:

1° the pursuit or vindication of the rights of physical or juridical persons, or the declaration of juridic facts;

2° the imposition or declaration of a penalty for delicts.

§2. Nevertheless, controversies arising from an act of administrative power can be brought only before the superior or an administrative tribunal.

Section 1 allows for persons' rights to be vindicated, for juridic facts to be declared, and for penal actions to be heard in a judicial trial. Section 2 mandates that disputes arising from acts of administrative power must be referred to a superior or to an administrative tribunal. The meaning of "disputes arising from acts of administration" will be explored in a later section. The Apostolic Constitution *Pastor bonus* (PB) also gives direction concerning those cases that can or must be heard by either the Apostolic Signatura (art. 121-125) or the Roman Rota (art. 126-130).⁴⁴ The following sections will examine both public and private juridic acts in an effort to clarify which juridic acts call for which process.

⁴⁴ See JOHN PAUL II, Apostolic Constitution, *Pastor bonus*, June 28, 1988, in *AAS*, 80 (1988), pp. 841-934. English translation in *Code of Canon Law Annotated*, pp. 1237-1239.

3.3 – Harm Unlawfully Inflicted by a Public Juridic Act

Juridic acts are generally classified into two categories, public juridic acts and private juridic acts. The following sections will first discuss public juridic acts and possible avenues of recourse for the harm that these acts can inflict. Then private juridic acts will be discussed, as will the proper procedures needed to remedy harm caused by these acts.

Public juridic acts are generally unilateral, authoritative, and binding acts issued in the name of the Church for the public good.⁴⁵ These juridic acts enact, clarify, change, or revoke laws and administrative acts. They can also create, alter, annul, rescind, or terminate rights.⁴⁶ Juridic acts can be used to declare juridic facts, to render judicial verdicts, to punish or penalize, and to mandate remedies.

There are three broad categories of acts that can be classified as public juridic acts. Public judicial juridic acts consist of penal or contentious sentences, as well as the procedural decrees issued by judges in ecclesiastical tribunals. Public legislative juridic acts, or laws, are issued by those possessing and exercising legislative power. Finally, administrative acts placed by those possessing executive power are public administrative juridic acts. Harm can unlawfully be inflicted by juridic acts in all three categories.

To determine how one must proceed to remedy the harm unlawfully inflicted by a public juridic act, one must determine who issued the public juridic act and in what

⁴⁵ See PREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 46.

⁴⁶ See *ibid.*

capacity that person was acting. For some persons holding ecclesiastical office, it is vital to determine what role the particular officeholder is assuming to be able to determine how to proceed with having one's harm repaired.⁴⁷ For example, bishops have a number of roles that they can be exercising, and how one proceeds depends on the capacity (legislative, executive, or judicial, or personal) in which the bishop is acting.⁴⁸ Parish priests may be acting in the governance of their own parish, or acting as the representative of the juridic person of the parish, or acting in a personal capacity.⁴⁹ Diocesan administrators may be fulfilling a function of their own office, implementing a decision of the bishop, or acting privately. Determining the proper role of the person is vital for knowing how one should proceed.

3.3.1 – Judicial Juridic Acts

Because much has been written about juridic acts in the administrative context, it is easy to overlook juridic acts performed in other circumstances, such as the judicial arena. In the strict sense, a judicial juridic act is "a decision about a disputed matter by a person or college with judicial authority."⁵⁰ The sentences issued by ecclesiastical tribunals in contentious cases, such as marriage cases, or penal cases are all juridic acts. However, judicial juridic acts include more than just judicial sentences. They encompass

⁴⁷ See MOODIE, "The Administrator and the Law," p. 45.

⁴⁸ See J.A. ALESANDRO and A.J. PLACA, "Church Agents and Employees: Legal and Canonical Issues," in *CLSA Proceedings of the Fifty-Eighth Annual Convention*, Washington, DC, CLSA, 1996, p. 42.

⁴⁹ See MOODIE, "The Administrator and the Law," p. 61.

⁵⁰ MOLLOY, "Administrative Recourse in the Revised Code of Canon Law," p. 263.

the many decrees issued during matrimonial, penal, or contentious trials. Harm from such decrees may occur at any stage or grade of trial. These acts are considered public juridic acts because they are unilateral acts published by the court in regards to some procedural or substantive aspect of the trial. The harm caused by an unlawful judicial juridic act can also be a juridic omission, such as violating the rights of a respondent by not publishing the acts of the case in accord with c. 1598. Unlike harmful acts committed by an opposing party, harm from these juridic acts stem from the juridic acts or omissions of the Court itself.

There are a number of ways in which judicial juridic acts can unlawfully inflict harm. The following are some of the most common ways to inflict harm unlawfully by a judicial act. The judicial act can be procedurally invalid because one of the requirements for the validity of the act was omitted. The act can be illicit because it was unjustly or wrongly issued. The act can be illicit because it illegitimately contains material that violates a person's right to his or her good name and reputation (c. 220). The act can be issued without complying with the time limits mandated by the Code (c. 1453). Finally, c. 1620 enumerates a list of acts or juridic omissions of the court that make a judgment (a juridic act) irremediably null, and c. 1622 lists actions that render a judgment remedially null.

3.3.2 – Legislative Juridic Acts

Legislative acts, or laws, are a second form of public juridic act. They are “ordinance[s] passed by a person, or college, with legislative authority for the common

good and affecting everyone in a certain territory, or everyone in a category of persons.”⁵¹ Canon 29 states:

General decrees, by which a competent legislator issues common precepts for a community capable of receiving law, are laws properly speaking and are governed by the prescripts of the canons on laws.

Unlike the other types of public juridic acts, only those possessing legislative power, namely popes, ecumenical councils, bishops, particular councils, and bishops’ conferences, can enact laws.⁵² Clearly, invalid laws can unlawfully inflict harm, and in keeping with c. 128, this harm must be remedied. In addition, laws passed that intentionally or negligently inflict harm can also require a remedy. The processes to remedy this type of harm will be discussed in a later section.

3.3.3 – Acts of Administrative Power, or Administrative Juridic Acts

A third type of public juridic act is administrative in nature. Pope Paul VI first coined the term “acts of administrative power” in Article 106 of *Regimini Ecclesiae universae* in 1967.⁵³ This term was later adopted in two canons of the 1983 Code, cc. 1400 §2, and 1445 §2. Distinguishing between public juridic acts of administrative power, also known as administrative acts, and other types of acts is critical because this determination governs what process is utilized. Though c. 1400 §1 1° sets out the objects

⁵¹ Ibid.

⁵² See cc. 135, 331, 341, 391, 445–446, and 455–456. This is not the place to consider whether the *ius proprium* of certain clerical religious institutes is legislative rather than executive in nature.

⁵³ See PAUL VI, *Regimini Ecclesiae universae*, August 15, 1967, in *AAS*, 59 (1967), pp. 885–928.

of a contentious trial, c. 1400 §2 takes the category of administrative juridic acts out of the realm of contentious trials and reserves them to the realm of administrative recourse:

§2. Nevertheless, controversies arising from an act of administrative power can be brought only before the superior or an administrative tribunal.

Therefore, if an act qualifies as an act of administrative power, it can only be referred to the person's superior to institute hierarchical recourse, or presented to an administrative tribunal. An act of administrative power has been defined as:

...any concrete, direct, and immediate, official, legally binding provision of an ecclesiastical administrative organ, which is issued in the exercise of ecclesiastical administrative power of governance for the external forum for the settlement of an individual case and is directed to the common good of the community.⁵⁴

Another definition of an act of administrative power is an act that is "issued unilaterally by an administrative authority and has legal effect on specific persons, outside the judicial sphere."⁵⁵ This means that this category encompasses most of the juridic acts enacted by persons possessing ordinary or delegated power of governance, including pastors, parochial vicars, deacons, persons responsible for administering a parish in the absence of a pastor, seminary rectors, school principals, hospital administrators, episcopal vicars, vicars general, members of the diocesan curia, bishops, and religious superiors of various levels.⁵⁶ As long as the administrator is acting on behalf of a public juridic

⁵⁴ "...[R]echtsverbindliche Maßnahme eines kirchlichen administrativen Organs, die in Ausübung der kirchlichen administrativen Leitungsgewalt auf dem Gebiet der äußeren Kirchenordnung (= des forum externum) zur Regelung eines Einzelfalles ergeht und auf das öffentliche Wohl der Gemeinschaft ausgerichtet ist." RAAB, *Rechtsschutz gegenüber der Verwaltung*, p. 289. Translated by BEAL, "Protecting the Rights of Lay Catholics," pp. 152-153.

⁵⁵ HAYWARD, *Administrative Justice*, pp. 152-153.

⁵⁶ See F.J. URRUTIA, "Administrative Power in the Church According to the Code of Canon Law," in *Studia canonica*, 20 (1986), pp. 259-261; BEAL, "Protecting the Rights of Lay Catholics," p. 153.

person, his or her acts can be acts of administrative power and public juridic acts. Acts of administrative power are used to apply the law to the daily life of the Church as a means to promote the common good or the *salus animarum*.⁵⁷

In 1990 a Promotor of Justice for the Apostolic Signatura wrote a private opinion on behalf of the Signatura outlining the criteria necessary for determining what constitutes an act of administrative power.⁵⁸ It states that an act of administrative power is the equivalent of an administrative act. It is not the same as an act of administration. There are two requirements necessary for an act to be an administrative act: the act has to be administrative in nature, and it has to come from a person possessing either ordinary or delegated administrative power.⁵⁹ The first requirement, that the act be “administrative in nature,” means simply that the act must “proceed either from administrative authority or from the exercise of administrative power.”⁶⁰ Additionally, the administrator must be acting for the public good.⁶¹

The second requirement is that an administrative act “requires that the individual actually possess an administrative office; only an administrator can place an administrative act.”⁶² In other words, the administrator must be in a position to exercise

⁵⁷ See MATTHEWS, “The Development and Future of the Administrative Tribunal,” pp. 118-119.

⁵⁸ See “Canon 1400 §2: Controversies from an Act of Administrative Power,” in K.W. VANN and L. JARRELL (eds.), *Roman Replies and CLSA Advisory Opinions 1991*, Washington, DC, CLSA, 1991, pp. 32-38.

⁵⁹ See *ibid.*, p. 37.

⁶⁰ *Ibid.*

⁶¹ See GORDON, “De tribunalibus administrativis propositis a commissione,” p. 610; MOODIE, “The Administrator and the Law,” p. 46.

⁶² MOODIE, “The Administrator and the Law,” p. 58.

administrative power for an act to be a juridic administrative act. There are two kinds of administrative power, ordinary power and delegated power. Ordinary power, according to c. 131 §1, is that authority “which is joined to a certain office by the law itself.” The other type of administrative power comes from power that has been delegated from another who possesses either ordinary or delegated administrative power. It is that authority which personally is granted to an individual that arises from a specific act of delegation.⁶³ As long as the administrator has either ordinary or delegated power, and is working for or on behalf of a public juridic person, he or she is able to place a valid administrative act.

Finally, it will be helpful to consider the various kinds of administrative acts. There are general executory decrees, which define more precisely the manner of applying the law, or to urge the observance of the law (c. 31).⁶⁴ Also included in this category are the various diocesan guidelines or policies issued by the bishop or by his vicars.⁶⁵ Instructions are also administrative acts that set out or clarify various provisions of the law.⁶⁶ Singular administrative acts, including decrees, precepts, and rescripts, are all administrative acts (c. 35). Rescripts, which include dispensations, permissions, privileges, and favors, are all administrative acts (c. 59).⁶⁷ Decrees imposing penalties through an administrative procedure are also administrative acts. If one of these

⁶³ See *ibid.*, p. 60.

⁶⁴ For more information on general executory decrees, see URRUTIA, “Administrative Power in the Church According to the Code of Canon Law,” pp. 267-268.

⁶⁵ See MOODIE, “The Administrator and the Law,” p. 56.

⁶⁶ See *ibid.*, p. 47.

administrative acts is unlawfully placed and it causes harm, a determination must be made concerning who is the appropriate physical or juridic person accountable for remedying the harm inflicted.

3.3.4 – Responsibility for Performing a Juridic Act

In addressing the remedy of harm, it is important to determine who can be held responsible for harm that is unlawfully inflicted by a juridic act. This was discussed in Section 2.5 of Chapter 2, but it is also important to mention it specifically in the context of juridic acts. Court personnel who issue judicial juridic acts are responsible for repairing the harm unlawfully inflicted through their juridic acts because they are bound personally to uphold the procedures of the tribunal. While a bishop is ultimately responsible for overseeing the tribunal, it would be exceedingly rare for a bishop to be held personally accountable for harm resulting from an individual case. Additionally, since legislators are bishops acting either in their own capacity or collegially, they are also individually responsible for any harm they might unlawfully inflict.

However, it is less clear in the administrative area, where an administrator may not be acting on his own behalf, but rather is acting on behalf of, and as a representative of, a juridic person. Therefore, if an administrator unlawfully inflicts harm on another, a determination must be made concerning whether that administrator was “performing functions of an organ of ecclesiastical authority,” if the administrator was acting in a private juridic capacity (e.g., entering into a contract on behalf of a parish), or if the

⁶⁷ Harm would not be caused by the granting of a favor, since the petitioner sought the favor.

administrator was acting in a purely personal capacity.⁶⁸ Krukowski defines organs of authority as “physical persons who within the limits of their competence may decide upon administrative acts in the name of ecclesiastical corporate bodies.”⁶⁹

The administrative acts engaged in by administrators on behalf of and in the name of the Church are public juridic acts; hence any harm caused while performing an administrative act may be repaired in virtue of c. 128. But canon law is wary about holding the Church or juridic person responsible for the harmful acts committed by its administrators, and generally holds the administrator personally responsible for the unlawful harm that he or she commits rather than assigning responsibility to the juridic person the administrator represents.⁷⁰ This is seen clearly in the law on temporal goods. If an administrator performs an invalid act that causes harm, the juridic person is liable only to the extent that it benefited from that action (c. 1281). If there was no benefit to the juridic person, then the administrator is personally responsible for the totality of the damage caused.⁷¹ If the administrator’s action is illicit as opposed to being invalid (e.g., c. 1284 §2), both the administrator and the juridic person may be held accountable for any damages caused by the unlawful action.⁷²

Administrators represent a juridic person, and the administrator may unlawfully cause harm to the juridic person he represents. Administrators are personally responsible

⁶⁸ KRUKOWSKI, “Responsibility for Damage,” p. 232.

⁶⁹ Ibid., p. 236.

⁷⁰ See FOLMER, “The Canonization of Civil Law, Part II,” p. 55.

⁷¹ See KRUKOWSKI, “Responsibility for Damage,” pp. 237-238.

for the damage that they cause as long as the juridic person did not benefit from the invalid act. If the harm caused by an administrator's dereliction of duty or failure to perform his canonical obligations is particularly egregious, and can be considered *culpa magna* or gross negligence, not only can he be required to repair the damage caused, but can also be held criminally accountable in virtue of c. 1389, which states that:

§1. A person who abuses an ecclesiastical power or function is to be punished according to the gravity of the act or omission, not excluding privation of office, unless a law or precept has already established the penalty for this abuse.

§2. A person who through culpable negligence illegitimately places or omits an act of ecclesiastical power, ministry, or function with harm to another is to be punished with a just penalty.⁷³

Generally c. 1389 is not invoked; the common practice is to remove the administrator rather than hold the administrator criminally responsible for his actions.⁷⁴

But, if a penal action is initiated against the administrator, an interesting question arises.

If an administrator unlawfully causes harm due to his administrative act, can a contentious action be initiated to have the harm remedied according to c. 1729?⁷⁵

Krukowski argues that c. 1729 provides one circumstance in which a person harmed by

⁷² See J. HITE, "Church Law on Property and Contracts," in *The Jurist*, 44 (1984), p. 124.

⁷³ See also *ibid.*, p. 123.

⁷⁴ See *ibid.*

⁷⁵ See Chapter 2, section 2.1.4 for a discussion of how c. 1729 relates to both penal actions and contentious actions.

an administrative act can seek a contentious process to have that harm remedied.⁷⁶ Even if a penal action is not initiated, it does not relieve the person of the obligation to remedy any harm that may have been unlawfully inflicted.

For example, if a pastor of a parish fails to get the requisite permission (c. 1291) and invalidly alienates a substantial amount of parish property that financially damages the parish, a subsequent pastor cannot make a claim against the diocese to have it remedy the harm that the first pastor inflicted on the parish, unless somehow the diocese was complicit in causing the harm.⁷⁷ Just because the priest is incardinated in the diocese does not mean that the diocese or the bishop is responsible for the unlawful and harmful acts of the priest who was originally appointed to that parish. Rather, that priest is personally liable for the harm that he unlawfully inflicted. In accordance with c. 1389, the bishop can institute a penal action against the pastor for his culpable negligence, and

⁷⁶ See KRUKOWSKI, "Responsibility for Damage," pp. 240-241. This also leads to an interesting conclusion that maybe in this one circumstance, a person harmed by an administrative act and who missed the time limit for recourse can have a second chance to have the harm remedied by bringing a contentious action that runs concurrently to a penal trial. If the act is a private juridic act, such as a dispute over a contract that has inflicted harm, the regular forum to hear this case would be within a contentious trial.

⁷⁷ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 498. This raises an important question of whether a bishop can be held responsible for damages if he assigns a priest to a parish, knowing that the man is financially inept and has caused significant financial troubles in most of his previous parishes. It is also relevant not only in relation to juridic acts, but for other acts committed by clerics. Though there is no vicarious liability doctrine officially recognized by the 1983 Code, there is a canonical tradition of responsibility in the Gregorian Decretals that has bearing on the scandals facing the Church. It states that, "Ignorance does not excuse a prelate for the sins of his subjects. That is in a mystical and moral sense. The pastor is not excused for ignoring the sins of his flock and the ravages that the wolf causes." (A. GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, 2nd edition, Ottawa, Saint Paul University, 1996, p. 119.) Since Church tradition recognizes the mystical and moral responsibility that a prelate has for the actions of his people, does this mean that a bishop bears direct responsibility for the harmful actions of his priests if the bishop has ignored "the sins of his flock and the ravages that the wolf causes," and allowed priests who harm their people to continue in parish ministry?

the subsequent pastor on behalf of the parish could at the same time initiate a contentious action to have the harm remedied in accord with c. 1729.⁷⁸

This scenario is further complicated, because with some exceptions most priests have limited personal funds and are in no position to remunerate a parish for any financial damage that they might cause. In the unlikely event that this type of case ever came before a tribunal, since financial remuneration is not generally possible, a judge or superior would have to think of different and creative ways for the former pastor to remedy the harm he inflicted on his parish. After making the determination concerning who is responsible for unlawfully inflicting the harm, the next step is to determine which process must be used to remedy that harm.

3.4 – Processes to Remedy Harm Caused by a Public Juridic Act

When one has been harmed by a public juridic act, there are various processes by which one can have that harm remedied. Before any of the other options are utilized, it is highly encouraged that the parties attempt to resolve the problem themselves, either

⁷⁸ This situation becomes even more complicated when determining who has standing on behalf of the parish to petition to have the harm remedied in this case. There is no person other than the parish's pastor who has standing to act on behalf of the parish as a juridic person to compel the pastor to remedy the damage he inflicted on the parish. If a member of the finance council discovers the problem, neither she nor any other member of the parish has standing to have the harm inflicted on the parish remedied while the pastor remains in office. If the bishop discovers the situation while the first pastor is still in office, he could remove the priest from the parish and institute a penal action against him, but it requires the representative of the juridic person, namely the pastor himself, to bring an action to have the damage remedied. This requires a subsequent pastor to act on behalf of the parish and against a fellow presbyter to petition to have the harm remedied, a position that few priests would want to be in for very practical reasons. One of the most important and very human reasons is that the new pastor must live the rest of his life in the same diocese with the presbyter against whom he petitioned. This type of action could cause serious enmity and dissention, not only between the two presbyters involved, but also among the general diocesan presbyterate as well.

through direct communication between the parties, or through some sort of conciliatory process like mediation.⁷⁹ In this way the problem can be resolved without the necessity of having a winner and a loser.⁸⁰ Sometimes the problem can be mediated by the diocese's own office of conflict resolution, if the problem is on a diocesan level and does not directly involve the bishop, and if the diocese has such an office. This is certainly a preferable option to any sort of formal process, but on occasion and for various reasons this kind of more informal process is not an option.

If the public juridic act is judicial in nature, in general one follows the procedures set out in the CIC Book VII concerning contentious trials. If the act is legislative, one must approach the Roman Rota because only the Rota can hear a case that involves a bishop as the respondent (*PB* art. 129). If one believes that the law is invalid because it is contrary to universal law, one also can petition the Pontifical Council for the Interpretation of Legislative Texts to review the law (*PB* art. 158). If the act is administrative, one has three options. Depending on the specific case and what is available in one's region, one can take administrative recourse, one can approach an administrative tribunal, and after one of the first two administrative options have been exhausted, one can take contentious-administrative recourse to the Apostolic Signatura. The following sections will discuss these options.

⁷⁹ Mediation will be discussed in further detail in Chapter 4.

⁸⁰ See K.K. SCHWANGER, "Administrative Justice in the Church in Light of Juridical and Theological Considerations," in *The Jurist*, 58 (1998), p. 422.

3.4.1 – Judicial Actions and Appeals

A rather delicate question arises when discussing harm caused by judicial juridic acts, especially in regards to ecclesiastical marriage tribunals. How should harm be remedied if the officials of an ecclesiastical court act unlawfully or unjustly during the conduct of a contentious trial? Within a contentious trial, judges issue decrees and notaries countersign them. Both defenders of the bond and promoters of justice write briefs and can file objections. Procurators and advocates can also submit briefs that become part of the acts of the case.

Canon 1457 recognizes that the competent authority can punish judges, tribunal officers and assistants with appropriate penalties if harm is caused to the litigants through intent to harm or serious negligence. Since tribunal officials are legally accountable for their actions, litigants may hold them responsible for harm unlawfully inflicted as a result of the juridic acts and other official acts performed during the various phases of a contentious trial. It is debatable, however, whether a person who alleges harm could get a hearing without taking the case to the Holy See.

Judicial juridic acts all take place within the context of either a contentious or penal trial. Since they are judicial acts, any juridic act that unlawfully inflicts harm would generally be handled within the framework of a contentious trial rather than being handled administratively. Canon 1459 allows an exception to be raised at any stage or grade of trial as soon as one discovers that a juridic act is defective, so issues concerning invalidity can be raised throughout a trial in first instance, as well as during an appeal. This action could be brought as an incidental matter and handled in accord with cc. 1587-

1591. If harm results from these unlawful acts, then depending on the nature of the juridic act, the person could either petition for a plaint of nullity against an act of the Court or appeal the Court's final decision.⁸¹

Presumably, the issue of a judicial juridic act that unlawfully inflicts harm also could be raised within an appeal to either second or third instance, or could be raised in a separate contentious action if the first trial is already completed. This action could be brought before a new panel of judges in first instance, preferably judges from outside the diocese that could hear the case *ad causam*. In a non-marriage case, the case is reserved to the Rota if one of the parties is a bishop, an abbot primate or abbot superior of a monastic congregation, a supreme moderator of a religious institute of pontifical right, a diocese or other ecclesiastical person having no superior below the Pope himself, or if the Supreme Pontiff commits the case to the Rota.⁸²

For example, the *ponens* of a tribunal writes libelous and calumnious statements in the sentence concerning one of the parties, labeling him an "alcoholic," "manic depressive," or "homosexual," when neither he has admitted this nor his physician diagnosed it.⁸³ This frequently occurs in judicial sentences, and if the evidence does not support the judge's "diagnosis," it could certainly be grounds for an appeal, in which the

⁸¹ See MATTHEWS, "The Development and Future of the Administrative Tribunal," p. 120.

⁸² See *PB* art. 129.

⁸³ The most likely scenario would be the following: a civil lawyer gets a copy of a sentence published to the Respondent which states that the Petitioner is an alcoholic, even though there is no professional diagnosis to these allegations. This official church document is then made public and is used as evidence in a civil forum to renegotiate a child custody dispute, resulting in the Petitioner losing custody of the children. This could also happen if one of the parties is in some form of public life, and the document is "leaked" to the press by a disgruntled former spouse.

appellant could seek reparation for any harm done to his reputation. When the decision is appealed, the aggrieved party could also challenge this characterization in second instance, or third instance if necessary.⁸⁴

If the moral certitude of the court was based on the libelous statements, the appeals court could overturn the judgment of the first instance court. If the trial is already completed and the party subsequently discovers the libelous statements, then the party could institute a contentious trial against the person who inflicted the harm to have the harm remedied. Moreover, the party could request a criminal investigation to punish the court personnel for violating c. 1457 by tarnishing his or her good name unlawfully, and then introduce a concurrent contentious action under c. 1729 to have the harm remedied. If calumny is proved, a penalty could be inflicted (c. 1390) in addition to a remedy being assessed.

Some acts of ecclesiastical courts could have profound moral and financial consequences for both the Church and the parties. For example, a sentence of nullity is issued, but the judgment is irremediably null because the Court violates the respondent's right to a defense by making no attempt to locate the respondent (c. 1620). In reality, the respondent is a local resident with his address listed in the local telephone book. The respondent discovers that a declaration of nullity was granted after reading about the plaintiff's remarriage in the local newspaper. The respondent opposes having his

⁸⁴ Appealing directly to the Rota has both advantages and disadvantages. Given that the harm was inflicted during the first instance trial, it is very likely that the Rota would carefully examine all the circumstances relating to the action that caused the harm, namely the acts of the first instance trial. If other irregularities were found, the Rota could invalidate the sentence, as well as decide on how else to remedy the harm inflicted.

marriage declared null, so he approaches the tribunal and rightfully claims that the sentence is irremediably null according to c. 1620 because he was never contacted or cited.

The unlawfully inflicted harmful effects of the court's negligence in such a case could be profound and extensive. For example, the plaintiff spent significant time, effort, and expense. She underwent an emotional ordeal during the first process for the declaration of nullity, and she did so in good faith. The plaintiff and the man with whom she recently attempted marriage had spent a great deal of time, emotion and energy preparing for their marriage and future life together. They may have children from previous unions, whose lives would certainly be affected by such a determination. They also may have spent a great deal of money purchasing a house and paying for a wedding that they now know is invalid through no fault of their own. They are currently living together in an irregular union, which produces spiritual and emotional turmoil. To make matters worse, if the plaintiff is a teacher in a Catholic institution where there is a morality clause in her contract concerning termination of employment for persons in irregular marriages, this could have significant financial effects and injure her reputation. The potential for damages in such a case is real, and the damages could well be severe. The tribunal is morally and legally responsible for the emotional, spiritual, and financial harm that it has unlawfully inflicted.

Because this is a case of a judicial and not an administrative juridic act, the remedy of this harm generally would need to be pursued in a contentious process.⁸⁵ Since the persons inflicting the damage are the tribunal officials in first instance, the second instance court could hear this case during an appeal. Another option is to declare the first instance sentence null, and have the bishop of the diocese of first instance bring in other independent judges *ad causam* to hear the marriage case and contentious case at first instance.

Another frequently occurring example is the grossly delayed action of ecclesiastical tribunals. Canon 1453 obliges judges not to prolong unduly their cases.⁸⁶ First instance cases should be completed and decrees of nullity issued within a year, and second instance cases are to be completed within six months. However, due to lack of adequate personnel, equipment, funding, and support, the time length of cases often extends considerably beyond than a year and a half, and sometimes can be prolonged for years. The violation of canonical time limits clearly makes the process illicit under ecclesiastical law. Canon law has recognized the damage that can be done when decrees

⁸⁵ However, there is a possibility that an act of this kind could require administrative recourse rather than a contentious trial. For example, a Respondent is very upset that he was not notified about the examination of his marriage, and he wants to prevent this from ever happening again. The Respondent approaches the bishop, tells him about his situation, and presents him with a letter asking him to take formal action to prevent it from happening again. The bishop tells him that he will take care of the problem, but no formal precept was issued. If no action has been taken after the person was assured of such action, the person could then petition for administrative recourse in accord with c. 57, which allows a person to take recourse in the event that a decree or precept is not issued.

⁸⁶ This emphasis on the importance of timeliness in adjudicating legal matters is not only enshrined in the equitable principle, "justice delayed is justice denied," but the 1991 Synod of Bishops also mentioned it when they stated the principle that for justice to be complete, its procedure should be swift. See SYNOD OF BISHOPS, statement, *Justice in the World*, November 30, 1971, n. 45. English version in J. GREMILLION, *The Gospel of Peace and Justice, Catholic Social Teaching Since Pope John*, Maryknoll, Orbis, 1976, p. 523.

and rescripts are not issued in a timely fashion in the administrative forum, and c. 57 permits that any harm done by the illicit delay or non-issuance of a decree can be remedied by taking recourse. Certainly, if that recognition is applied in administrative cases, it is only just and equitable that tribunals that unlawfully extend their time limits before issuing their final decrees ought to be held responsible for the harm that they illegitimately and unlawfully inflict on the parties that have approached them.⁸⁷

The illegitimate extension of the time necessary to process cases and issue final declarations of nullity can have profound ramifications for parties, especially those waiting to remarry and have children. For example, a 38 year-old, devoutly Catholic man submits a petition to his local tribunal, and the case subsequently takes four and a half years before both instances issue a decree of nullity. The woman he wants to marry, also a devout Catholic, who was 36 at the time he filed the case, is now over 40 years old at its completion. This couple would never consider entering into a union outside the Church. Has the tribunal's failure to comply with the time limits set by the Code deprived this couple of the possibility of having children? This scenario is played out repeatedly in

⁸⁷ Ultimately the diocesan bishop is responsible for ensuring that his tribunal operates in a legal and lawful manner. If time limits are abused, one could request a penal investigation alleging that the parties have been harmed by the serious negligence of the court in accord with c. 1457. This would be a separate issue than the request for the remedy of the harm, though the cases could be heard concurrently in virtue of c. 1729.

tribunals all over the world while the faithful wait patiently, sometimes for years, for their declaration of nullity.⁸⁸

Neglecting to observe procedural time limits undoubtedly is illicit because it is in violation of ecclesiastical law, and any harm that results must be remedied. As in the previous example, this case would have to be pursued in a contentious forum, either before a new and independent *turmus* in first instance, on appeal in second instance, or appealed directly to the Rota after the lengthy first instance case. Since the grounds of case, the cause of the harm, and the seriousness of the subject matter are all time sensitive, it would be interesting to observe if the Rota would expedite their processing of this kind of case, given that the time limits cited in the Code are not applicable to them.

3.4.2 – Processes for Legislative Acts

Because a law is not an act of administrative power but is rather of legislative power, any harm resulting from such an act would be addressed in a contentious process rather than through an administrative process. If they are in accord with the divine law, the legislative acts of popes and ecumenical councils can never be contested, and this includes the legislative acts of the dicasteries that have been confirmed *in forma specifica*

⁸⁸ There are some very human concerns that arise when the courts do not comply with canonical time limits in processing cases, and in many cases the Church is not very good in recognizing and addressing these important concerns. This issue of the desire for children arises frequently, as people are forced to wait years for a final judgment by the court. Because of very valid concerns, faithful and devout Catholics find themselves in a biological and moral dilemma that force them to choose between waiting years for the Church's judgment and entering into an invalid civil union so that they can attempt to have children before it becomes a biological impossibility. It is the tardiness of tribunals that puts the faithful in this dilemma, and it causes great anguish to the parties involved.

by the Pope.⁸⁹ By extension, one cannot make a claim that these laws unlawfully inflicted harm, unless this harm was caused by the law's violation of the divine law,⁹⁰ because according to c. 1404, the First See is judged by no one. According to c. 1405, ecclesiastical judges are absolutely incompetent to review any act or instrument confirmed by the Pope, which would include the acts of an ecumenical council, so no ecclesiastical forum would be competent to hear such a case.⁹¹

The only types of laws that can be challenged to an authority below the Pope or an ecumenical council are legislative acts enacted by bishops, particular councils, and bishops' conferences. If a particular law is contrary to the universal law, it can be challenged before the Pontifical Council for the Interpretation of Legislative Texts. If a person who has been directly affected by a law believes that law to be invalid, he or she can petition the Council to review it, because *PB*, article 158, states that:

At the request of those interested, this Council determines whether particular laws and general decrees issued by legislators below the level of the supreme authority are in agreement or not with the universal laws of the Church.

⁸⁹ See K.K. SCHWANGER, "Contentious-Administrative Recourse Before the Supreme Tribunal of the Apostolic Signatura," in *The Jurist*, 58 (1998), pp. 178-179. See also footnote 28 in URRUTIA, "Administrative Power in the Church According to the Code of Canon Law," pp. 266-267.

⁹⁰ For example, if a universal law had unforeseen negative consequences that amounted to an injustice, the Pope could be petitioned to have him remedy the harm by abrogating or derogating from the law.

⁹¹ There has been a canonical tradition known as the "right of remonstrance," which allows a bishop to petition the pope on the grounds that the observance of that law in his diocese would be unjust or unduly burdensome. See H.J. GUTH, *Ius remonstrandi: Das Remonstrationsrecht des Diözesanbischofs im kanonischen Recht*, Freiburger Veröffentlichungen zum Religionsrecht, vol. 4, Freiburg, Universitätsverlag Freiburg Schweiz, 1999; L. DE LUCA, "Lo 'jus remonstrandi' contro gli atti legislative del Pontefice," in *Studi in onore di Vincenzo del Giudice*, Milano, Giuffrè, 1953, pp. 243-273; and J. HÄRING, "De iure remonstrationis episcoporum contra leges et mandata Sedis Apostolicae," in *Miscellanea Vermeersch. Scritti pubblicati in onore del R. P. Arturo Vermeersch S.J.*, vol. 1, Roma, Pontificia Università Gregoriana, 1935, pp. 321-326.

If the Council determines that the law is contrary to universal law, then it can declare such a law invalid (c. 135 §2). However, the Council is able to determine only whether the law is in keeping with the universal law; it is not empowered to mandate a remedy for harm that already has been inflicted. If the universal law has unlawfully inflicted damage, and a dispensation from the law is not possible (cf. cc. 86-87), then a remedy of harm could be sought from the Pope himself. A direct petition to the Holy Father is known as a *provocatio*. A case can be referred to or introduced before the Holy Father at any stage or grade of trial (c. 1417).⁹²

Of course, one could also attempt to have the harm remedied in a less formal matter if the legislator is one's diocesan bishop. One could certainly approach the bishop, explain the situation and the harm that the law has caused, and ask that the harm be remedied or ask for an exception to be made.⁹³ It is possible that the bishop was unaware of the harm that the law inflicted, and he could decide to remedy the harm of his own accord. However, if a remedy is not forthcoming, then one's only option is to contest the law formally or to petition a higher authority for a dispensation or other remedy, if the case calls for it.

⁹² Though c. 1417 states that these cases are referred to the Holy See, its counterpart, c. 1059 in the CCEO, clarifies the meaning of c. 1417 by specifically stating that one brings a *provocatio* directly to the Holy Father.

⁹³ It is possible in certain circumstances to avoid the law's effect through dispensations, privileges, and indults. However, these are exceptions to the law and do not allow for the challenge of the law itself. They merely restrict the application of the law from applying to certain persons or groups. Harmful laws can also be avoided by their non-observance, whether by way of *epikeia*, excusing causes, contrary customs, or the non-reception of the law by the community.

The law is unclear to whom a formal petition should be presented because “canon law has no established procedure for challenging allegedly unjust laws.”⁹⁴ However, since the legislator will always be either a bishop or a group of bishops, the Roman Rota presumably is the proper body to hear a case alleging that a bishop unlawfully inflicted harm when he promulgated a diocesan law. According to art. 129 §1, the Rota is the proper court of first instance for all contentious matters involving bishops, unless it involves the rights or temporal goods of a bishop in his capacity as the representative of a juridic person. Such a case would follow the procedures adopted by the Rota to pursue a contentious trial in first instance. After formally requesting that the legislator reconsider his decision, one could use c. 128 to petition the Rota for the remedy of unlawfully inflicted harm resulting from legislative juridic acts issued by bishops, particular councils, or bishops’ conferences.

Conceivably, c. 128 could be invoked if a law can be proved to be invalid and has subsequently inflicted harm. Rather than petition for the law to be revoked or changed because it is perceived to be unjust, the petition could allege that the harm inflicted by the law was manifestly unlawful because of the law’s being invalid, and according to the natural law that harm must be remedied, as reflected in c. 128. In addition, persons harmed by the law may request that the legislator grant them a dispensation or exemption from the law. This would not remedy harm already caused by the law but only prevent the law from inflicting additional harm, unless the harmful effects of the law had not yet been inflicted due to the subject’s refusal to comply with the law.

⁹⁴ BEAL, “Protecting the Rights of Lay Catholics,” p. 131.

3.4.3 – Administrative Recourse

The final group of processes concerns recourse for unlawfully inflicted harm caused by an administrative act. One might question why the Church needs any processes to challenge the decisions of a superior or hierarchy. Since Vatican II, the faithful have become more active in their participation in the mission of the Church, and canon law has helped to facilitate this participation. One of the results of this greater participation is that it has increased exponentially the “potential for tension and conflict between the rights of the faithful and the decisions of administrative authorities” because the faithful are no longer just “passive recipients of clerical ministration.”⁹⁵ Though there are persons who at times consider this type of greater participation of the faithful at best to be a nuisance and at worst to be disobedience, having working processes to facilitate administrative recourse is critical because it “bears on the concrete capacity for members of the faithful to fulfill essential baptismal obligations and rights.”⁹⁶

Administrative recourse is to the administrative realm what appeal is to the judicial realm.⁹⁷ John Beal states that recourse is a legal remedy for persons who believe that an administrative act has caused them to be unlawfully injured, or that the implementation of a promulgated but not executed administrative act will cause them to

⁹⁵ J.P. BEAL, “Administrative Tribunals in the Church: An Idea Whose Time Has Come or an Idea Whose Time Has Gone?” in *CLSA Proceedings of the Fifty-Fifth Annual Convention*, Washington, DC, CLSA, 1993, pp. 50-51.

⁹⁶ *Ibid.*, p. 51.

⁹⁷ See BEAL, “Protecting the Rights of Lay Catholics,” p. 158. See also J.F. NOUBEL, “Les recours administratifs dans le Code de droit canonique,” in *Revue de droit canonique*, 10 (1960), pp. 97-140.

be harmed.⁹⁸ If someone has suffered from the unlawful infliction of harm caused by a public juridic act, and specifically an act of administrative power, c. 1400 §2 requires that, rather than using a contentious process, the harmed person must utilize an administrative forum.

Generally speaking, one can take recourse against “any act of an administrator using administrative or executive power that affects a person or group in the external forum.”⁹⁹ This statement is true, with the exception of acts of the Roman Pontiff, or an ecumenical council, or acts of the dicasteries that have been approved *in forma specifica* by the Pope.¹⁰⁰ These acts are non-impugnable according to cc. 1732 and 1734. Michael Moodie broadly defines particular administrative acts, which are impugnable according to c. 1732, as the act of any public administrative office that violates the law or a person’s rights.¹⁰¹ These acts are subject to administrative recourse “whether that action be written or oral, formal or informal. If an official can hire or fire, make contracts, or deny individuals the exercise of their rights, then the official’s actions would fall under the norm of c. 1732.”¹⁰² This definition may, however, be overly broad and would include some acts that rightfully are characterized as private juridic acts rather than public ones.

⁹⁸ See BEAL, “Protecting the Rights of Lay Catholics,” p. 158.

⁹⁹ J.C. MESZAROS, “Procedures of Administrative Recourse,” in *The Jurist*, 46 (1986), p. 114.

¹⁰⁰ See *ibid.* See also SCHWANGER, “Contentious-Administrative Recourse,” p. 179.

¹⁰¹ See MOODIE, “The Administrator and the Law,” p. 62.

¹⁰² *Ibid.*

A person may have recourse against any decree, precept, rescript, privilege, dispensation, permission, and generally against any administrative act made by a Church authority outside of judicial proceedings.¹⁰³ There are three ways that one can take recourse for an administrative act. Depending on the circumstances, one harmed by an administrative act can petition for hierarchical recourse, utilize an administrative tribunal, or if one has exhausted all other available processes, one can have the recourse reviewed by the second section of the Apostolic Signatura.

For hierarchical recourse as well as for administrative tribunals, as long as one has a just motive (c. 1737), recourse can be used not only to challenge both the substantive and procedural legality of the act but also the damage caused by the illegal administrative act.¹⁰⁴ This means that, in accord with c. 128, the recourse can result in a determination concerning the legality of the underlying act. If the act is determined to be unlawful (either invalid or illicit), then the superior can assign a remedy to repair the harm inflicted. However, the burden of proof is on the petitioner of the recourse because the presumption is that the act of the administrator is both legal and proper.¹⁰⁵

If one remains dissatisfied with the results after utilizing either hierarchical recourse or an administrative tribunal, one can petition for a hearing before the Apostolic

¹⁰³ See D. L. BARR, *The Right to One's Reputation: Applicable Legislation in the United States of America*, JCD diss., Ottawa, Saint Paul University, Faculty of Canon Law, 1993, p. 64. See cc. 57 and 59. Privileges, dispensations, permissions, and any favors granted by rescript would not be the subject of recourse since they benefit the petitioner. However, the denial of a favor or the omission of a rescript is subject to recourse. Likewise, a third party might be harmed by a favor given to another, which could be subject to recourse.

¹⁰⁴ See KRUKOWSKI, "Responsibility for Damage," p. 240.

¹⁰⁵ See BEAL, "Protecting the Rights of Lay Catholics," p. 159.

Signatura. This is actually an administrative-contentious process rather than simply a superior's review of his subordinate's actions, though the Signatura's scope of review is narrower than the other two processes. The norms governing the Signatura do not permit the discretionary acts of an administrator to be challenged. However, it does review claims that a law was violated, as well as claims that the petitioner was damaged by the illegal action (*PB* art. 123). The following sections will explore all three administrative options for recourse.

3.4.3.1 – Hierarchical Recourse

The first and most common option is hierarchical recourse. The norms pertaining to hierarchical recourse are found in cc. 1732-1739. Before a formal process begins, the parties are encouraged to mediate the problem in accord with c. 1733. If this fails or mediation is not a feasible option, then one initiates a formal administrative process.

To begin a process to have unlawfully inflicted harm remedied through hierarchical recourse, a person has ten canonical days from the time the administrative act was issued to submit a written petition to the author of the act claiming that he or she has suffered from unlawfully inflicted harm, and asking the author to reconsider the act. According to c. 1735, within the next thirty days the author of the act can revoke it entirely, or amend it by issuing a new decree, or reject the petition and let the act stand. In addition, if the juridic act has unlawfully inflicted harm, the author has the opportunity to voluntarily comply with c. 128 and remedy the harm that he or she committed. If the person remains unsatisfied with the response of the author of the act, or if the person does

not receive any response within three months, the person then has the right to take recourse with the person's hierarchical superior (c. 1737). This recourse must be made within fifteen days from the time that the person was notified of the administrator's response, or after the three months have expired. According to c. 1739, the superior has seven options that allow him to: revoke it, amend it, confirm it, declare it invalid, abrogate it, substitute another in its place, or rescind it.

If the administrator against whom recourse is taken is the diocesan bishop, then recourse is made to the competent Roman congregation.¹⁰⁶ If recourse is made against someone who is directly subject to the diocesan bishop, the case goes immediately to the bishop because he is that person's immediate superior (c. 1734 §3 1°), unless that person was merely executing an act of the bishop. In that case the act is the bishop's and not his subordinate's, and it must be forwarded to the appropriate Roman dicastery.¹⁰⁷

The public juridic acts of administrative authorities not directly subject to the diocesan bishop follow the standard procedure for administrative recourse.¹⁰⁸ Recourse against a public juridic act of a religious superior is taken to the higher superior. If recourse is taken against the act of a local superior, it is first taken to the major superior (usually the provincial), then to the supreme moderator, and finally to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. If the petitioner

¹⁰⁶ See MESZAROS, "Procedures of Administrative Recourse," p. 114.

¹⁰⁷ See *ibid.*

¹⁰⁸ Meszaros gives a number of examples of persons in middle management to whom this would apply, for example: teachers or professors in Catholic education, school boards, religious education boards, employees of charitable agencies, health and hospital employees, etc. See *ibid.*, pp. 114-115.

remains dissatisfied after the competent Roman congregation hears the recourse and issues a decision, or if one has not received a response within the requisite three-month time limit, according to Article 123 of *Pastor bonus*, the next step is to take recourse with the Apostolic Signatura.¹⁰⁹ The process for cases sent to the Signatura will be discussed in a later section.

When recourse is made to an administrator's superior, the aggrieved person submits a petition containing the evidence supporting his or her claim. If the claim is based on c. 128, the petition should explain why the underlying act is either invalid, illicit, or unjust and how it unlawfully inflicted harm on the petitioner. Since there are no written procedures governing how recourse is to be reviewed, superior administrators, religious superiors, bishops, and congregations are able to proceed in whatever fashion they feel is just and equitable.¹¹⁰ This means that the petitioner's ability and opportunity to present supporting evidence of the claim, and his or her ability to review the acts of the case, will depend on the discretion of the person or dicastery reviewing the case, as well as the nature of the case itself.¹¹¹

¹⁰⁹ If the decision of the superior goes against the decision of the subordinate, the subordinate also has the right to appeal that decision all the way to the Signatura.

¹¹⁰ See J.H. PROVOST, "Recent Experiences of Administrative Recourse to the Apostolic See," in *The Jurist*, 46 (1986), p. 149.

¹¹¹ See SCHWANGER, "Administrative Justice in the Church," p. 422; PROVOST, "Recent Experiences of Administrative Recourse to the Apostolic See," p. 149.

3.4.3.1.1 – Available Remedies

Hierarchical superiors hearing recourse have great discretion in their choice of remedy. They are not only able to make a determination on the legality of the act, but also whether the administrative act was opportune.¹¹² According to c. 1739, superiors are able to confirm the underlying act or declare it null if they believe that the act is invalid. They can also rescind it if the act is rescindable; they can revoke the act altogether, amend it, replace it (*subrogare*), or modify it (*obrogare*).

Though the Code clearly allows a superior to confirm, rescind, revoke, amend, etc. an act, the canons on hierarchical recourse do not explicitly state that a superior can compel a subordinate to remedy the harm that he or she has unlawfully inflicted. According to Pedro Lombardía, c. 57 §3 does establish the principle that administrative authorities are “liable for any damage [that his or her] activities may cause [and] dispels any doubt about the applicability of the principles of c. 128 to the activity of those holding offices with executive power.”¹¹³ However, there is no canon that specifically authorizes superiors to require the reparation of damages during recourse.

This having been said, it does not make sense to say that a hierarchical superior possesses broad power and discretion to decide the disposition of the underlying juridic act, but does not have the power to compel his subordinate to remedy any harm that he or she caused. An injured party’s only option is to take recourse to challenge an administrative juridic act in an administrative forum, which eliminates the possibility of a

¹¹² See BEAL, “Protecting the Rights of Lay Catholics,” p. 159.

¹¹³ OTADUY, “Canons 1-95,” *Code of Canon Law Annotated*, p. 109.

challenge in a contentious trial. It is illogical to say that c. 128, which specifically mentions juridic acts and is located in the section in the Code specifically concerning juridic acts, can be applied only in contentious actions, before the Signatura, or in an action before an administrative tribunal, but not in hierarchical recourse. It is even less logical to think that an aggrieved party has to go through exhaustive and essentially meaningless levels of hierarchical recourse just so that the party could petition the Signatura specifically to have an adjudication concerning damages.¹¹⁴ It is equally unreasonable that the harm inflicted by an illegal administrative act can be remedied only if the administrator is charged with a penal offense, and the aggrieved party can have the harm remedied only if he or she files a concurrent contentious action in accord with c. 1729.

To apply the universal norm of c. 128, a superior must have the authority to require a subordinate to remedy any unlawfully inflicted harm, or c. 128 has no meaning. Therefore, it is logical to hold that those persons adjudicating actions of hierarchical recourse are also competent to adjudicate the reparation of damage claims. This authority to repair harm is the exercise of the executive power of an administrative authority, the power to make a decision by means of a singular decree (cf. cc. 48; 16 §3).¹¹⁵

¹¹⁴ The Signatura has the specific mandate to adjudicate the reparation of damages according to *PB* art. 123.

¹¹⁵ On the exercise of executive power by lay superiors, see J.M. HUELS, "The Power of Governance and its Exercise by Lay Persons: A Juridical Approach," in *Studia canonica*, 35 (2001), pp. 59-96.

3.4.3.1.2 – Potential Drawbacks to Administrative Recourse

Though there are a number of benefits of using administrative recourse to remedy unlawfully inflicted harm, there are drawbacks as well. It is a commonly held opinion among canonists that, of the different canonical processes, administrative recourse is the least able to protect the rights of the people.¹¹⁶ Even the 1967 Synod of Bishops recognized this fact when it asserted:

The common opinion of canonists is that administrative recourses are not a little lacking in ecclesiastical practice and in the administration of justice. Hence, the necessity is perceived everywhere to establish administrative tribunals in the church according to grade and kind, so that the defense of rights in the same tribunals should have its proper and canonical procedure.¹¹⁷

There are various reasons for this view. First, on a local level, it is the diocesan bishop who receives the petition for recourse against a subordinate. The recourse is against someone he has employed, or someone with an office in the diocese, or is a cleric incardinated within his own diocese. The superior's understandable concern over poisoning his relationship with his subordinate creates "official, psychological, and personal pressure" to uphold the action of the subordinate.¹¹⁸

¹¹⁶ See BEAL, "Protecting the Rights of Lay Catholics," p. 161; C. LEFEBVRE, "De recursibus administrativis in iure canonico lineamenta historica," in *Monitor ecclesiasticus*, 99 (1974), pp. 197-222; and GORDON, "De tribunalibus administrativis propositis a commissione," p. 603.

¹¹⁷ The full quote reads, "Dum in Codice Iuris Canonici recursus et appellationes iudiciales sufficienter regulatae secundum iustitiae exigentias reputantur, e contra communis opinio canonistarum censet recursus administrativos non parum deficere in ecclesiastica praxi et administratione iustitiae. Exinde necessitas ubique persentitur ordinandi in Ecclesia tribunalia administrativa secundum gradus et species, ita ut defensio iurium in eisdem habeat propriam et canonicam proceduram quae apud auctoritates diversi gradus apte evolvatur." PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, "Principia quae Codicis iuris canonici recognitionem dirigant," in *Communicationes*, 1 (1969), p. 83.

¹¹⁸ BEAL, "Protecting the Rights of Lay Catholics," p. 161.

The second drawback is that, while superiors have a great amount of discretion in deciding cases of recourse, this discretion is more open to abuse than in a formal judicial process. There are fewer protections for a petitioner than in a contentious process or in an administrative tribunal. Much of the procedure is left to the discretion of the superior, which can leave a party with very little input after the initial petition is filed. The superior is under no obligation to keep the petitioner informed of anything other than issuing a response in a timely manner. Because there is great emphasis placed on the common good, often superiors put greater weight on an unconditional deference to authority than on the petitioner's right to defense.¹¹⁹

Third, even if the superior is able to decide the recourse in a completely fair and evenhanded manner, there remains the appearance of favoritism if the recourse is decided in the subordinate's favor. The dissatisfied petitioner may believe that the superior was either unduly trying to protect his subordinate, or that the superior did not give the recourse the attention and priority that the petitioner felt the recourse deserved.¹²⁰

Hierarchical recourse also can be confusing, especially when it comes to understanding the various competencies, complexities and procedures of the Roman dicasteries. Sometimes just attempting to determine who has competency to hear one's recourse is a bewildering ordeal. Nonetheless, due to the time limits involved and the issues at stake, it is critical that one petitions for recourse in a timely manner.

¹¹⁹ See MATTHEWS, "The Development and Future of the Administrative Tribunal," p. 121; and A. RANAUDO, "Il contenzioso amministrativo canonico," in *Monitor ecclesiasticus*, 93 (1968), p. 551.

¹²⁰ See BEAL, "Protecting the Rights of Lay Catholics," p. 161.

Communication is also frequently a problem. Even with an advocate, communication with the dicasteries is difficult, and it can be hard to find someone who knows where one's recourse stands once it has been filed. It is also not unheard of for more than one person within a dicastery to respond to the recourse with conflicting answers.¹²¹

Additionally, having connections with someone in the dicastery often can influence the disposition of one's case.¹²² If the recourse is filed against a bishop, often the petitioner or his advocate is not notified of the result of the recourse. Only the bishop is notified, and it is up to him to inform the petitioner or advocate of the results of the recourse.¹²³

Finally, a timely review of the recourse generally cannot be expected from the Holy See. Though for some types of recourse this may not be as large an issue, in some cases it can be critical. In a case previously addressed, a priest takes recourse to the Holy See because he received a letter from his bishop stating that he was suspended due to an accusation of impropriety. Additionally, he had 24 hours to vacate the rectory, and his salary and health benefits were being cut off at the end of the month. He wants his letter of suspension declared invalid so that the diocese must reinstate his salary and benefits until his case is properly investigated. For this priest, timely recourse is imperative to avoid severe financial repercussions as well as the harm to his reputation. Nevertheless, cases such as this one have been known to take over a year before the recourse is addressed, and by then the damage has been compounded. Unfortunately, there does not

¹²¹ See PROVOST, "Recent Experiences of Administrative Recourse to the Apostolic See," p. 146.

¹²² See *ibid.*, pp. 147, 159.

¹²³ See *ibid.*, p. 149.

seem to be any way to expedite the recourse, nor is there a legal way to guarantee that the effects of the act are suspended during the recourse. Finally, there is no guarantee that the congregation's decision will be enforced following the recourse, because the congregations are reluctant to use coercive measures against bishops to compel enforcement of their decisions.

3.4.3.2 – Administrative Tribunals

An administrative tribunal is a hybrid between hierarchical recourse and a contentious trial. It is “a judicial forum in which a panel of judges adjudicates claims that an administrative decision violated the law, either because the procedure followed was defective, or because the grounds on which it was based was erroneous.”¹²⁴ An administrative tribunal has fewer remedies available to it than does an administrator who is judging hierarchical recourse, because the tribunal is only able to 1) confirm an act by determining that it is legitimate, or 2) determine that the act is illegitimate and either rescind it or declare it null.¹²⁵ The tribunal also is able to adjudicate any claim that harm was unlawfully inflicted and mandate the reparation of that harm.

In 1967, the Synod of Bishops drafted ten principles to govern the revision of the Code. One of these principles called for the creation of administrative tribunals of

¹²⁴ PAPROCKI, “Part V: The Method of Proceeding in Administrative Recourse,” p. 1824.

¹²⁵ See *ibid.*; see also MOLLOY, “Administrative Recourse in the Revised Code of Canon Law,” p. 271.

various grades so that the rights of the people could be protected and adjudicated.¹²⁶ In the years following the Synod, Paul VI created a special committee to draft the norms creating administrative tribunals.¹²⁷ The committee drafted norms on establishing and regulating administrative tribunals.

Administrative tribunals originally were to be mandatory, but later the committee decided that they should be optional, with the decision being left to the various conferences of bishops. These provisions were included in the 1980 draft revision of the Code. However, due to theological concerns over bishops having their decisions reviewed by their own tribunals rather than the Holy See,¹²⁸ practical considerations, including the lack of appropriately trained staff, and fears that these tribunals could cause the faithful to become increasingly litigious, the section concerning the creation of local administrative tribunals was not promulgated in the 1983 Code.¹²⁹ Despite the section being excised, two references to administrative tribunals remain in the Code. The common opinion is that these two canons were retained deliberately, given that there were opportunities for them to be excised in a list of corrections published after the

¹²⁶ See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, "Principia quae codicis iuris canonici recognitionem dirigant," p. 83.

¹²⁷ See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema de procedura administrativa*, Vatican City, Typis polyglottis Vaticanis, 1972.

¹²⁸ See R. TORFS, "Rights in Canon Law: Real, Ideal, or Fluff?" in *CLSA Proceedings of the Sixty-First Annual Convention*, Washington, DC. CLSA, 1999, p. 368.

¹²⁹ See PAPROCKI, "Part V: The Method of Proceeding in Administrative Recourse," p. 1824; and HAYWARD, *Administrative Justice*, p. 121.

promulgation of the Code.¹³⁰ The first is c. 1400 §2, which reads: "Nevertheless, controversies arising from an act of administrative power can be brought only before the superior or an administrative tribunal." The other reference to administrative tribunals comes in c. 149 §2, which reads:

§2. Provision of an ecclesiastical office made to one who lacks the requisite qualities is invalid only if the qualities are expressly required for validity of the provision by universal or particular law or by the law of the foundation. Otherwise it is valid but can be rescinded by a decree of the competent authority or by a sentence of an administrative tribunal.

It is evident that the Code contemplates and allows for the creation of lower administrative tribunals. However, there are almost no administrative tribunals in existence. In 1991, the Canon Law Society of America published guidelines for the establishment of both diocesan and regional tribunals.¹³¹ In addition, the CLSA attempted to implement a few administrative tribunals *ad experimentum*. The Archdiocese of St. Paul/Minneapolis and the Archdiocese of Milwaukee have experimented with administrative tribunals, but administrative tribunals have not been implemented elsewhere.¹³² In a notification sent to the Archbishop of Milwaukee, the Signatura made it clear that an indult to create larger numbers of first instance administrative tribunals on a

¹³⁰ See HAYWARD, *Administrative Justice*, p. 124; J. OCHOA, "I processi canonici in generale," in *Apollinaris*, 57 (1984), pp. 201-202; MATTHEWS, "The Development and Future of the Administrative Tribunal," pp. 187-194; J. HERRANZ, "La giustizia amministrativa nella Chiesa dal Concilio Vaticano II al Codice del 1983," in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, Libreria editrice Vaticana, 1991, p. 26.

¹³¹ See CANON LAW SOCIETY OF AMERICA, *Protection of Rights in the Church: Revised Report of the Canon Law Society of America on the Subject of Due Process*, Washington, DC, CLSA, 1991.

¹³² See P. MCGREEVY et al., "The Final Report on the Committee on the Experiment on Due Process in the Church," in *CLSA Proceedings of the Sixty-First Annual Convention*, Washington, DC, CLSA, 1999, p. 147.

permanent basis would not be forthcoming.¹³³ The final report published by the CLSA on these experimental tribunals speculates that the Signatura “sees such courts peculiar to the administrative style of a particular bishop” rather than a process that should be implemented on a widespread basis.¹³⁴ Kevin Matthews has posited that maybe ecclesiastical administrative law is just beginning to develop, and that more time is needed before it matures enough to warrant the implementation of administrative tribunals.¹³⁵

This lack of established and functioning administrative tribunals is obviously its biggest drawback. Part of the problem is that diocesan canonists are already overextended in the marriage tribunal, chancery, and parishes. Adding another tribunal to a diocese requires additional trained personnel with canonical expertise.¹³⁶ This is expensive, and resources and personnel are often lacking.¹³⁷ At this time, while hierarchical recourse is readily available, there is “no judicial remedy easily accessible to those in the Church who feel their rights have been violated by administrative acts.”¹³⁸ Therefore, administrative tribunals are not now a practical option for remedying unlawfully inflicted harm except in the very few dioceses where they exist.

¹³³ See *ibid.*, p. 153.

¹³⁴ *Ibid.*

¹³⁵ See MATTHEWS, “The Development and Future of the Administrative Tribunal,” p. 193.

¹³⁶ See MCGREEVY, “The Final Report,” p. 149.

¹³⁷ See *ibid.*

¹³⁸ BEAL, “Protecting the Rights of Lay Catholics,” pp. 155-156.

3.4.3.3 – Administrative-Contentious Recourse to the Signatura

Administrative-contentious recourse before the Apostolic Signatura is the third type of administrative recourse, though it can be utilized only after either of the other two administrative options have been exhausted.¹³⁹ Recourse before the Signatura is differentiated from hierarchical recourse because the Signatura is a judicial tribunal. It exercises judicial power, whereas decisions made at inferior levels of hierarchical recourse are decrees of executive power. Though the Apostolic Signatura is a judicial tribunal, it also has an administrative function. Article 106 of the 1967 apostolic constitution *Regimini Ecclesiae universae* (*REU*) created the section of the Signatura that is responsible for hierarchical recourse.¹⁴⁰ Article 106 of the constitution states that people have the right to seek recourse in the event that an administrative act violates a legal norm.¹⁴¹ The 1983 Code builds on *REU* in c. 1445 §2 when it states:

§2. This Tribunal deals with conflicts which have arisen from an act of ecclesiastical administrative power and are brought before it legitimately, with other administrative controversies which the Roman Pontiff or the dicasteries of the Roman Curia bring before it, and with a conflict of competence among these dicasteries.

Only a few years after the promulgation of the Code, the apostolic constitution *Pastor bonus* clarified the competences of each of the dicasteries and tribunals of the Roman curia. Article 123 of *PB* defines the Signatura's role as follows:

¹³⁹ For a well-written and exhaustive study of this aspect of the Signatura, see P. HAYWARD, *Administrative Justice According to the Apostolic Constitution "Pastor bonus,"* Roma, Pontificium Athenæum Sanctae Crucis, Facultas Iuris Canonici, 1993.

¹⁴⁰ See PAUL VI, Apostolic Constitution, *Regimini Ecclesiae universae*, August 15, 1967, in *AAS*, 59 (1967), pp. 885-928.

¹⁴¹ See KRUKOWSKI, "Responsibility for Damage," p. 240.

§1. The Signatura adjudicates recourses lodged within the preemptory limit of thirty useful days against singular administrative acts whether issued by the dicasteries of the Roman Curia or approved by them, whenever it is contended that the impugned act violated some law either in the decision-making process or in the procedure used.

§2. In these cases, in addition to the judgment regarding illegality of the act, it can also adjudicate, at the request of the plaintiff, the reparation of damages incurred through the unlawful act.

§3. The Signatura also adjudicates other administrative controversies referred to it by the Roman Pontiff or by the dicasteries of the Roman Curia, as well as conflicts of competence between these dicasteries.

The Signatura adjudicates actions of recourse against singular administrative acts, meaning an act that “emanate[s] from one exercising executive authority.”¹⁴² “Singular” means that the act “is directed to a person or group of persons not capable of being the passive subjects of a law.”¹⁴³ The most commonly challenged acts before the Signatura are singular decrees and precepts, though rescripts can also be challenged.¹⁴⁴

Along with cases challenging a juridic act, the Signatura is also competent to hear claims for the reparation of damages. The competence of the Signatura “includes dealing with the controversies arising not only on account of the violation of the objective norm, but also on account of the damage resulting from the violation of the subjective rights by the ecclesiastical administrative act.”¹⁴⁵ Because of this, the Signatura not only can determine whether an act is legitimate, but also whether any damage caused by the act

¹⁴² SCHWANGER, “Contentious-Administrative Recourse,” p. 178. See also P. MONETA, “Il provvedimento amministrativo impugnabile nel diritto canonico,” in *Ephemerides iuris canonici*, 27 (1971), pp. 76-130.

¹⁴³ SCHWANGER, “Contentious-Administrative Recourse,” p. 178.

¹⁴⁴ See HAYWARD, *Administrative Justice*, p. 159.

¹⁴⁵ KRUKOWSKI, “Responsibility for Damage,” p. 240.

was unlawfully inflicted.¹⁴⁶ If a determination is made that the harm was unlawfully inflicted, then the Signatura can mandate the reparation of that harm by whatever means the Signatura judges to be appropriate. There are three requirements for the Signatura to make such a determination:

1. that the administrative act be alleged to be in violation of law, either *in procedendo* or *in decernendo*;
2. that the same act caused damage to the subjective rights of the petitioner;
3. that the petitioner requested the reparation of the damage by means of a joint action before the Signatura.¹⁴⁷

Recourse to the Apostolic Signatura is different from hierarchical recourse in many ways. First, unless the administrative act is directly issued by a dicastery, or unless the Pope specifically mandates the Signatura to handle a specific action, the Signatura is not the administrative equivalent of the Rota in first instance. Because one cannot approach it directly, but only after having exhausted the proper administrative channels, it is considered a "supplement to hierarchical recourse."¹⁴⁸ In fact, the Signatura's role is to provide a judicial review of the petitioner's hierarchical recourse, as well as granting to the petitioner the rights of due process that are not explicitly present in hierarchical

¹⁴⁶ See SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, "Recourse to the Apostolic Signatura," in *Roman Replies and CLSA Advisory Opinions 1997*, Washington, DC, CLSA, 1997, p. 27. This is an informational document issued by the Signatura to clarify the procedures necessary to pursue recourse properly.

¹⁴⁷ SCHWANGER, "Contentious-Administrative Recourse," p. 181. See also E. LABANDEIRA, *Tratado de derecho administrativo canónico*, 2nd edition. Colección canónica, Pamplona, Ediciones de Universidad de Navarra, S.A., 1993, p. 502.

¹⁴⁸ Z. GROCHOLEWSKI, "La *Sectio Altera* della Segnatura Apostolica con particolare riferimento alla procedura in essa seguita," in *Apollinaris*, 54 (1981), p. 70.

recourse.¹⁴⁹ In this process, the petitioner is allowed to present evidence, contest the evidence presented by the respondent, and examine the acts of the case.¹⁵⁰

Another difference between hierarchical recourse and petitioning the Signatura is that a person can petition the Signatura only for an objective violation of the law. This is because the Signatura only reviews acts that violate the law rather than using the standard for hierarchical recourse of having a "just reason."¹⁵¹ This violation of the law can be a violation of the substantive law (*in discernendo*) as well as a violation of the procedural law (*in procedendo*).¹⁵² Furthermore, the definition of an unlawful administrative act means an administrative act that violates the divine natural or positive law, or ecclesiastical written or customary law.¹⁵³ In other words, if one can prove that an administrator's reasons for a juridic act were unfounded, or that the reasons or requirements necessary for a particular type of action were not observed or fulfilled, then one may be able to prove that the law regarding the substance of the decision was

¹⁴⁹ See SCHWANGER, "Administrative Justice in the Church," p. 423.

¹⁵⁰ See articles 109, 112, 114, and 118 of the *Normae speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae post Constitutionem apostolicam Pauli PP. VI 'Regimini Ecclesiae universae,'* Vatican City, Typis polyglottis Vaticanis, 1968. Also in *Leges Ecclesiae post Codicem iuris canonici editae*, edited by X. OCHOA, Rome, Commentarium pro Religiosis, 1968, pp. 5321-5332. See also SCHWANGER, "Administrative Justice in the Church," p. 423.

¹⁵¹ See SCHWANGER, "Contentious-Administrative Recourse," pp. 178-179.

¹⁵² See SIGNATURA, "Recourse to the Apostolic Signatura," pp. 28-29.

¹⁵³ See SCHWANGER, "Contentious-Administrative Recourse," p. 180; GROCHOLEWSKI, "La Sectio Altera" p. 70.

violated.¹⁵⁴ Though this definition is broad, it remains more restrictive than the standard for hierarchical recourse, which allows for recourse for “any just motive” (c. 1737).¹⁵⁵

3.4.3.3.1 – Conditions Necessary for Recourse to the Signatura

The first condition for recourse to the Signatura is that it must be against an individual administrative act, which is an act that arises from the exercise of administrative or executive power in the Church.¹⁵⁶ One cannot appeal the decision of a judicial tribunal or a bishop’s legislative acts to the Signatura. Acts of the Pope, which include acts approved *in forma specifica* by him, and acts of an ecumenical council are also unable to be reviewed by the Signatura.¹⁵⁷

Only a petitioner who has a legitimate interest in the case and has been “personally and directly” harmed by the administrative act can take recourse.¹⁵⁸ A group of persons who is not a juridic person does not have standing to petition as a group, though they may petition individually.¹⁵⁹ In addition, the person must have the capacity

¹⁵⁴ See SIGNATURA, “Recourse to the Apostolic Signatura,” p. 29.

¹⁵⁵ See SCHWANGER, “Contentious-Administrative Recourse,” p. 180.

¹⁵⁶ See SIGNATURA, “Recourse to the Apostolic Signatura,” pp. 27-28.

¹⁵⁷ See HAYWARD, *Administrative Justice*, p. 155.

¹⁵⁸ See SIGNATURA, “Recourse to the Apostolic Signatura,” p. 29.

¹⁵⁹ See Chapter 2, section 2.4.1 for a discussion concerning standing of non-juridic groups of persons.

to plea, or else have a parent, guardian, curator, or in the case of a juridic person, a legal representative to stand in the person's place.¹⁶⁰

The administrative act must have either been confirmed by an appropriate dicastery during recourse or have been issued by a dicastery. Recourse to the Signatura can result from either a decision of the dicastery confirming the lower administrator's decision, or from either party if the congregation issues another decision that is not to their liking.¹⁶¹ However, if the appropriate dicastery does not reply within the requisite three month time period, according to c. 57, the response can be presumed to be negative, and seemingly recourse can proceed to the Signatura on the presumption of a negative decision from the appropriate dicastery.

3.4.3.3.2 – Available Remedies

The Signatura's role has been narrowly defined so that it judges the legality or illegality of an act by determining whether or not a law has been violated. Once this has been determined, there must be a "causal link between the unlawful act and the damage suffered by the Plaintiff."¹⁶² Then the judges of the Signatura must take into

¹⁶⁰ See SCHWANGER, "Contentious-Administrative Recourse," p. 183.

¹⁶¹ See SIGNATURA, "Recourse to the Apostolic Signatura," p. 28.

¹⁶² HAYWARD, *Administrative Justice*, p. 191. There is an ongoing discussion concerning the apportionment of damages between the various levels of recourse. If harm has been done by the original administrator, and the action has been confirmed by a higher superior, does that second administrator become an "accomplice" in continuing the infliction of harm? F. Salerno makes the argument that if one of the dicasteries confirms an act that has unlawfully inflicted harm, it should share in the responsibility for compensating the victim because it is responsible for hierarchical control of subordinate administrators. F. SALERNO, "Il giudizio presso la 'Sectio Altera' del S. T. della Segnatura Apostolica," in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, Libreria editrice Vaticana, 1991, p. 156.

consideration all of the merits of the case to assess and assign a remedy. When assigning reparation, the Signatura can take into account “any harm occasioned to any material or spiritual interest for which the law offers protection.”¹⁶³ The Signatura can award general damages, which usually result in a monetary award, and specific damages, which attempt to restore the person to the way they were prior to the harm being inflicted.¹⁶⁴

Presumably, if a situation arose where neither of these options was possible, the Signatura has the discretion to craft an equitable remedy that, under the circumstances, would best redress the harm inflicted. The issue of damages will be discussed in greater detail in Chapter 4.

3.4.3.3.3 – Potential Drawbacks of Recourse to the Signatura

Recourse to the Signatura does have its shortcomings. The first drawback to approaching the Signatura is cost. Generally there is no cost directly associated with lower levels of recourse, but approaching the Signatura requires a deposit of approximately 1550.00 European euros.¹⁶⁵ Depending on the expense of the case, the

¹⁶³ HAYWARD, *Administrative Justice*, p. 194. See also I. GORDON, “La responsabilità dell’amministrazione pubblica ecclesiastica,” in *Monitor ecclesiasticus*, 98 (1973), pp. 391-395.

¹⁶⁴ See HAYWARD, *Administrative Justice*, p. 195; and G. MONTINI, “Il risarcimento del danno provocato dall’atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica,” in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, Libreria editrice Vaticana, 1991, pp. 189-190.

¹⁶⁵ The cost had previously been 3,000,000.00 lira.

funds may be returned or the cost could be even greater.¹⁶⁶ This does not take into account the cost of the advocate, which is required by art. 99 of the *Normae Speciales*.

The second drawback is the inconvenience of making an appeal to the Signatura.¹⁶⁷ The process is cumbersome, especially for a person who is not from Italy and does not speak the language. One is required to hire a qualified procurator-advocate who may or may not speak the language of the petitioner, and this makes correspondence with one's procurator-advocate very difficult.¹⁶⁸

Finally, even if the Signatura decides for the petitioner and against the administrator, there is no mechanism for the tribunal to enforce its judgment.¹⁶⁹ Even though non-conformity could result in a new case for non-compliance, this does not help in remedying the harm that the petitioner suffered in the first place. Some canonists have suggested that compliance could be enforced through disciplining the administrative authority, but this would work only if the subsequent process could be quickly implemented to prevent further harm.¹⁷⁰

¹⁶⁶ There is a possibility that the fee could be waived or reduced if one can prove that there is a true financial need and that the recourse has some foundation. See SIGNATURA, "Recourse to the Apostolic Signatura," p. 31.

¹⁶⁷ See V. VONDENBERGER, "Effective Due Process Is Possible in the Church," in *Studia canonica*, 30 (1996), p. 167.

¹⁶⁸ See SIGNATURA, "Recourse to the Apostolic Signatura," pp. 29-30.

¹⁶⁹ See HAYWARD, *Administrative Justice*, pp. 222-223.

¹⁷⁰ See HAYWARD, *Administrative Justice*, p. 223; LABANDEIRA, *Tratado de derecho administrativo canónico*, pp. 774-775.

3.5 – Harm Unlawfully Inflicted by a Private Juridic Act

The other kind of juridic acts to which c. 128 applies are private juridic acts. In the *coetus*' discussions during the drafting of c. 128, there was a question whether this canon would apply to harm inflicted by a private juridic act. Ultimately, the *coetus* agreed that the canon applied to both public and private juridic acts.¹⁷¹ However, even if the *coetus* had not discussed this, private juridic acts are certainly included in the meaning of the words of c. 128.

Private juridic acts are all the other types of juridic acts performed by private persons and juridic persons. These acts result from the will and initiative of individual physical or juridic persons who are acting in their own name, and not in the name of the Church.¹⁷² These acts arise from the rights and duties of the Christian faithful in their private capacity, and although these acts are not in the name of the Church, some of these private juridic acts need some Church authority's involvement to provide such things as recognition, confirmation, approval, consent, or permission.¹⁷³

Many of these private acts are contractual, because contracts are agreements for services or things between two or more parties and are not actions performed in the name of the Church for the good of the faithful. In addition, there are other non-contractual acts that also are private juridic acts. Formally defecting from the Church (c. 1086) is a private juridic act, though canonists disagree over what constitutes a formal defection.

¹⁷¹ See *Communicationes*, 21 (1989) p. 175.

¹⁷² See PREE, "On Juridic Acts and Liability in Canon Law: Part One," p. 46.

¹⁷³ See *ibid.*, pp. 46–47.

Private vows are private juridic acts, as well as the making of a will, the donation of property, and the renunciation of a right.¹⁷⁴ The following sections will examine types of private juridic acts, how harm can be unlawfully inflicted, and what processes are used to remedy that harm.

3.5.1 – Acts of Administration

There are many acts performed by administrators in the Church that do not have the character of public juridic acts. These private juridic acts can be called juridic acts of administration as contrasted with administrative acts, which are public juridic acts.

Juridic acts of administration are actions that are administrative in nature, performed by administrators, but they lack one or more of the essential elements of an administrative act.¹⁷⁵ Therefore, these acts are not an exercise of the Church's power of governance.¹⁷⁶

Among the more significant activities that can fall in the category of juridic acts of administration are:

1. [Juridic] acts of church officials performed in their capacity as private persons;
2. [Juridic] acts of church-related organizations, which are not part of the public governance structure of the church;
3. [Juridic] acts of church authorities in their official capacity that partake in the nature of a private transaction (*actus qui etiamsi auctoritate fiant administrativa, ab eo ponantur tanquam a persona privata*).¹⁷⁷

¹⁷⁴ See L. CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, 2nd edition, Roma, Edizione Dehoniane, 1996, vol. 1, p. 186.

¹⁷⁵ See BEAL, "Protecting the Rights of Lay Catholics," p. 156.

¹⁷⁶ See *ibid.*

¹⁷⁷ *Ibid.*

The first example is an administrator acting in a private capacity and in his own name, or on behalf of a private juridic person or association. The administrator is not acting on behalf of any public juridic person, or in the capacity of an officeholder for a public juridic person who wields administrative power. The juridic acts he performs in this capacity may be administrative in nature but not be a public juridic act. For example, a priest volunteers to be on the board of directors of a diocesan hospital that is a private juridic person. The priest's actions as a board member are administrative, but he is acting in his private capacity, not as pastor or as a representative of the juridic person of the parish. The decisions made by the board are administrative in nature, but are private juridic acts rather than public juridic acts because they are enacted in the name of the hospital and not in the name of the Church.

The acts of Church-related organizations designated as private juridic persons or associations of the faithful are private juridic acts. This would include such actions as enrollment of members, election of officers or board members, passage of by-laws, expulsion of members, payment of dues, hiring and firing of employees, etc. Even though many of the acts that are performed by these organizations are administrative in nature, the acts are private rather than public because the acts are not done in the name of the Church, but in the name of the organization. As long as the organization is not a public juridic person, then the acts of the organization are private rather than public juridic acts. If the acts of one of these organizations unlawfully cause harm, then they are remedied in the same way as other private juridic acts.

Finally, all contracts or transactions entered into by administrators in their official capacity fall into the category of private juridic acts. This is because contracts by their very nature are enacted bilaterally or multilaterally rather than unilaterally, and public juridic acts are unilateral. If a contract that is entered into invalidly or illicitly causes harm, it constitutes harm resulting from an unlawful private juridic act, and is actionable under c. 128. Unlike the other types of private juridic acts, according to c. 1290, the rules regulating contracts are governed by the civil law of the place where the contract was entered into, so any tribunal adjudicating such a case would be obliged to apply the rules governing contracts of their own civil jurisdiction. Because of this, and because most of these contracts would be entered into with people or businesses that are not associated with the Church, as a practical matter few cases of this nature would ever be adjudicated in an ecclesiastical forum.

Though all of these above-mentioned acts are administrative in nature, none of their actions are public juridic acts. Because they are not public administrative acts, they do not fall under c. 1400's category of an "act of administrative power" that require the aggrieved party to utilize administrative recourse to have harm remedied. Rather, since these acts are private juridic acts, they would require a contentious process to remedy any harm their actions might inflict. The use of a contentious process to adjudicate these private acts of administration is largely untested because this area of the law is somewhat "unexplored territory."¹⁷⁸ Beal sees this potential for the protection of the rights of the

¹⁷⁸ Ibid., p. 157.

faithful against acts of administration through a contentious process as being more of a “loophole” to use a contentious process rather than “a new front in the law.”¹⁷⁹

3.5.2 – Other Private Juridic Acts

Most other private juridic acts are the acts of persons acting in their private capacity as members of the faithful. Private contractual agreements, oaths, private vows, wills, charitable donations, adoption, joining an association of the faithful or a personal prelature, registering in a personal parish, the transfer from one Church *sui juris* to another, leaving the Church by a formal act - all of these acts are private juridic acts. In the unlikely event that any of these private juridic acts unlawfully inflicted harm, the case would be heard in a contentious forum.

3.6 – Processes to Remedy Harm Caused by a Private Juridic Act

Generally, there are two processes that can be used to remedy unlawfully inflicted harm caused by a private juridic act. Because these acts are not administrative acts, they are unable to be heard through administrative recourse. This leaves either utilizing a conciliation process like mediation, or instituting a contentious process in a competent tribunal. These same options also apply to cases for the reparation of harm due to “other acts placed with an intent to harm or with negligence” (c. 128). The reparation of harm could also be tried as an incidental case, for example, in a case of marital nullity. Both conciliation processes and contentious trials will be discussed in Chapter 4.

¹⁷⁹ *Ibid.*

3.7 – Conclusion

This Chapter has examined the various types of juridic acts that can unlawfully inflict harm. It then examined both public and private juridic acts to determine what processes can be used to remedy harm unjustly inflicted by them. Juridic acts, especially public juridic acts, are commonplace in the daily administration of the Church. They make up the Church's laws and judicial decisions, sacraments and contracts, and are a principal vehicle for carrying out the administrative functions of the Church. Much of the public face of the Church depends on the Church's acts being perceived as being valid, licit, and legitimate. Often canonists hear from others about the "unnecessary red tape" involved for the proper performance of various juridic acts, and that these acts are "too legalistic" and "not very pastoral." While this may be a common perception, the rules required for the valid, licit, and legitimate performance of juridic acts serve to protect the faithful.

The protection exists to ensure that the people of God are treated fairly, justly and respectfully. When invalid or illicit juridic acts occur, if the actor is not willing to remedy the unlawful act himself, the faithful have the right to act in a timely fashion and use the processes available to address both the legality of the act as well as the harm that act has inflicted. Church leaders must also respect the right of the faithful to have that harm remedied by first encouraging the perpetrator to remedy the harm himself, then by conducting the proper procedures fairly and in a timely fashion.

Generally, it is when the proper procedures are not followed, either in executing the initial act, or in failing to attempt to repair the harm that the initial act inflicted, that

the most grievous harm occurs. One has only to look at the various scandals rocking the Church to observe the immense harm that can be done when problems are not confronted, invalid and illicit acts are ignored or covered up, responsibility for the harm these acts inflict is not taken, and harm is not remedied.¹⁸⁰ Though this part of the canon can have bearing on private members of the faithful, c. 128 in regard to juridic acts is primarily an obligation as well as an encouragement for those in the Church who wield power and authority.

Church administrators and judges have two very important responsibilities when it comes to remedying harm resulting from juridic acts. First they must know and follow the proper procedures to keep any inflicted harm to a minimum. Second, not only must their actions be legal, fair, and just, but these actions must also appear to be legal, fair and just, or they compound the harm that has already been caused. This means that, among other things, Church officials must: have the proper procedures available, with competent personnel and adequate support to facilitate them; ensure that the parties have competent and readily available advocates; encourage rather than discourage people who have been harmed to use the procedures that they have a right to utilize; act in a timely manner; respond to correspondence from the parties; keep the parties properly informed about the progress of their recourse or case; allow the parties to be heard; avoid the appearance of special treatment or partiality; and enforce any judgments in whatever ways are available.

¹⁸⁰ There is an ancient maxim of Roman law that was adopted into Gregory IX's decretals that seems to have significant relevance to the problems the Church is facing. It states, "truth should not be omitted in order to avoid scandal" (D. 41. 3. 25). GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, p. 119. When truth is suppressed in an attempt to avoid scandal, and then it eventually emerges, the scandal is significantly worse than if the problem had been confronted when it first occurred.

If the Church follows its own rules and procedures concerning juridic acts and protects the faithful from harm inflicted by invalid or illicit acts, it will result in a Church viewed as more just and equitable and less arbitrary, secretive and insular. If it fails to do this, this failure results in the faithful's loss of trust in the Church's ability to govern in a fair, just and equitable fashion. It also opens the Church to claims of hypocrisy and the accusation that it preaches a standard of conduct that it does not itself follow. It can also lead to public scandal, especially when these failures are exposed by the local or national media, and lead to widespread feelings of betrayal, disillusionment, and hurt among the faithful. Sadly, these scandals could often be avoided if, as soon as the harm is discovered, the Church takes the proper steps in a timely fashion to remedy the harm its representatives had caused through their juridic acts.

This Chapter has dealt with remedying the harm inflicted by violations of the law through invalid or illicit juridic acts. However, c. 128 not only addresses the harm caused by juridic acts. The second half of the canon requires the remedy of harm caused by "any other acts performed with either *dolus* or *culpa*." Chapter 4 will explore remedying harm caused by the person's intention to harm or by his negligence. This generally involves the violation of a person's right or duty, as well as the potential violation of a law. Canon law will be compared with the common law in this regard, both in respect to what constitutes standards for defining and determining *dolus* or *culpa*, as well as what remedies are available to repair the harm inflicted.

CHAPTER 4

HARM CAUSED BY OTHER ACTS PLACED WITH *DOLUS* AND *CULPA*

The preceding chapter addressed the issue of remedying unlawfully inflicted harm caused by a juridic act. The purpose of Chapter 4 is to examine the other half of c. 128, which addresses harm stemming from any other act placed with either *dolus* or *culpa*. Harm in this context is understood in its broadest possible meaning and includes all types of damage.¹ The harm can be “financial...physical, intellectual, spiritual, ethical, social, and psychic integrity of the person, e.g., damage to somebody’s reputation, insult, [or] sexual trespasses.”² As long as the harm is unlawfully inflicted, each of these types of harm is actionable and must be remedied in accord with c. 128.

Unlike juridic acts, the categories of invalid or illicit acts are not a part of the determination of whether an act is unlawful. Because these other acts are not juridic acts, they do not fit neatly into categories of invalid or illicit acts according to the positive law. Rather, these acts cannot be declared null by the positive law; they must be proven to be unlawful. The only way one can prove an act’s unlawfulness is to prove in a contentious action that the act causing harm is committed either intentionally or negligently. If the

¹ See H. FREE, “On Juridic Acts and Liability in Canon Law: Part Two,” in *The Jurist*, 58 (1998), p. 509; G. MONTINI, “Il risarcimento del danno provocato dall’atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica,” in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, Libreria editrice Vaticana, 1991, pp. 188-189; G.R. BACARDÍ, *Pautas para una concepción del resarcimiento de daños*, JCD diss., Pamplona, Universidad de Navarra, S.A., 1993, p. 116.

² FREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 509.

result of an action is harmful but is committed without an evil intention or negligence, then the harm is not unlawful or posed unlawfully, and not actionable. It is simply either lawfully imposed or accidental.³

How then are these "other acts" able to inflict harm on another person? Harm can occur when a person's rights have been violated through breaking divine or ecclesiastical law, or when a person breaches an obligation that he or she is bound to fulfill. Canon law has traditionally treated duties and rights simultaneously. If a person "has the principal or exclusive duty to perform some function, he may also be said to have the right to do it. Conversely, rights often imply a corresponding duty."⁴ With violations of both rights and duties, the resulting harm can be inflicted either intentionally or negligently, making it actionable before an ecclesiastical tribunal.

Canon 128 presents two ways that these violations can be performed that make them unlawful. First the act can be committed with *dolus*, meaning that the act is committed with an evil intention, knowing that the act violates the law, a person's rights, or a duty that the person has an obligation to perform. Second, an act can be committed with *culpa*, meaning that the act is negligently performed or negligently omitted. In both cases, the action or non-action results in unlawfully inflicting harm on another person. Canon 128 requires that any harm resulting from these unlawful acts must be remedied.

³ Even accidentally inflicted harm at the very least requires an apology according to the moral law. However, if a harmful act is truly accidental and not negligent, then c. 128 does not apply and the harm is not actionable in an ecclesiastical forum.

⁴ J. HUELS, "The Correction and Punishment of a Diocesan Bishop," in *The Jurist*, 49 (1989), p. 509.

What methods can be used to remedy the harm inflicted by these acts? Canon 221 gives Christ's faithful the right to have their rights vindicated before a competent ecclesiastical forum. Canon 1400 specifies that contentious trials are the proper forum for the "pursuit or vindication of the rights of physical or juridic persons, or the declaration of juridic facts," unless the act constitutes an "act of administrative power." As discussed in Chapter 3, cases involving harm that has resulted from acts of administrative power are heard in an administrative forum.⁵ Methods of alternate dispute resolution are also an option that can provide a remedy for harm.

As noted in Chapter 2, there are many questions that arise from issues stemming from the administration of a contentious trial that the procedural canons do not answer. Canon 128 states the general norm that unlawfully inflicted harm must be repaired. It does not give practical direction on how this is to be done. Certainly, if the answer can be found within the procedures already outlined in the Code in regards to administrative or contentious actions, then those procedures should be used to remedy the harm inflicted. However, on occasion neither the canons on administrative actions nor those on the conduct of a contentious action apply in a given case. When there is a *lacuna* in the law concerning a particular circumstance, c. 19 gives four options to aid canonists in arriving at an answer. Canon 19 of the CIC states:

⁵ In addition to the norms for ordinary contentious trials, the Code provides norms for penal trials, marriage trials, and oral contentious trials, all of which have their own rules and procedures. Though penal trials are a type of canonical trial, because they concern the infliction of a penalty, are initiated by the Church rather than by another party, and are not intended to remedy the harm inflicted on a victim, penal trials are not going to be discussed in this chapter. Likewise, though a marriage case is a specific type of contentious trial, its purpose is not intended to address the remedy of harm. Therefore, marriage trials also will not be discussed in this chapter.

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.

The canon provides four alternatives one can use for a *lacuna* in either written or customary law. The Code does not require that the various possibilities cited in the canon be consulted in a particular order, so that any of the methods suggested by the Code rightly can be used to fill canonical *lacunae*.⁶ The first option is to consult the canonical law issued in similar matters and apply it by analogy of law (*analogia legis*). These would be laws issued in similar matters in the CCEO, the CIC/17, other particular laws, or even other parts of the CIC that would have comparable norms.⁷ For example, one could consult penal law principles to provide for procedural gaps in a contentious trial.⁸ Second, one can look to the practices of the Curia, especially the Rota and the Signatura, insofar as these can be known. Third, one can consult the common and constant opinion of persons learned in canon law. Finally, one can consult the general principles of law applied with canonical equity. These can be the general legal principles of the *Regulae iuris* or other texts from the canonical tradition. However, this also means that one can

⁶ See J.G. OTADUY and P. LOMBARDÍA, "Canons 1-95," in *Code of Canon Law Annotated*, p. 92; and J.M. HUELS, "Title I: Ecclesiastical Laws [cc. 7-22]," *New Commentary on the Code of Canon Law*, p. 80.

⁷ See HUELS, "Title I: Ecclesiastical Laws [cc. 7-22]," *New Commentary on the Code of Canon Law*, p. 78.

⁸ An example is using the penal canons on imputability for assessing imputability in contentious matters.

consult the general principles of law found in the civil law or common law, as long as these concepts do not violate the divine law or ecclesiastical law.⁹

Regarding the remedy of harm, the corresponding common law area is known as tort law. In the common law, tort law includes the definitions of what constitutes the non-criminal but illegal infliction of harm and its remedies. Tort law deals with both the intentional infliction of harm as well as with the legal concept of negligence. Negligence encompasses positive acts that are negligent as well as the negligent omission of an act that one had the duty to perform.

The common law has a long tradition in both law and equity of providing remedies to redress unlawfully inflicted harm. When canon law does not provide any guidance in this area, c. 19 allows the principles of the common law to be applied in specific cases. Furthermore, there are many equitable remedies of the common law that are not widely recognized or applied in canon law. It would be useful to explore whether their use could be expanded in future revisions of the law.

The purpose of this chapter is to explore the unlawful infliction of harm by other acts. First, the chapter will examine the ways that other acts inflict harm, including the violation of the rights of others as well as the neglect of one's duty. The chapter then will examine acts placed with *dolus* or *culpa* to determine what causes these acts to inflict harm unlawfully. Next, the processes by which the harm can be remedied will be explored. Then this chapter will compare the common law understanding of tort law and

⁹ See OTADUY, "Canons 1-95," *Code of Canon Law Annotated*, pp. 92-93.

its remedies in both law and equity, with the canonical concept of the unlawful infliction of harm by other acts placed intentionally or negligently. Finally, the chapter will explore the difficult problem of irremediable harm.

4.1 – What Constitutes “Any Other Act”

Besides juridic acts, c. 128 refers to “*quovis alio actu*,” i.e., any act that unlawfully inflicts harm other than a juridic act. This covers three categories of acts that inflict harm: acts that violate a law, or violate a person’s rights, or stem from a person’s breach of a duty or obligation. However, though these acts inflict harm, it is not simply the resulting harm that makes them actionable. In addition to actually causing harm, the harm must also be unlawfully inflicted, i.e., committed with *dolus* or *culpa*, for the case to be actionable. The other acts include all negligent acts, both negligent non-acts and negligent positive acts. These other acts must be committed with either *dolus* or *culpa* to make the harm resulting from them unlawful. If harm is inflicted lawfully (e.g., a right is restricted because of the imposition of an expiatory penalty), there is no obligation to make reparation because the harm is not unlawfully inflicted. If the harm is inflicted accidentally, then there is also no obligation to repair it because there is no *dolus* or *culpa*. However, if these acts are committed either with an evil intent or they are committed negligently, the resulting harm is unlawfully inflicted and c. 128 is applicable.

These “other” harmful acts include the non-juridic acts of administrators, tribunal personnel, and juridic persons. It includes the acts both of agents and private

individuals.¹⁰ Additionally, this category includes intentional or negligent criminal behavior that inflicts harm, such as the sexual abuse of minors (c. 1395 §2), calumny (c. 1390), homicide (c. 1397), abuse of ecclesiastical office (c. 1389), etc.¹¹

The following sections will examine how harm can be inflicted through the violation of laws, rights, and duties. Though these three types of violations will be discussed separately, in reality these divisions are not always distinct. Harm can be inflicted by the violation of a law that ignores a right. A right can be violated because a person neglected to fulfill his duty. A person can violate a duty that is mandated by the law. Therefore, it is important to remember that actions can be initiated because of a combination of these violations rather than as only one of the three. Finally, after considering how harm is inflicted, this section will explore how these harmful acts are also unlawful due to either *dolus* or *culpa*. This section will compare the concepts of *dolus* and *culpa* with the common law concepts of malice or intentional torts and common law negligence.

4.1.1 – Acts That Violate a Law

The first way that harm can be inflicted is through the violation of an ecclesiastical law. This is certainly evident when one either intentionally or negligently violates a penal law, and harm results. This also occurs when a right protected by the

¹⁰ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 502.

¹¹ See *ibid.* A victim can seek to have the harm inflicted from a crime remedied by initiating a contentious action in accord with c. 1729 if a penal action has been instituted. If not, then the victim can initiate a contentious action prior to and independent of any action that may be taken by the diocese in the future.

ecclesiastical law is violated, or when one either intentionally or negligently breaches a duty that is mandated by canon law. Violations of ecclesiastical law are *per se* unlawful; thus any harm that results from these violations is unlawfully inflicted. Once one can prove that the law was either intentionally or negligently violated and harm resulted, then the harmed person can petition for the harm to be repaired in accord with c. 128.

For example, a priest violates c. 1395 §2 by sexually abusing a minor.¹² If a canonical penal action is brought due to the commission of a canonical delict, then the parents acting on behalf of the child concurrently can bring a contentious action before the court asking that the perpetrator remedy the harm he has inflicted in accord with c. 1729. If the victim is no longer a minor at the time of the penal action, the victim can petition on his or her own behalf. If the Church does not initiate a penal action, presumably the victim or the victim's parents can initiate an independent contentious action claiming that the law has been violated and requesting that the priest be forced to

¹² In the Code, c. 1395 defines a minor as a person who is under the age of 16 years. However, in 1994 the Holy See modified this definition and temporarily raised the age to 18 for the United States. The modification was originally for five years, however, on November 30, 1998, Pope John Paul II extended this provision for ten years until April 25, 2009. See T.J. GREEN, "Book VI: Sanctions in the Church [cc. 1311-1399]," in J.P. BEAL, J.A. CORIDEN and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, p. 1599.

remedy the harm that he has inflicted.¹³ If it can be proved that the priest violated the law, then the harm is *per se* unlawfully inflicted and should be remedied.¹⁴

4.1.2 – Acts That Violate a Right

Another way that one can inflict harm is through the violation of a person's rights.

The importance of this was recognized when the Commission for the Revision of the Code drafted ten principles that would govern the revision of the Code. The sixth principle stated:

The use of power in the Church must not be arbitrary, because that is prohibited by the natural law, by divine positive law, and by ecclesiastical law. The rights of each one of Christ's faithful must be acknowledged and protected, both those which are contained in the natural and divine positive law and those derived from those laws because of the social condition which the faithful acquire and possess in the Church.¹⁵

It is evident that those who drafted the 1983 Code believed it to be of utmost importance that the rights of the faithful be acknowledged and protected, and these principles were included in the 1983 Code.

¹³ A question arises about the Congregation for the Doctrine of the Faith's (CDF) mandating that all cases involving sexual abuse be forwarded to it. See JOHN PAUL II, *Motu proprio, Sacramentorum sanctitatis tutela*, May 18, 2001, in *AAS*, 93 (2001), pp. 737-739. If the CDF is adjudicating these cases, what happens to the victim's right to bring a concurrent contentious action in accord with c. 1729? Are victims allowed to bring a separate contentious action, or must they also petition CDF to hear their claim as well? Do victims lose their right altogether to petition for a remedy? These questions have not been resolved by CDF, but must be answered so that the faithful's right to petition for the remedy of harm is respected.

¹⁴ Of course, the petitioner will also have to describe the nature of the harm to determine its extent and the proper means of repairing it.

¹⁵ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, "Principia quae codicis iuris canonici recognitionem dirigant," in *Communicationes*, 1 (1969), p. 82; translated in J.A. CORIDEN, "A Challenge: Making the Rights Real," in *The Jurist*, 45 (1985), p. 6.

Canon 1491 states the principle that “every right is reinforced not only by an action but also by an exception unless other provision is expressly made.” This means, “Every right is protected by an action, that is, by the faculty to approach a court of justice in search of juridical protection.”¹⁶ Additionally, c. 221 recognizes that the *christifideles* have a right to have their rights vindicated before a competent ecclesiastical forum, and to have the perpetrator repair any harm inflicted upon them by an unlawful violation of their rights. Both physical and juridic persons enjoy certain rights, including those enumerated within the 1983 Code, as well as other natural/human, civil, contractual, ecclesial, ecclesiastical, and acquired rights.¹⁷ This section will first examine the rights of physical persons and the rights of the unbaptized. Then it will briefly touch on the violation of the rights of juridic persons.

In discussing rights, it must be remembered that c. 223 states that the exercise of rights must always take into account the common good of the Church as well as the rights of others. In addition, c. 223 §2 allows ecclesiastical authorities to regulate the exercise of rights that are proper to Christ’s faithful. There is much debate among canonists about what effect this canon has on a person’s actual ability to exercise his rights within the Church.¹⁸ In addition, some canonists have expressed the idea that an emphasis on individual rights, “if considered purely in terms of power or a claim against the Church,”

¹⁶ C. DIEGO-LORA, “Canons 1476-1512,” *Code of Canon Law Annotated*, p. 928.

¹⁷ See J.P. MCINTYRE, “Rights and Duties Revisited,” in *The Jurist*, 56 (1996), p. 115.

¹⁸ See R.J. CASTILLO LARA, “Some General Reflections on the Rights and Duties of the Christian Faithful,” in *Studia canonica*, 20 (1986), pp. 7-32; J.H. PROVOST, “The Nature of Rights in the Church,” in *CLSA Proceedings of the Fifty-Third Annual Convention*, Washington, DC, CLSA, 1991, pp. 1-18; J.P. MCINTYRE, “The Acquired Right, A New Context,” in *Studia canonica*, 26 (1992), pp. 25-38; CORIDEN, “A Challenge: Making the Rights Real,” pp. 1-23.

errs on the side of individualism and personalism and is “diametrically opposed to the very communal nature of the Church.”¹⁹ This topic is hotly debated, especially between those coming from a common law perspective and those coming from a European civil law understanding of rights.²⁰ However, the purpose of this section is to examine which rights can potentially be vindicated within a canonical forum rather than how these rights could be restricted by the ecclesiastical authority or the common good. Thus, the effect that c. 223 has on the exercise of one’s rights is beyond the scope of this work.

Nevertheless, one can contend that looking at rights from the perspective of c. 128 changes the focus of the rights discussion slightly. Working from the premise of c. 128, the focus of one’s complaint is that harm has been unlawfully inflicted and that this harm requires a remedy. It is not that the right in question necessarily must be upheld to the possible detriment to the Church or the common good, but merely that the harm resulting from the violation of that right must be remedied. Additionally, this remedy does not

¹⁹ A. MENDONÇA, “Promotion and Protection of Rights in the Church,” in *Philippiniana Sacra*, 33 (September-December 1998), p. 441.

²⁰ Sometimes, different views on the nature of rights stem from the milieu from which the individual comes. James Provost mentions this in discussing a fundamental difference in the way that Europeans and Americans view rights, and these perceptions are significant enough to cause misunderstandings if they are not taken into account. He states:

[T]he difference in perception can be stated in terms of differing views of social order. The European experience has developed a special sense of the social unit, whether under traditional monarchies or in various forms of democratic states, East and West. The social order assures the welfare of the individual. In the American mindset, a strong sense of local autonomy has been prized, even if not always carried out in practice. The theory has been that the welfare of the individual assures the social order. These differences lead to differing sensitivities with regard to rights. From a European perspective, the focus is on the social order; rights result from respect for the social order. From an American perspective, the focus is on the person; social order results from respect for personal rights (J.H. PROVOST, “Promoting and Protecting the Rights of Christians: Some Implications for Church Structure,” in *The Jurist*, 46 [1986], pp. 298-299.)

require that the right necessarily must be enforced, if the enforcement of this right is harmful to the community; other types of remedies may be applied.

Furthermore, c. 128 addresses the consequences resulting from the acts or negligence of the decision-maker. This is a completely separate issue from persons demanding that their rights be respected. According to the natural law, the decision-maker is responsible for the harmful consequences of his actions regardless of the demands of the victim. Since the canon addresses the natural law obligation of the person inflicting the harm rather than being written from the perspective of the victim, the fact that a person has violated another's right or has negligently violated a right, even if it is to protect the common good, does not relieve that person of the obligation of remedying the harm that has been inflicted. When a person petitions for a remedy in accord with c. 128, this demand stems not from an overly individualistic understanding of rights but from the natural law obligation of the decision-maker to remedy the harm that has been unlawfully inflicted. Because c. 128's emphasis is on the remedy of harm rather than the blind enforcement of rights, this method of looking at rights seems much more in keeping with the communal nature of a Church community rather than espousing a form of radical individualism and personalism.

4.1.2.1 – Rights of Physical Persons

When one thinks of rights, most often one thinks in terms of the rights of individual human beings. In an American context one thinks of the Bill of Rights, which includes protections of free speech, freedom to worship, and free assembly. Canadians

too have the Charter of Rights, which guarantees the protection of certain rights. On a multi-national front, the United Nations' Universal Declaration of Human Rights was passed in 1948 to protect human dignity and human rights.²¹ The Church has also recognized the importance of enumerating and protecting rights. Pope John XXIII, in *Pacem in terris*, stressed that human rights are rooted in the nature of the human person.

Any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. By virtue of this, he has rights and duties, flowing directly and simultaneously from his very nature. These rights are therefore universal, inviolable, and inalienable.²²

The recognition of human rights, especially in relation to respecting religious freedoms, became the impetus for the Second Vatican Council's Declaration on Religious Freedom, *Dignitatis humanae*, promulgated in 1965.²³ This heightened awareness of the importance and protection of rights eventually resulted in the enumeration of specific rights in the Code of 1983.

With regards to the protection of rights, c. 221 provides that Christ's faithful have the right to have their rights vindicated before a competent ecclesiastical forum. The Church recognizes many different kinds of rights: natural rights, human rights, ecclesial rights, ecclesiastical rights, acquired rights, civil rights, and contractual rights. However,

²¹ See S. HOLLAND, "Equality, Dignity and Rights of the Laity," in *The Jurist*, 47 (1987), p. 103.

²² JOHN XXIII, Encyclical, *Pacem in terris*, April 11, 1963, in *AAS*, 55 (1963), p. 259. English translation in J. LANGAN, "Can There be a Human Rights Problem in the Church?" in *The Jurist*, 46 (1986), p. 30.

²³ See SECOND VATICAN COUNCIL, Declaration on Religious Liberty, *Dignitatis humanae*, December 7, 1965, in *AAS*, 58 (1966), pp. 929-946. English translation in FLANNERY, vol. 1, pp. 799-812.

it is not clear if all of these rights are included in the rights that can be vindicated by a competent ecclesiastical authority.

Some rights are enumerated in the CIC, including natural, ecclesial and ecclesiastical rights, civil legal rights that are recognized in the Code, procedural rights, and acquired rights. All of these rights can be vindicated under c. 221 because they are identified as rights that are protected by the Code. The following sections will examine which rights may be vindicated in an ecclesiastical forum.

4.1.2.1.1 – Natural Rights or Human Rights

The Church recognizes that there are rights that belong to an individual by virtue of his or her human dignity.²⁴ These rights are “prior to and independent of any positive formulation,” and apply both to the non-baptized as well as the baptized.²⁵ With regard to human rights within secular society, Walter Kasper wrote:

Human rights are not just claims [that] people reciprocally grant to each other; nor are they given to the individual by the State or by society. They are innate rights, given to men and women with their very being. These rights antecede and transcend the State and society, and yet must be recognized and transferred into positive law by them. Since they are founded in the God-given being of men and women, they are exempt from all discretionary or arbitrary whim.²⁶

²⁴ There is an ongoing debate among canonists whether one can call rights in the Church “fundamental.” For articles outlining the various positions, see CASTILLO LARA, “Some General Reflections,” pp. 7-32; PROVOST, “Promoting and Protecting the Rights of Christians,” pp. 304-305; CORIDEN, “A Challenge: Making the Rights Real,” pp. 1-23; and J.H. PROVOST, “Rights in Canon Law: Real, Ideal, or Fluff?” in *CLSA Proceedings of the Sixty-First Annual Convention*, Washington, DC, CLSA, Catholic University of America, 1999, pp. 338-341.

²⁵ CASTILLO LARA, “Some General Reflections,” pp. 14-15.

²⁶ W. KASPER, “The Theological Foundations of Human Rights,” in *The Jurist*, 50 (1990), pp. 156-157.

The 1971 Synod of Bishops published a statement entitled *Justice in the World*.²⁷

In its introduction, the document states that because natural, human rights have a theological foundation, the protection of human rights and human dignity is intrinsically tied to the witness of the gospel.²⁸ It recognizes that the marginalization of people, inadequate food and clean water, lack of housing, lack of educational opportunities, lack of religious freedom, and lack of self-determination in the political sphere, all contribute to violating the fundamental dignity of the human being.²⁹

Some of these natural rights are specifically enumerated in the CIC, such as the protection of one's good reputation and privacy (c. 220).³⁰ Because these rights are natural rights, not ecclesial ones, they apply to all individuals whether baptized or not. Hence, under c. 1476, the natural or human rights of all people, baptized and unbaptized, theoretically can be protected and vindicated within an ecclesiastical forum.³¹ There are other human rights that are not specifically listed in the Code. Presumably, since human

²⁷ See SYNOD OF BISHOPS, statement, *Justice in the World*, November 30, 1971. English version in J. GREMILLION, *The Gospel of Peace and Justice, Catholic Social Teaching Since Pope John*, Maryknoll, Orbis, 1976.

²⁸ See KASPER, "The Theological Foundations of Human Rights," p. 159.

²⁹ See CORIDEN, "A Challenge: Making the Rights Real," pp. 17-18.

³⁰ The Rota has a number of cases dealing with defamation, including: c. MASSIMI, January 5, 1920, in *SRR Dec.*, 12 (1920), pp. 1-6; c. CANESTRI, July 26, 1940, in *SRR Dec.*, 32 (1940), pp. 589-602; c. CANALS, January 19, 1971, in *SRR Dec.*, 63 (1971), pp. 47-52.

³¹ One might raise the point whether an ecclesiastical tribunal is the proper place to adjudicate a claim that a person's human rights have been violated. Generally speaking, an ecclesiastical forum is most likely not the proper forum for a trial of this nature. However, in the common law, occasionally a suit is filed not simply because some harm has occurred that needs to be remedied, but because the person who has been harmed wants to make a point. If someone lives in a politically or socially oppressed society where there is no other unbiased forum available, it is at least within the realm of possibility that a person could bring an action before an ecclesiastical tribunal simply to expose the repressive practices of a particular government official, presuming that the tribunal would accept such a case.

rights stem from the human dignity of all people, if one of these rights has been unlawfully violated, that right also could theoretically be vindicated within an ecclesiastical forum, even if it is not specifically mentioned in the Code.

4.1.2.1.2 – Ecclesial and Ecclesiastical Rights Enumerated in the CIC

All of the Christian faithful, including baptized non-Catholics, have rights and duties that stem from their incorporation into the people of God through baptism.³² These rights are called ecclesial rights by some authors.³³ Additionally, Catholics are united with Christ in the Catholic Church through the “bonds of profession of faith, of the sacraments, and of ecclesiastical governance” (c. 205). As such, they become members of the Church, with additional rights and duties that are in accord with their status in the Church.³⁴ These ecclesial rights are granted to Catholics by virtue of canon law. Many of these rights are found in CIC Book II, The People of God, though other rights are scattered throughout the Code; e.g., the procedural law lists a number of rights, including the right to a defense.³⁵ Finally, there are ecclesiastical rights that arise from a person’s

³² See CIC c. 96.

³³ See J.H. PROVOST, “Ecclesial Rights,” in *CLSA Proceedings of the Forty-Fourth Annual Convention*, Washington, DC, CLSA, 1983, p. 42; MENDONÇA, “Promotion and Protection of Rights in the Church,” pp. 442-443; MCINTYRE, “The Acquired Right. A New Context,” p. 32.

³⁴ See PROVOST, “Promoting and Protecting the Rights of Christians,” pp. 289-342.

³⁵ See CIC cc. 221, 1620 and 1720.

office within the Church.³⁶ These rights are acquired through the provision of an office and remain as long as the person holds the office.³⁷

Many of the ecclesial rights of the baptized and the ecclesiastical rights of those holding an office are enumerated in the CIC, and as such are rights that are to be protected by a competent ecclesiastical authority. These rights apply to many categories of persons, including the rights of all Christ's faithful,³⁸ the rights of the laity,³⁹ rights of parents,⁴⁰ rights of clerics,⁴¹ rights of bishops,⁴² and rights of religious.⁴³ If these rights are violated unlawfully, and this results in harm, then c. 128 mandates that the harm be remedied.

Are baptized non-Catholics considered *christifideles* for the purposes of having the right to have their rights vindicated before a Catholic ecclesiastical court? Though non-Catholic Christians are in imperfect communion and do not possess the full rights and obligations of membership in the Catholic Church by virtue of c. 11, they

³⁶ See MENDONÇA, "Promotion and Protection of Rights in the Church," p. 443; MCINTYRE, "The Acquired Right, A New Context," p. 32.

³⁷ See *ibid.*

³⁸ Cc. 208-223.

³⁹ Cc. 224-231.

⁴⁰ Cc. 226, 793.

⁴¹ Cc. 273-289.

⁴² Cc. 393, 396, 397, and 1227.

⁴³ Cc. 630, 654, 659, and 669-670. Elizabeth McDonough has an informative article on the rights of religious. See E. McDONOUGH, "The Protection of Rights in Religious Institutes," in *The Jurist*, 46 (1986), pp. 164-204.

nevertheless are baptized validly and are incorporated into the body of Christ. The Church recognizes that these baptized, non-Catholic members of Christ's faithful possess rights by virtue of their baptism, though these rights are not as broad as one who is fully incorporated into the Catholic Church.

Some commentaries have asserted that due to c. 205, *christifideles* in c. 204 should be defined as those baptized persons who are in full communion with the Catholic Church.⁴⁴ Therefore, they would argue that the rights enumerated in the Code, including the right to have one's rights vindicated before a proper ecclesiastical forum, do not apply to baptized non-Catholics. It can also be argued that, as a practical matter, because the Church has no temporal authority to summon baptized non-Catholics and force them to submit to an ecclesiastical process, it would be not just if they had the right to bring an action without having the corresponding duty to respond if they themselves are summoned. While there is merit to these arguments, a stronger argument can be made that in regards to c. 221, baptized non-Catholic *christifideles* should be included among those who have the right to have their rights vindicated before an ecclesiastical tribunal, especially if the person who harmed them was a Catholic.⁴⁵

The first reason is scriptural. Saint Paul gave clear instructions that Christians should settle their differences among themselves rather than submitting their disputes to a

⁴⁴ For example, see R. J. KASLYN, "The Christian Faithful, Introductory Canons [cc. 204-207]," *New Commentary on the Code of Canon Law*, p. 246.

⁴⁵ It would be highly unlikely that a case could be accepted or harm repaired if the offending person were a non-Catholic, unless the non-Catholic were employed by the Church or accepted its authority to make an equitable judgment.

civil authority.⁴⁶ If non-Catholic Christians are willing to bring a case before a Catholic ecclesiastical authority and submit to the jurisdiction of the court, this certainly is more in keeping with the scriptural mandate than forcing them to approach a civil court. This is especially true if their own Church or ecclesial community does not have formal processes to adjudicate disputes.

In addition, recognizing this right to approach an ecclesiastical forum sends an ecumenical message to the larger Christian community that the Catholic Church recognizes the validity of the baptism of other Christians, and it will protect the rights that flow from baptism, even the baptism of Christians that are not Catholic. As a purely practical matter, adjudicating a case of non-Catholic Christians who have chosen to submit to a canonical process testifies to the greater community their belief in the fairness of the process and the eventual justice of the outcome. Finally, in such a case, a physical or juridic person within the Church generally would be the one inflicting the harm. Not recognizing that a non-Catholic Christian has a right to bring an action against a Catholic in an ecclesiastical forum would be detrimental because 1) the Church would appear to be interested only in protecting its own member at the expense of the one harmed; and 2) it would force the non-Catholic Christian to take the action to civil court. Given these reasons, recognizing the right of a non-Catholic member of the *christifideles* to approach an ecclesiastical forum is in the best interests of all involved, and there is no positive prohibition against it in the law.

⁴⁶ 1 Cor. 6: 1-6.

4.1.2.1.3 – Acquired Rights, including Civil Rights

When the new Code was promulgated in 1983, there were a number of persons who had rights previously acknowledged or granted to them by the Church. Canon 4 of the CIC was once again included in the 1983 Code to prevent the new law from stripping these persons of these specific rights by protecting acquired rights. Therefore, in the spirit of the Code's policy of non-retroactivity stated in c. 9, c. 4 states that rights that were acquired prior to the Code would remain intact unless the Code specifically revoked them. It would have been impossible for the Code to enumerate specifically these rights because of their vast number and because of the breadth of the subjects that they cover. Given that these rights were specifically protected by the Code, one can certainly include these rights as ones that can be vindicated under c. 221, if they have been unlawfully infringed upon and harm has resulted.⁴⁷

A subset of acquired rights is the civil rights given to individuals by virtue of their citizenship in a particular country.⁴⁸ Some of these rights could be protected canonically because they are statements of natural rights that have been incorporated into the civil law, or because c. 22 canonizes the civil law in certain circumstances.⁴⁹ However, because a violation of a civil right would most likely be pursued in civil court rather than in a canonical forum, canonical protection of these rights will not be explored.

⁴⁷ For further information on acquired rights, see MCINTYRE, "The Acquired Right, A New Context," pp. 25-38.

⁴⁸ See MENDONÇA, "Promotion and Protection of Rights in the Church," p. 444.

⁴⁹ For examples of the canonization of the civil law, see CIC cc. 197, 1059, 1286, 1290, 1299, and 1500.

4.1.2.1.4 – Implied Rights

Canons 209-223 are a list of rights and obligations pertaining to all of Christ's faithful. Other rights in various places in the Code specifically refer to the rights of lay people, seminarians, clerics, religious, and other individuals. Along with these specified rights, there are also a number of rights that are implied by the Code though they are not specifically stated. A good example of this is the right of a victim to pursue a contentious trial for reparations stemming from the commission of a canonical delict. Although the Code does not specifically enumerate this right, c. 1729 provides for a contentious action to be brought by a victim against a perpetrator during the penal trial. This fact certainly implies that if an individual has the right to bring an action for reparations during a penal trial, that individual also has the right to bring this same action even if the decision has been made to handle the perpetrator's offence outside of a penal trial.

Another area of implied rights is that of contracts and employment. Canon 1290 canonizes the civil law both generally and specifically in the area of contracts unless it is contrary to divine law or canon law (c. 22). This would imply that the civil laws concerning contractual rights and laws concerning breach of contractual obligations would also be canonized, and that these rights "are enforceable in the Church legal system as they would be under the civil law system."⁵⁰ This is especially true for employment contracts. According to c. 1286, administrators are bound to follow the civil laws relating to labor and social life in making and enforcing employment contracts. Any individual who has been unlawfully harmed by an administrator of a public juridic person

⁵⁰ PROVOST, "Ecclesial Rights," p. 60.

in a contractual or employment dispute has the right to seek reparation of that harm by means of a canonical process, applying the appropriate civil law on the subject.

Finally, it is possible that a civil corporation could be harmed by a member or representative of the Catholic Church, especially in regards to a breach of a contractual obligation. Theoretically, a civil corporation in these circumstances would have standing to seek to have the harm done to it repaired in an ecclesiastical process.⁵¹

4.1.2.2 – Rights of Juridic Persons

There is little discussion about the fact that juridic persons possess rights. Therefore, it follows that the violation of their rights can and ought to be remedied. The 1983 Code does not articulate the rights of juridic persons such as parishes, dioceses, and associations,⁵² though they clearly possess both rights and obligations.⁵³ This oversight was noted by a number of persons during the period prior to the revision of the Code, including Cardinal Joseph Ratzinger, who wrote:

Each time that the Church exists as a community, it is a subject of rights in the larger Church. It is not only the office-holders on the one hand, and the individual believers on the other, who have rights in the Church. The Church, as such, as it exists in each community, is a holder of rights.

⁵¹ Though a case of this type realistically would be handled by the civil courts, a civil corporation would have the same rights as an unbaptized individual (see Chapter 2, section 2.4.1). This means that if a corporation is harmed by a breach of contract or by the violation of a law, it could have standing to seek reparations in a canonical forum.

⁵² For a good overview of the rights of parishes, dioceses, and associations, see PROVOST, "Promoting and Protecting the Rights of Christians," pp. 314-335, and J.A. CORIDEN, "The Rights of Parishes," in *Studia canonica*, 28 (1994), pp. 293-309.

⁵³ See CORIDEN, "The Rights of Parishes," p. 294.

These Churches are, properly speaking, the subject of rights, in fact they connect all the other subjects of rights in the Church.⁵⁴

It is possible for all of these communities to suffer from unlawfully inflicted harm. If they are recognized as public juridic persons possessing rights, they are able to have these rights vindicated before an appropriate ecclesiastical forum.

4.1.3 – Acts That Violate a Duty

Not only can harm be unlawfully inflicted by the violation of a law or of one's rights, one can also be harmed when a person unlawfully ignores or neglects his or her duty.⁵⁵ Augustine Mendonça refers to obligations and rights as “flip side[s] of the same reality.”⁵⁶ James Provost argues that “the very wording in the code (which speaks of duties, then of rights) evidences for some that the mind of the Legislator gives priority to duties, and shows the secondary or derived nature of rights in the Church.”⁵⁷

The Code specifies duties that are the responsibility of the person to whom the duty is allocated. These duties result from one's state in life, office, role, or by vicarious assignation. Obligations also can arise voluntarily from agreements such as contracts. Though c. 221 specifically allows one to vindicate one's rights, there is no explicit

⁵⁴ J. RATZINGER, “Demokratisierung der Kirche?” in *Demokratie in der Kirche*, Linburg. Lahn, 1970, pp. 38-39. Translated in CORIDEN, “The Rights of Parishes,” p. 294.

⁵⁵ See PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” p. 502.

⁵⁶ MENDONÇA, “Promotion and Protection of Rights in the Church,” p. 438.

⁵⁷ PROVOST, “The Nature of Rights in the Church,” p. 4.

statement of a right to vindicate one's rights that have been violated by a person who has unlawfully violated a duty.

As stated in a previous section, it is sometimes difficult to distinguish between the violation of a right and the neglect of a duty because they frequently overlap. Persons usually have a right to something that another person has a duty to provide. Often a violation of a duty can be pursued as the violation of a right that corresponds with a person's duty. This would mean that a case of this nature is founded on the right of c. 221. However, there are instances in which harm is unlawfully inflicted when there is no violation of a specific right, yet harm was inflicted because a person neglected to fulfill his or her legal duty or obligation. Given that the right to vindicate one's rights is clearly elucidated, and given that rights and duties are obviously intertwined throughout canonical tradition, it follows that a person can bring an action for the remedy of harm in cases where a duty or obligation has been violated, even if there is no specific violation of an explicit right.

An example of this would be the case where a youth minister takes a group of seventh graders to a diocesan retreat house for an all day retreat. The formal policy of the parish is that children must have written parental consent before being allowed to leave church property. One child forgot to have his form signed, but the minister allowed the child to attend anyway. The child is injured while on the retreat, and the parents ask the minister to pay for the medical bills not covered by their insurance. According to the policy of the parish, the minister has a duty to have written parental consent before taking a child off campus, and the minister breached this duty. Had the minister not taken the

child to the retreat house the child would not have been injured, so the act of the minister led to the measurable harm. The minister is responsible for repairing the harm that he inflicted by violating his duty of care.

4.1.4 – Acts Anticipated to Inflict Harm

Canon 128 is intended to oblige a person to repair the unlawfully inflicted harm that he or she has caused. But occasions arise where one knows that harm is imminent because a law, right, duty, or obligation is about to be violated. However, this violation has yet to occur. Canon law does not have a developed mechanism enabling one to approach a judge in an emergency situation to restrain harmful actions. Nevertheless, there is a judicial method of preventing harm that requires a more extensive process, including consultation with the other party.

There is another option that one can use to prevent harm, but it is an administrative act rather than a judicial one. One could always approach the bishop or superior and request that he issue a precept to prevent the harm from occurring. However, if one simply desires to proceed judicially, one must wait until after the harm has been inflicted before then seeking to remedy the harm, unless one begins a contentious case and requests that c. 1496 §2, which allows for a temporary restriction of a right, which is called a “restraint,” be enforced until the case has been adjudicated fully. Both precepts and restraints will be discussed later in section 4.3.3.2.

The common law has various equitable remedies to prevent a harmful act before it occurs, or to halt a harmful action until a court can adjudicate the issue. These measures

are critical in preventing harm rather than having to wait until the harm has already occurred. Because these common law provisions could be very beneficial in the canonical context, they will be discussed in detail later in the chapter.

4.1.5 – Acts Placed with *Dolus*

The previous sections specifically addressed how an act can inflict harm. In order to approach an appropriate canonical forum, not only must an act be harmful, but the harm also must be inflicted unlawfully. Lawful restrictions of rights are not actionable. One way that an “other act” can unlawfully inflict harm is when an act is committed with *dolus*. This means that a person chooses to engage in an action knowing that it will result in causing harm to another, and the act does, in fact, cause harm. The following are some examples: 1) an editor publishes an article for the local diocesan paper despite his knowing that one of the statements in the article unlawfully harms another’s reputation (c. 220); 2) a defender of the bond makes calumnious statements in a defender brief knowing that the statements are libelous, but chooses to submit the brief anyway; 3) a Church official intentionally fails to follow the process necessary to vindicate a person’s rights, or to impose a penalty; 4) a person knowingly breaks a contractual agreement; 5) a person knowingly commits a canonical delict that inflicts harm on another person.

4.1.5.1 – Elements of *Dolus*

The primary element of *dolus* is that of intention. The person acts knowing that the action being performed is morally wrong or illegal, and that it will cause harm to

another, yet the person intends to act and completes the act despite this knowledge.

Albert Gauthier defines *dolus* as “evil intent.”⁵⁸ It is the intentionality of the act that distinguishes it from a negligent act, in which the person should have known that an act could inflict harm, but in fact did not know, or was not sure that the act was harmful. The person must know that the act will be harmful in some way for *dolus* to be applicable. The other element is that harm did in fact result from the act that was placed with evil intent. If no harm results, while the intention may have been sinful, no process is possible because there is no measurable harm.⁵⁹

4.1.5.2 – Common Law Malice/Intent

Dolus in canon law has a similar counterpart in the common law. In the common law, several legal concepts are comparable to the canonical concept of *dolus*. One of these concepts is malice, which is:

...the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury... a condition of the mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act towards another without justification or excuse... Malice in law is not necessarily personal hate or

⁵⁸ GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, p. 73.

⁵⁹ For example, a new pastor and the high school youth minister are having a serious personality conflict. In an effort to force the youth minister to resign, the pastor tells her that in addition to her present duties, he has agreed to put her in charge of coordinating Diocesan Youth Day, and she will now be responsible for the middle school youth group. However, rather than feeling overworked and underpaid, the youth minister is thrilled with the challenge provided by the added responsibilities. In this fictional scenario, even though the pastor's intent was to cause harm, it was not perceived as harm and therefore did not result in any harm. Conversely, if the added responsibilities had forced the youth minister to quit the job, or if the youth minister had refused the new duties and had been fired, then harm would have resulted and the act would have been actionable due to the *dolus* of the pastor.

ill will, but it is a state of mind which is reckless of the law and of the legal rights of the citizen.⁶⁰

Another way the common law describes acts committed with malice is to call them intentional or willful torts. An intentional tort is an act that is perpetrated by a person who intends to commit an act that the law has declared wrong.⁶¹ The definition also includes "proceeding with knowledge that the harm is substantially certain to occur, not just that there may be a possibility of the harm occurring."⁶² This is opposed to a negligent act, where the person does not exercise the requisite degree of care when engaging in an act that is permitted. For an act to be intentional or willful, it must include the elements of malice and ill will. These elements can be manifested when one has knowledge of danger yet is indifferent to others' safety, or has this knowledge and fails to use ordinary care.⁶³

In the common law, acts committed with malice, intentional torts, intentional breaches of contract, and any other intentionally committed wrongful act are actionable in court. If one can prove that a harmful act was intentionally committed, and harm resulted, then the Court can award damages or mandate an equitable remedy if the case is

⁶⁰ J.R. NOLAN et al., "Malice," *Black's Law Dictionary*, 6th edition, Saint Paul, MN, West Publishing Company, 1991, p. 660.

⁶¹ See "Intentional Tort," *Black's Law Dictionary*, pp. 1036 and 1104.

⁶² W.W. BASSETT, *Religious Organizations and the Law*, vol. 2, Deerfield, IL, Clark Boardman Callaghan, 1997, p. 7/31.

⁶³ See "Willful Tort," *Black's Law Dictionary*, p. 1104.

a case in equity.⁶⁴ The intentionality of the act is what separates it from negligent acts. These will be discussed in the following section.

4.1.6 – Acts Placed with *Culpa*

Culpa in canon law, which can be translated as “negligence,” is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances, or it is the omission of diligence or negligence that harms another.⁶⁵ Negligence can be due to a person’s culpable ignorance of the law, meaning that the person who has a duty to know the law believes that his act is lawful even though his act is objectively against the law. If the act causes damage, the person’s ignorance of the law is culpable.⁶⁶ Negligence can also occur when a person fails to be appropriately vigilant when performing an act that causes damage. Had the person acted more carefully the harm could have been foreseen and avoided.⁶⁷ Finally, negligence can occur when a

⁶⁴ These options will be discussed in a later section.

⁶⁵ “*Omissio debitae diligentiae vel negligentia ex qua alteri nocetur*,” in c. MORI, December 7, 1914, in *SRR Dec.*, 6 (1914), pp. 336-337.

⁶⁶ See PREE, “On Juridic Acts and Liability in Canon Law: Part Two,” pp. 506-507.

⁶⁷ See *ibid.*, p. 507. See also W. AYMANS and K. MÖRSDORF, *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici. 1: Einleitende Grundfragen und allgemeine Normen*, 13th edition, Paderborn, F. Schöningh, 1991, p. 382.

person neglects to act when he or she had a duty to do so, and harm results.⁶⁸ In all of these cases, the act is unlawful and any harm must be remedied.

4.1.6.1 – Elements of *Culpa*

In the common law, there are four elements that must be present for an action to be deemed negligent.⁶⁹ These elements also hold true as a standard for canon law. First, for an act to be negligent the person placing the act must have a duty of care, which means that the person is responsible for fulfilling a particular duty or obligation. Second, the person must have breached that duty in some way. Third, the act must have been the proximate cause of the harm.⁷⁰ This means that for the person to be culpable there must be a causal link between the person's act and the damage inflicted.⁷¹ Though generally there must be a direct link between the person causing the damage and the person damaged, on at least one occasion the Rota deemed an indirect link sufficient for a person

⁶⁸ The negligent violation of a duty raises some rather provoking questions in regards to the recent scandals involving clergy sexual misconduct with minors. Bishops are specifically entrusted with the full care of souls. This means that they have a duty to foster, nurture and protect the souls of the people and clergy of his diocese. This raises the interesting question in cases where the bishop has been negligent in this duty, or has intentionally acted in such a way that violates his duty, and damages the souls in his diocese. If so, could the people who have been spiritually damaged in this manner formally petition to have this harm remedied in a contentious action? For example, if a bishop has knowingly assigned a priest who has been diagnosed as a pedophile to a parish and the priest re-offends, is the bishop morally and legally responsible for jeopardizing the souls of the families that have been victimized?

⁶⁹ See *La Salle Law Library: Volume II: Torts, Domestic Relations and Persons*, Chicago, IL, La Salle Extension University, 1965, p. 100.

⁷⁰ For a more in depth explanation of causality, see section 2.3.2 of Chapter 2.

⁷¹ "Quod damnum sit reipsa secutum, et quod actio, de qua agitur, sit causa efficax huius damni, palam est, et ab omnibus admittitur." C. MANY, August 5, 1913, in *SRR Dec.*, 5 (1913), p. 526. See also c. MANY, March 30, 1914, in *SRR Dec.* 6 (1914), p. 154; c. MASSIMI, January 5, 1920, in *SRR Dec.*, 12 (1920), p. 3; c. MASSIMI, December 22, 1926, in *SRR Dec.*, 18 (1926), pp. 429-434; c. PASQUAZI, July 12, 1962, in *SRR Dec.*, 54 (1962), pp. 366-369.

to be responsible for the harm inflicted.⁷² Finally, there must be actual harm inflicted, and this harm must be able to be measurable or provable in some way. All of these elements must be present for an act to be deemed negligent.

In canon law there have traditionally been three levels of negligence.⁷³ *Culpa levissima* is the lowest level of *culpa*. Justinian held that a person could be held accountable for this low level of negligence if it was in relation to damage to property or to negligent behavior.⁷⁴ This concept of *culpa levissima* is similar to the common law understanding of "slight negligence." "Slight negligence" is defined as "the failure to exercise great care, or not using the level of care that a person of extraordinary prudence and foresight is accustomed to use."⁷⁵

Next is *culpa levis*, which is an ordinary level of negligence or, according to c. 1321 §2, the omission of due diligence.⁷⁶ In Roman law, *culpa levis* was present when "what could have been foreseen by a diligent man was not foreseen."⁷⁷ This would be the same as "ordinary negligence" in the common law, which is defined as "the doing of

⁷² See c. PRIOR, April 4, 1916, in *SRR Dec.*, 8 (1924), p. 76.

⁷³ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 507. For Rotal decisions that address the levels of *culpa*, see c. MANY, March 30, 1914, in *SRR Dec.*, 6 (1914), pp. 154-157; c. MORI, December 7, 1914, in *SRR Dec.*, 6 (1914), pp. 336-337; c. LEGA, July 14, 1913, in *SRR Dec.*, 5 (1913), pp. 451-455; and c. PRIOR, April 4, 1916, in *SRR Dec.*, 8 (1916), pp. 76-78.

⁷⁴ D. 9, 2, 44. See A. GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, 2nd edition, Ottawa, Saint Paul University, 1996, p. 73.

⁷⁵ "Slight Negligence," *Black's Law Dictionary*, p. 718.

⁷⁶ CIC c. 1321 §2. "[Q]ui vero id egit ex omissione debitae diligentiae..."

⁷⁷ D. 9, 2, 31. GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, p. 73.

some act which a person of ordinary prudence would not have done under similar circumstances, or the failure to do what a person of ordinary prudence would have done under similar circumstances.”⁷⁸

Finally there is *culpa magna*, or great negligence. Canon 1326 §1 3° gives a good definition of *culpa magna* when it states that one may be punished more severely if one “foresaw the event but nevertheless omitted to take the precautions to avoid it which any careful person would have taken.” The difference between negligence and great negligence is one of degree. Whereas negligent behavior means that the person should have known something could cause harm, great negligence is when the person foresaw that an act was most likely to inflict harm, but did nothing to prevent it. *Culpa magna* is almost the same as *dolus*, except that with gross negligence, harm is only most likely to occur rather than harm being substantially certain. *Culpa magna* would be the equivalent of “gross negligence” in the common law, which is defined as a “conscious and voluntary act or omission which is likely to result in grave injury” or an “indifference to a present legal duty and utter forgetfulness of legal obligations so far as other persons may be affected.”⁷⁹

Canon 128 does not distinguish between the various levels of negligence in requiring the remedy of unlawfully inflicted harm. Since the canon gives no guidance concerning the extent to which the various levels of negligent acts must be remedied, one first can look to the penal law to see under which circumstances *culpa* is considered to be

⁷⁸ “Negligence,” *Black's Law Dictionary*, p. 716.

⁷⁹ “Gross Negligence,” *Black's Law Dictionary*, p. 717.

a punishable offense. In the penal law, according to c. 1321 §2, *culpa* is punishable only if a law or precept specifies that it is punishable. There are only three canons that provide a penalty for negligence. Canon 1389 provides for a just penalty for someone who negligently harms another while performing or omitting an act of ecclesiastical power, ministry, or function. Canon 1457 provides for a just penalty for a judge's negligence that harms litigants. Finally, c. 1741 allows a pastor to be removed from office if he is gravely negligent in fulfilling his parochial duties.⁸⁰ In imposing a penalty for *culpa*, a judge is able to inflict a more serious punishment if the negligence was *culpa magna* rather than *culpa levis*.

Negligence in the penal law is not a commonly punishable offense, and it is only punishable in cases of neglect of office. However, the penal law and c. 128 serve separate functions. The determination of whether one should be punished for one's negligence is a different matter from whether one should be held accountable under c. 128 for one's negligent actions that unlawfully inflicted harm. While an ecclesiastical penal law may determine whether an act is punishable because of grave negligence, the natural law requires that unlawfully inflicted harm be remedied using a lower standard of negligence.⁸¹ Therefore, just because an act is not punishable under the penal law does

⁸⁰ Removal from office is not a penalty, but in this case it has the same effect as a penal deprivation of office.

⁸¹ See J. KRUKOWSKI, "Responsibility for Damage Resulting from Illegal Administrative Acts in the Code of Canon Law of 1983," in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law*, organized by Saint Paul University and held at the University of Ottawa, August 19-25, 1984, Ottawa, Saint Paul University, Faculty of Canon Law, 1986, p. 233.

not take away one's natural obligation to remedy the harm that one commits, whether that negligence be slight or gross.

The Rota has given some guidance concerning what level of *culpa* relates to the various levels of harm.⁸² The level of *culpa* necessary for contractual liability depends on various rules based on the type of contract, which according to c. 1290 depends on the civil laws in the jurisdiction.⁸³ Non-contractual liability is always actionable, even for slight negligence.⁸⁴ Individuals causing harm while performing their professional duties are not responsible for slight negligence but only for ordinary or gross negligence.⁸⁵ Finally, if a person acting as a public authority causes the harm, that person is responsible only for ordinary or gross negligence.⁸⁶

4.1.6.2 – Negligence vs. Accident

Historically, *culpa* was considered to be on a scale between *dolus* and *casus* (an accident).⁸⁷ All three types of acts cause harm, but while negligence was worse than an accident, it was not as bad as an intentionally harmful act. It is evident from a simple reading of c. 128 that the canon does not mention harm inflicted accidentally. Can c. 128

⁸² See FREE, "On Juridic Acts and Liability in Canon Law: Part Two," pp. 507-508.

⁸³ See c. MANY, August 5, 1913, in *SRR Dec.*, 5 (1913), pp. 527-528.

⁸⁴ See c. MANY, May 27, 1913, in *SRR Dec.*, 5 (1913), pp. 344-345.

⁸⁵ See c. MANY, August 5, 1913, in *SRR Dec.*, 5 (1913), pp. 527-528.

⁸⁶ See *ibid.*, p. 529; c. PRIOR, April 4, 1916, in *SRR Dec.*, 8 (1916), pp. 76-78; and c. LEGA, July 14, 1913, in *SRR Dec.*, 5 (1913), pp. 452-454.

⁸⁷ See GAUTHIER, *Roman Law and its Contribution to the Development of Canon Law*, p. 73.

be applied to accidental acts that cause significant harm, although there is no negligence involved? The notes from the committee in charge of drafting c. 128 provide the answer to this question.

When the *coetus* on General Norms was presented with the option of integrating a section concerning responsibility for accidental harm that was drafted by the *coetus* on Procedures, it declined to do so.⁸⁸ Most likely this was due to the fact that while an accident may cause significant harm, because it cannot be anticipated or prevented the harm it causes is not unlawfully inflicted. Therefore, since the *coetus* intentionally excluded this option from the canon, it stands to reason that it intended not to extend c. 128 to cover the harm caused by acts that were not negligent or deliberate.

The current Code requires fault before liability can be assessed. As long as the act is truly an accident and could not have been prevented, the harm done is not legally actionable. However, although the harm was inflicted accidentally, this does not relieve the person who caused the accident from the moral responsibility of apologizing for the accident and trying to remedy the harm that he or she accidentally inflicted.

⁸⁸ Compare the version drafted by the committee on Procedures, "Any damage done must be remedied by the one who caused it with malice or negligence, or even, if civil law or equity should require it, from the one who without negligence gave cause for the damage" (*Communicationes*, 11 [1979], p. 75), with the canon drafted after the committee on Norms became aware of and had incorporated the other committee's work: "Whoever unlawfully inflicts damage upon another by a juridic act, or indeed by any other act placed with malice or negligence, is obliged to repair the damage done." *Communicationes*, 23 (1991), p. 285.

4.1.6.3 – Common Law Negligence

As stated previously, the common law has four requirements for an act to be considered negligent.⁸⁹ First, a person placing the act must have a duty to use due care. Second, the person must have breached that duty. Third, that breach must have been the proximate cause of the harm. Finally, there must be actual harm inflicted, and this harm must be measurable or provable in some way.⁹⁰

In the common law, duty is generally determined by balancing whether the duty of care is less than the gravity of injury multiplied by its probability of occurrence.⁹¹ This determination takes into account that “the more serious the potential injury, the less probable its occurrence need be before a defendant will be held to do some burdensome things to avoid it.”⁹² These elements are weighed to determine whether the person had a duty to exercise a certain standard of care. The common law’s standard of care is the degree of care exercised by a reasonable person under the same circumstances.⁹³ This is known as the reasonable person standard.⁹⁴ All actions are judged against this standard, and if it is determined that a reasonable person would have acted differently in the same circumstances, then the person has breached the requisite standard of care. If the breach

⁸⁹ See J.A. ALESANDRO and A.J. PLACA, “Church Agents and Employees: Legal and Canonical Issues,” in *CLSA Proceedings of the Fifty-Eighth Annual Convention*, Washington, DC, CLSA, 1996, p. 38.

⁹⁰ See BASSETT, *Religious Organizations and the Law*, vol. 2, p. 7/149.

⁹¹ See ALESANDRO, “Church Agents and Employees,” p. 45.

⁹² *Ibid.*

⁹³ See *La Salle Law Library: Volume II: Torts, Domestic Relations and Persons*, p. 104.

⁹⁴ Many law schools and attorneys in the United States refer to this doctrine in gender-neutral terms. However, this edition of *Black’s Law Dictionary* continues to cite this standard as the reasonable man standard. See “Reasonable Man Standard,” *Black’s Law Dictionary*, p. 875.

of care was the proximate cause of a provable injury, then the party was negligent and damages can be assessed.

The determination in the common law that an action was either placed maliciously or negligently is made following a trial. At the end of the process, if a determination is made that harm has been maliciously or negligently inflicted, or if in equity the determination is made that harm is imminent, then the judge or a jury can assign damages or another equitable remedy.

4.2 – Canonical Processes for “Other Acts”

Now that the issue of how one can unlawfully inflict harm through “other acts” has been addressed, the canonical processes through which this harm can be remedied must be examined. There are three types of canonical processes that can be used for “other acts.” The first is a contentious trial. The second is an oral contentious trial, which is actually a modified form of the contentious trial. The third is some type of alternate dispute resolution.

It is beyond the scope of this work to explain in detail the various contentious procedures and how one brings and proceeds with a contentious case or with mediation. Rather, the following sections will provide a brief overview of these processes to determine which type is appropriate for the various types of harm inflicted. They will examine the use of contentious trials and oral contentious trials, as well as the various forms of alternate dispute resolution, in an effort to determine the methods available to remedy harm inflicted by “other acts” in accord with c. 128.

4.2.1 – Contentious Trials

The first possibility to remedy harm caused by these acts is the initiation of an ordinary contentious action.⁹⁵ The stated purpose of this trial, or for that matter any trial, is to vindicate rights or declare juridic facts (c. 1400). This is done via a contentious process, the intent of which is to discover the truth so that justice may be done.⁹⁶

Even though the Code has a fairly extensive section concerning the procedures governing a contentious trial, it seems that most of the time and effort given to the canonical discussion of contentious trials is either within the context of marriage nullity, or discussing how trials can be avoided altogether. There also is the presumption in the minds of many Catholics and non-Catholics alike that if one has been harmed by another person, one files a suit in civil court rather than petition for redress before an ecclesiastical court.⁹⁷ It would not even occur to most of the faithful to bring an action before a diocesan tribunal, and it would most likely be quite a surprise to the tribunal staff as well.⁹⁸ However, given the scriptural mandate that Christians should resolve their disputes among themselves, the contentious trial is one way that an individual can have remedied any harm that has been unlawfully inflicted upon him.

⁹⁵ For a good overview on the conducting of a contentious trial, see M. WILENS, *The Ordinary Contentious Trial: A Schematic Overview*, privately published, 1992.

⁹⁶ See C.A. COX, "Section I: The Ordinary Contentious Trial [cc. 1501-1655]," *New Commentary on the Code of Canon Law*, p. 1655.

⁹⁷ See M.R. MOODIE, "Defense of Rights: Developing New Procedural Norms," in *The Jurist*, 47 (1987), p. 423.

⁹⁸ See *ibid.*

Canon 1476 allows anyone, whether baptized or not, to bring action in a contentious trial. If someone believes that they have had harm unlawfully inflicted upon them, by an act other than an act of administrative power, and the case involves a violation of a law, duty, or right, they can petition their local tribunal to have this harm redressed by presenting a *libellus* to a court of first instance.⁹⁹ Both CIC c. 1405 §3 and art. 129 §1 1° of *Pastor bonus* state that the Roman Rota has competence in first instance for contentious actions initiated against bishops.

Contentious trials have many advantages over administrative recourse. Unlike administrative recourse, trials have procedures that are specified in and required by the Code. If procedures are not followed and the rights of the parties are violated, this can invalidate the whole proceeding (c. 1620). In a contentious process, parties can ensure that their side of the story is being presented and evaluated by the judges. Both sides have the right to present evidence, and the court is able to take the time to study that evidence in coming to its conclusions. The evidence in a contentious trial is generally presented through documents and through testimony taken individually rather than with both parties present for a hearing. This means that generally the parties are not forced to confront each other directly during the process.

The parties, as well as the judges, can request expert testimony to help in understanding the issues and making a fair judgment. Both parties are able to choose advocates and procurators to represent them, though in some types of cases the parties are allowed to represent themselves. Advocates can submit legal briefs to the tribunal to

⁹⁹ See cc. 221, 1400, 1476, and 1491.

make their case. Generally cases are heard by a *turmus* of three judges rather than by only one person judging a case. The standard of proof is “moral certitude” rather than a decision made simply at the discretion of the administrator (c. 1608). There is much less discretion in the process than in administrative recourse, and the rights of the parties are better protected. Courts also have the right to assign a remedy for the harm inflicted once the facts have been determined. Finally, a court of second instance may review the case to insure the fairness of the judgment. Overall, these procedures are in place to protect the rights of the parties and as much as possible to ensure a fair outcome to the process.

Contentious trials also have significant drawbacks. While contentious trials are useful, in that they are less arbitrary, more in depth, and less subject to abuses than administrative processes, in actuality they are not widely known, and are not often utilized. In fact, many people and certainly most lay people do not know that there are ecclesiastical processes available if harm has been inflicted upon them. Even if they do know, many laypeople would not take advantage of these processes for fear of being labeled a troublemaker in their diocese or parish, or because they do not want to cause a scandal or make an enemy of the pastor, bishop, or other Church authority. Such reasons recommend having less litigious and confrontational structures for resolving conflicts and repairing harm. The establishment of an office of mediation in the diocese is a positive step toward this goal.

The Code itself demonstrates a decided preference for parties to avoid the use of ecclesiastical tribunals to adjudicate disputes.¹⁰⁰ Canon 1446 earnestly encourages parties to resolve their differences themselves or with the help of a mediator or arbiter, and it encourages all the faithful to avoid lawsuits whenever possible. Canons 1713-1716 also encourage the avoidance of contentious processes through the intervention of arbiters or mediators. Canon 1733 §2 allows for both Bishops' Conferences as well as for individual bishops to create permanent offices of dispute resolution to promote non-litigious settlements of disputes. Finally, c. 1400 §2 takes a whole category of disputes out of the realm of contentious trials, and requires that disputes concerning acts of administrative power be resolved in an administrative process. All of these canons discourage the use of a contentious action to remedy harm. In fact, James Provost argues that, because c. 1400 §2 removes the vast majority of cases from the possibility of a contentious trial, in effect, "[T]he courts do not exist as a means to vindicate much more than the right to marry."¹⁰¹ Provost is correct in his criticism. The more than two hundred canons concerning the conducting of a contentious trial are rarely used outside of marriage cases, and most of the faithful are completely unaware of their existence or their purpose.

Presuming that persons know that they can initiate a contentious trial, the conduct of that trial also presents significant practical problems. At present, most of the canonists working in a diocese are trained almost exclusively to handle marriage cases. Generally,

¹⁰⁰ See R.E. BASS, "Due Process: Conciliation and Arbitration," in *CLSA Proceedings of the Fifty-Third Annual Convention*, Washington, DC, CLSA, 1992, p. 68.

¹⁰¹ PROVOST, "The Nature of Rights in the Church," pp. 14-15.

both the canonists and the support staff are inexperienced in handling non-marital contentious actions. Due to the lack of personnel, and specifically a lack of degreed canonists, tribunal employees are already overwhelmed with the marriage cases presently before their courts.

There is also the question of the actual competency of the judges in judging non-marital cases.¹⁰² Church officials and especially canonists rightly are wary of civil judges attempting to interpret canon law. Given that the canon law canonizes the civil law in certain instances, and given that few canonists have a degree in civil law, the question must be raised whether canonical judges have the requisite knowledge of the civil law necessary to apply it properly in a particular case. This is especially true in common law jurisdictions, where a judge must not only be familiar with the statutory law of his or her jurisdiction but also the jurisprudential case law that glosses and refines the law and its application to given fact patterns. Given the complexity of applying the civil law, as well as the general lack of experience among canonists regarding the conducting of contentious trials, it is not surprising that canonists do not promote the more frequent use of contentious trials.

¹⁰² See PROVOST, "Rights in Canon Law: Real, Ideal, or Fluff?" p. 336. In this context, competence is not whether a judge is juridically competent (c. 1407) to hear a case, but whether the judge possesses the ability, knowledge and skill necessary to apply the law to the given facts, or knows the proper procedures that must be followed in conducting a contentious case. This question of competence is relevant not only to instances where the civil law is canonized e.g. contractual disputes (see also section 4.6), but also to the application of the procedural canons regarding contentious trials. Generally speaking, after learning the law from a faculty of canon law, less experienced canonists learn how to apply canon law to practical cases from canonists with more experience. This is certainly true in regards to marriage tribunals. However, most canonists working in tribunals have never adjudicated a non-marital contentious trial in all their years of working in a tribunal. All they know are the procedures for adjudicating a marriage case. One can certainly question whether a judge who has been working in a marriage tribunal for a number of years would be competent to adjudicate a non-marital trial, or whether the judge's lack of experience could compound the harm that has already been inflicted.

In addition, contentious procedures require significant time and money, as well as canonical expertise and personnel.¹⁰³ Contentious cases require experienced judges, notaries, experts, and advocates for the parties. In many dioceses there are not the requisite amount of licensed, competent, and experienced persons to fill these offices. Contentious cases are time consuming. This means that these cases would take time away from the processing of marriage cases, since the personnel conducting contentious actions would be the same as the personnel of the marriage tribunal. These cases are also expensive because of the time, effort, and expertise necessary to adjudicate them. This could make them cost-prohibitive for either the parties or for the diocese. Certainly, there can be significant expense incurred if the case is appealed to the Rota.

There is also the issue concerning how judges should apply the law in adjudicating a case and assigning a remedy in an equitable and consistent manner. There is not a large body of canonical jurisprudence for judges to consult in dealing with a non-marital contentious case. There are only a handful of Rotal decisions concerning limited types of non-marital cases. Many of these cases were decided prior to the 1983 Code. As a practical matter, it is difficult to establish jurisprudential guidelines from a mere handful of cases. Furthermore, there are not many jurisprudential examples of remedies in non-marital cases, and specific remedial guidelines are not found in the 1983 Code.¹⁰⁴ Since most canonists do not have ready access to Rotal decisions, and since many canonists do not have a working knowledge of Latin, the few cases that do exist may not

¹⁰³ See D.L. BARR, *The Right to One's Reputation: Applicable Legislation in the United States of America*, JCD diss., Ottawa, Saint Paul University, Faculty of Canon Law, 1993, p. 102.

¹⁰⁴ This is especially true concerning the award of monetary damages.

be widely available or readable. This makes conducting a non-marital trial and rendering a judgment difficult because there are few guidelines to follow.¹⁰⁵

There is also the question of a possible appeal of the judgment to a second instance court. The same issues that face courts of first instance would also be present for judges in second instance courts, unless that second instance court is the Rota. If one of the parties is unhappy with the judgment of the court, then the case can be appealed to the Rota for either second or third instance. If a case is appealed to the Rota, like administrative recourse to the Signatura, parties to a contentious action face a number of difficulties such as distance, language, expense, as well as facing the Rota's significant backlog of cases, which has resulted in cases taking many years to be adjudicated. The Rota also requires special Rotal advocates to argue the case, and this can be expensive as well as linguistically challenging.

Finally, there is the perplexing issue of enforcement. Assuming that a judgment is reached, can the tribunal enforce its judgment? If the perpetrator is a cleric, religious, or employee of the Church, then the tribunal may have some leverage to enforce a judgment. However, barring circumstances in which the Church has some direct control over a person, or in cases where the parties willingly and voluntarily submit to the judgment of the court, there is no means of enforcing a tribunal's decision. This is frustrating, because even if the parties participate in a contentious trial, if one of the

¹⁰⁵ Unlike common law, canonical cases do not create precedents by which judges in subsequent cases are bound. However, the decisions of the Roman Rota are highly influential and act as guidelines for the proper adjudication of a case, as well as for the assessing of remedies.

parties does not like the judgment, he or she can flagrantly ignore the order of the court with few negative ramifications.

4.2.2 – Oral Contentious Trials

An oral contentious process is a shortened version of the contentious trial that is described in cc. 1656-1670. It is similar to an ordinary contentious trial, in that it “retains the substance of a regular formal trial: contradictory issues, exceptions, proofs, publicity, discussion, [and a] decision (which is motivated).”¹⁰⁶ However, it differs from a contentious trial in a number of ways. In general, the procedures are easier, and the process is simplified and streamlined. It is less time consuming and less cumbersome than the normal contentious process. The process takes place before a sole judge rather than a *turnus* (c. 1657). The time limits for this process are shortened (cc. 1659-1661), and most importantly, both parties are called to present their case at a hearing (*audientia*), through both testimony and documentary proofs (cc. 1661, 1663-1667).¹⁰⁷ The decision of the judge is given either the day of the hearing or within five canonical days of the hearing (c. 1668).

There are certain types of cases in which the use of the oral contentious process is not allowed. The canons forbid the oral contentious process to be used for marriage cases (c. 1690), cases that challenge the validity of an ordination (c. 1710), and penal cases (c.

¹⁰⁶ F.G. MORRISEY, *Procedural Law* (DCA 5206a: Class Notes for Private Use of Students), Ottawa, Saint Paul University, Faculty of Canon Law, 1998-1999, p. 239.

¹⁰⁷ See *ibid.*

1728).¹⁰⁸ Its use is permitted for such cases as the resolution of incidental questions (c. 1590), cases concerning a complaint of nullity (c. 1627), questions arising from the right to appeal (c. 1631), and marital separation cases (c. 1693).¹⁰⁹ However, if the oral contentious process is used for a case that is forbidden by law, c. 1656 §2 specifies that the judicial acts of that case are null.

The advantages of an oral contentious process are the streamlined procedures and the ability to have the case adjudicated quickly and less expensively. Its primary drawback is its limited applicability. Because it can be used in only certain circumstances and is not able to be used for matrimonial cases, this process is not widely employed. Another drawback is that in theory the process is not as protective of a person's rights as an ordinary contentious trial. This is one reason why use of the oral contentious process is forbidden for marriage and penal cases. Unfortunately, marriage and penal cases make up the vast majority of cases heard in tribunals, which severely limits the oral contentious trial's practical applicability. In addition, the oral contentious process faces many of the same difficulties as the ordinary contentious trial, including lack of jurisprudence, lack of personnel with expertise in conducting these trials, and an inability to enforce the judgment.

¹⁰⁸ See J.P. BEAL, "Section II: The Oral Contentious Process [cc. 1656-1670]," in *New Commentary on the Code of Canon Law*, p. 1754.

¹⁰⁹ See *ibid.*

4.2.3 – Alternate Dispute Resolution

A U.S. Assistant Attorney General stated it quite well when he said that, “in the disputing world, the forum should fit the fuss.”¹¹⁰ Not every unlawful infliction of harm in the Church requires a formal process for the harm to be remedied. Frequently, all litigants really want is “an apology, an opportunity to set the record straight, or a chance to preserve or restore their reputation and self respect.”¹¹¹ These types of cases may or may not be less serious, but they certainly are more easily remedied through a less adversarial process. As stated in the previous section, the Code not only recognizes this reality, but also strongly encourages this approach in lieu of a contentious trial.

There are a number of less formal alternatives in which a party can have harm remedied. These processes, known collectively as alternate dispute resolution (ADR), are generally easier to access, are less confrontational, less expensive, and less time consuming than either a contentious trial or administrative recourse. And unlike the oral contentious process, there are few limitations placed on their use.¹¹² There are at least four processes that can be used in resolving disputes concerning the unlawful infliction of

¹¹⁰ R. OLSON, “Growth in the Dispute Resolution Field: Letting a Thousand Flowers Bloom,” in *Dispute Resolution*, 19 (Summer, 1986), p. 1.

¹¹¹ J.P. BEAL, “Have Code, Will Travel: Advocacy in the Church of the 1990’s,” in *The Jurist*, 53 (1993), p. 327.

¹¹² Obviously, this is not an option for marriage nullity cases or for formal penal cases. However, it could be used initially for penal matters not involving the actual imposition of a formal penalty. For example, the two sides voluntarily could agree for one of the parties to behave or not behave in a certain fashion, such as to stay away from a particular person or establishment, to agree to live in a particular place or under particular rules, etc. This could be the step taken prior to instituting a formal process. Both sides would have to voluntarily agree to the outcome, or else the case would have to proceed as a formal penal contentious trial.

harm that arise within the Church: negotiation, mediation, conciliation and arbitration.¹¹³

James Coriden lists and defines these various types of alternate dispute resolution options. The definitions he gives are as follows:

Negotiation: conferring, discussing, or bargaining by the disputing parties to reach a settlement; disputing groups often are represented by individuals.

Conciliation: an informal process in which the third party tries to bring the parties to agreement by lowering tensions, improving communication, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally or, in a subsequent step, through formal mediation.

Mediation: a structured process in which the mediator assists the disputants in reaching a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach a settlement but is not empowered to render a decision.

Arbitration: involves the submission of the dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is less formal and less complex and often can be concluded more quickly than court proceedings. In its most common form, binding arbitration, the parties select the arbitrator and are bound by the decision, either by prior agreement or by statute.¹¹⁴

Within the context of the Church, these processes are voluntary, in that the "two or more disputants request or accept the assistance of a third party to assist them to resolve their dispute."¹¹⁵ There are numerous canons encouraging parties to resolve their differences through ADR rather than utilizing the more formal processes throughout the Code. Canon 1446 encourages parties to strive to resolve their differences themselves or

¹¹³ See V. VONDENBERGER, "Effective Due Process Is Possible in the Church," in *Studia canonica*, 30 (1996), p. 170.

¹¹⁴ J.A. CORIDEN, "Alternate Dispute Resolution in the Church," in *CLSA Proceedings of the Forty-Seventh Annual Convention*, Washington, DC, CLSA, 1986, p. 64.

¹¹⁵ J.P. BEAL, "Protecting the Rights of Lay Catholics," in *The Jurist*, 47 (1987), p. 138.

with the help of a mediator or arbiter, and encourages judges to persuade the parties to either seek an equitable solution to their dispute themselves or to use a mediator. Canon 1659 also mentions mediation in the context of an oral contentious trial. Canons 1713-1716 encourage the avoidance of judicial disputes by using arbiters. Canons 1676 and 1695 suggest that parties use a third party to try to reconcile in their marriages rather than formally separate or petition for nullity. Canon 1733 §1 encourages parties to use a mediator rather than attempting administrative recourse. Finally, c. 1733 §2 permits Bishops' Conferences and individual bishops to create permanent offices of dispute resolution to promote non-litigious settlements of disputes.

There are many benefits to using ADR rather than a formal process. First, the process is significantly less time consuming than a formal process. It is also generally less expensive. The procedures are less complicated, confusing and intimidating. It is also significantly less confrontational, and is less likely to create or exacerbate hostility between the two parties. Often the various types of ADR are seen as being more compassionate and more responsive to dealing with the underlying problems of the dispute.¹¹⁶ In addition, sometimes the result of the process can be registered with a civil authority, making it binding in the civil law of the jurisdiction. This means that the civil authority will enforce the decision as they would the outcome of mediation resulting from a purely civil case.

Though the various types of ADR options have many benefits, these processes also have their drawbacks, such as:

¹¹⁶ See VONDENBERGER, "Effective Due Process Is Possible in the Church," p. 170.

- 1) Lack of awareness about the process,
- 2) Inadequate funding and staffing,
- 3) Absence of training for personnel,
- 4) Absence of Church structures to facilitate use,
- 5) Failure to refer conflicts to process.¹¹⁷

Another problem is the possibility that the “sharp disparity in power between the parties that is typical of conflicts between lay people and church officials biases the process against the complainant.”¹¹⁸ Further problems arise with regard to canonical time limits. If parties agree to mediate a dispute, and the mediation is unsuccessful, does this render other recourse options unavailable because the parties did not conform to the time limit for recourse? This is not clear. Despite its drawbacks, alternate dispute resolution is seen as a viable and practical way for the faithful to have the harm done to them remedied at a local level.

4.3 – Remedies for Unlawfully Inflicted Harm

Now that this chapter has examined the processes for the remedy of harm caused by “other acts,” including ordinary contentious trials, oral contentious trials and alternate dispute resolution, it must explore the remedies that can be assigned to repair unlawfully inflicted harm. In the common law, a remedy is defined broadly as “the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.”¹¹⁹ In canon law, the concept of reparation, and in particular the reparation of scandal,

¹¹⁷ BEAL, “Protecting the Rights of Lay Catholics,” p. 142.

¹¹⁸ *Ibid.*, p. 147.

¹¹⁹ “Remedy,” *Black’s Law Dictionary*, p. 896.

appears in many places in the Code.¹²⁰ However, the Code on occasion uses different terms to describe the different forms that the reparation of harm can take. Canon 128 uses *reparandi* as the general term that encompasses all types of remedies. *Compensatio*, or compensation, is used to describe responsibility for material or financial damages (e.g. c. 1649), whereas *satisfactio*, or satisfaction, is used to describe the attempt to restore damage done to things that cannot necessarily be quantified monetarily, such as damage to a person's reputation (e.g. c. 1390 §2).¹²¹ The concept of *reparatio* often requires *restitutio*, or restitution, for the harm done.¹²² However, c. 128 simply uses the word *reparandi* and does not address "in what way, in what kind, and by what means the damage is to be repaired."¹²³ This means that all of these other remedial concepts may be taken into account when attempting to determine how to repair harm that has been unlawfully inflicted.

Ecclesiastical judges have great discretion in fashioning appropriate remedies that are suitable for repairing the various types of harm inflicted. Canon 128 does not give any specific guidance concerning how unlawfully inflicted harm is to be repaired, which allows for creative and appropriate remedies to be crafted. This is necessary because

¹²⁰ The Code refers to the reparation of harm in general in cc. 57, 128, 982, 1062, 1189, 1347, 1357, 1498, 1729, and 1730. It specifically refers to the reparation of scandal in cc. 695, 1341, 1344, 1347, 1357, 1361, 1399, and 1727.

¹²¹ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 510.

¹²² See *ibid.*, citing BACARDÍ, *Pautas para una concepción del resarcimiento de daños*, p. 116, and G. MONTINI, "Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica," in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, Libreria editrice Vaticana, 1991, pp. 179-200. For canons concerning *restitutio*, see cc. 78, 695, 1289, 1333, 1475, 1647, and 1727.

¹²³ PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 511.

canon law must take into account some special factors and issues concerning the reparation of harm that may not be a concern in civil legal jurisdictions. For example, because the ultimate goal of the Church is the salvation of souls rather than the regulation of a society, canonical judges may have different goals in assigning a remedy than their civil law counterparts. Moreover, many of the persons in the Church have taken a vow or promise of poverty. Therefore, in these cases monetary remedies are not a practical solution because the perpetrator has no assets, other than the personal patrimony he or she may have acquired before entering the community.¹²⁴ There are also types of harm, such as spiritual harm, that do not lend themselves to monetary damages.¹²⁵ Additionally, there are only certain people who can be compelled to abide by a tribunal's judgment (specifically those who are clerics or who belong to a religious institute or society of apostolic life).¹²⁶ Given these unique circumstances, is up to the judges to craft remedies that attempt to repair harm in new and inventive ways.

¹²⁴ This becomes a particular problem when there has been a case of financial misconduct by a person with no assets. To cite a true example, a priest who is not incardinated into the diocese but who, nevertheless, has been assigned as pastor of a parish, has been in serious conflict with both the local bishop and the parish. The conflict becomes so bad that the pastor unexpectedly and without notice leaves to return to his home diocese. Before he leaves, out of spite, the pastor orders \$20,000 worth of useless lawn care products to be delivered after he has left, and pays for it out of the parish's building fund. How does one compel a priest who has no personal funds and who has left the diocese to remedy the \$20,000 worth of damage he inflicted on the parish? This becomes even more of a problem if the priest is a religious, because religious who take solemn vows have no personal patrimony.

¹²⁵ An example of spiritual harm would be harm that causes one's loss of faith or trust in God or in the Church.

¹²⁶ It also could be possible to enforce a judgment against those employed by a public juridic person. However, this could only be done if it was included as a clause in the person's employment contract that the juridic person reserves the right to garnish the person's wages in order to enforce either a civil or canonical judgment levied against them. While such clauses would have no affect on those employed outside the church, it could help make significant progress in being able to enforce judgments against those who are employed by parishes, dioceses, and other public juridic persons.

The following sections explore how harm can be remedied, both in canon law and in the common law. The common law will be examined for two reasons: first as a contrast to canon law, and second to suggest possible ways of filling *lacunae* in the canon law concerning possible remedies for harm (cf. c. 19). The section will explore the remedy of harm through the award of monetary damages. Next, it will examine the equitable remedies available in both common and canon law. Finally, temporary remedies will be examined in both common and canon law to see how one can prevent further harm from occurring prior to a case being adjudicated fully. Though this chapter is specifically addressing potential remedies for harm caused by other acts, these remedies can also be applied in the administrative forum to remedy the harm caused by juridic acts.

4.3.1 – Legal Remedies of Monetary Damages

The first and potentially the most straightforward method of remedying harm is to compensate a person monetarily for the harm that has been done. This works quite well for cases in which harm is quantifiable in some way and the perpetrator is in a position to compensate the victim. Both under the common law and canon law this method may be used to remedy harm. The following sections will discuss why this remedy is used, as well as how the common law assesses and uses this remedy. Then the canon law use of this remedy will be examined.

4.3.1.1 – Common Law Damages

In the common law, the closest equivalent to the initiation of an ordinary contentious trial to remedy harm in canon law is the filing a civil action in a common law court claiming that one has been unlawfully harmed by the acts of another through his or her negligent or intentional act. There are two broad areas of the common law that have similar applications to the types of harm covered by c. 128: the areas of torts and contracts. This harm can include damage both to real and personal property, personal injury, the violation of a person's rights, contractual violations, and employment issues. The harm in many of these cases can be assigned a value and can be remedied through the award of monetary damages. In the common law system, an award of a certain sum of money damages is the principal remedy for cases that are not criminal cases.¹²⁷ Damages are awarded by either the decision of a jury or are imposed by a judge. This monetary award is intended to serve two purposes.

First, the award of damages attempts to compensate the plaintiff for the harm suffered and the loss incurred. In other words, "the money damages will substitute, so far as money can, for the plaintiff's substantive interest which was impaired by the defendant's breach."¹²⁸ This type of money damages is generally known as

¹²⁷ Criminal cases in common law are handled differently than civil cases. The plaintiff is always the state, and the penalty imposed for a verdict against a defendant can range from community service, to the payment of a fine, to a period of incarceration. The principal purposes for imposing penalties in the criminal system are to punish the person for their wrongdoing and to deter other persons from committing the same offense. Governments also claim a secondary purpose, which is the rehabilitation of the offender.

¹²⁸ D. RENDLEMAN, *Remedies: Cases and Materials*, 6th Edition, Saint Paul, MN, West Group, 1999, p. 14.

compensatory damages, because it compensates parties for the harm inflicted upon them in an attempt to make them whole again.¹²⁹

There are various ways that compensatory damages can be assessed depending on whom or what has been damaged, and how the person has been harmed. The court can order that the defendant restore the *status quo* by returning things to the way they were prior to the tort, e.g., returning an item that has been wrongfully appropriated. It can also order that the damages be assessed at the cost for the property to be restored to its former condition if the value of the property has been decreased.¹³⁰ If this is not possible, the court can order that victims be compensated for the value of the loss, either to their persons or to their property. If the harm is to someone's property, then there are specific issues that must be taken into account. Sometimes the harm is difficult to assess because the item is unique, or priceless, or has subjective rather than real value.¹³¹ Sometimes the court awards the actual value of an object, and sometimes it awards the cost to replace the object, if the object is replaceable. In these cases it is the task of the attorney to convince a judge why a certain method of assessing and valuing the damage is the fairest.

In regards to harm inflicted on a physical person, the court has recognized methods to assess harm caused by the loss of life (a wrongful death action) or limb, as

¹²⁹ See BASSETT, *Religious Organizations and the Law*, vol. 2, p. 7/220.

¹³⁰ See RENDLEMAN, *Remedies: Cases and Materials*, p. 17.

¹³¹ For example, a diocese and a museum are disputing the ownership of vestments that were given to the first bishop of the diocese. The vestments were made from local materials and are of very little monetary value. However, the bishop was quite fond of them and prized them for being the first gifts he received as bishop from the people of his very poor diocese. Though the monetary value of the vestments are quite low, their subjective value is quite high, and this could be taken into account in determining an amount of damages.

well as sometimes allowing damages to be assessed to compensate victims for their pain and suffering.¹³² Much of this depends on the jurisdiction. Some jurisdictions allow for awards based on a person's lost enjoyment of life, which compensates a person for the "limitations on the person's life created by the injury."¹³³ Certainly the cost of past, present and future medical expenses are taken into account.¹³⁴ In assigning damages, judges and juries do take into account the value of remedying the continuing effects stemming from an injury that can extend well into the future.

The second purpose of monetary damages is an attempt to deter both the defendant(s) and any other person(s) contemplating committing the same action, as well as to encourage persons in similar situations to take precautions to prevent the damaging action from reoccurring.¹³⁵ This type of monetary damages is known as punitive damages, because the intent of the court is to punish the party and deter any possible imitators.¹³⁶ Punitive damages are awarded above and beyond the amount given to compensate victims for their specific loss.¹³⁷ Depending on the severity of the tort, these are the types of common law damages that can result in huge judgments worth millions of dollars. There is no equivalent of punitive damages in canon law.

¹³² Courts use such tools as statistical charts, including mortality tables and work-life expectancy tables, in attempting to calculate and assign a monetary value to a person's life. See RENDLEMAN, *Remedies: Cases and Materials*, p. 43.

¹³³ *Ibid.*, p. 57.

¹³⁴ See BASSETT, *Religious Organizations and the Law*, vol. 2, p. 7/221.

¹³⁵ See RENDLEMAN, *Remedies: Cases and Materials*, p. 57.

¹³⁶ See BASSETT, *Religious Organizations and the Law*, vol. 2, p. 7/220.

¹³⁷ See "Exemplary or Punitive Damages," *Black's Law Dictionary*, p. 271.

4.3.1.2 – Canon Law Damages

In canon law, harm is divided into two categories, tangible harm and non-tangible or moral harm. Generally the reparation of these two types of harm requires different types of remedies. Tangible harm is an injury that can be seen, touched, or measured, and usually tangible harm can be given a monetary value. Tangible damage that can be assessed and repaired is known as *damnum non patrimoniale reparable*, which refers to damage to property that likely is able to be redressed in its own order.¹³⁸ This means, for example, that the damage can be assessed and be fixed, or the item can be replaced. Damage to property can be appraised and assigned a value. Physical harm also can be assessed by using the bills generated from hospital, therapy, or rehabilitation facilities. In cases canonizing the civil law, such as cases dealing with contracts, the civil legislation of the country of the case's origin must be applied.¹³⁹

Sometimes assessing tangible damage and assigning a monetary value is not so straightforward, and in fact can be very difficult. Unfortunately neither c. 128 nor the procedural law gives much guidance in answering some very important questions in regards to assessing damages. For example, what criteria should a judge use in assessing the value of damage done? What if the thing damaged cannot be monetarily assessed because it is unique, or is considered priceless? How does one assess the harm if it tragically involves the loss of a life? Should the subjective value of an object be taken into account when assessing restitution? Should the actual value of an object be the

¹³⁸ See KRUKOWSKI, "Responsibility for Damage," p. 234.

¹³⁹ See c. RAAD, May 22, 1973, in *SRR Dec.*, 65 (1973), pp. 457-461; c. SERRANO, April 18, 1975, in *SRR Dec.*, 67 (1975), pp. 321-324.

standard used to assess value, or the cost to replace the object?¹⁴⁰ Does a judge take into account the value of having to remedy the effects of the harm that could extend well into the future?¹⁴¹ Though c. 128 is clear that the harm needs to be repaired, the Code gives no guidance on how to address these very practical issues, and yet these could all be very concrete problems a judge could face in applying c. 128. These issues must be addressed so that c. 128 is not just a moral guideline, but can be practically applied in concrete cases.

There are other, more general issues concerning remedies that also are not answered by c. 128 or the procedural law on contentious trials. For example, does reduced imputability require a reduction of the amount of reparation? If more than one person is responsible for committing the harm, how should the responsibility for reparation be apportioned? Should each accomplice be assessed the full amount of the damage, or should it be divided among those who caused the harm? How closely connected must one be to an act to be considered causally responsible for the harm that act inflicts? What if the victim contributed to causing the harm that was inflicted (contributory negligence)? What if a person is physically or monetarily unable to repair the harm that he has inflicted? All of these issues must be taken into account by the judges when attempting to craft a fair and equitable remedy, but, unfortunately neither the Code nor canonical jurisprudence gives much guidance. One solution is to see how

¹⁴⁰ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 511.

¹⁴¹ These would be compensating for such things as maintaining payments for therapy needed in the future, or providing for future medical needs stemming from the initial harm. It could also include compensation for potential lost wages, for a reduced quality of life, for educational or occupational training, for expenses associated with relocating, etc.

the common law treats these matters, and apply these principles with canonical equity in concrete cases in virtue of c. 19.

Finally, unlike the common law, canon law does not assess punitive damages. In common law, criminal law and tort law are separated into two distinct actions, which require two different trials.¹⁴² In the common law it is possible that a criminal action may not be appropriate, and yet a jury in a civil action believes that one of the parties needs to be civilly punished for his or her actions. This punishment is exacted civilly through the imposition of punitive damages.

In canon law punishment is incurred only through a penal action, and any law that imposes a penalty must be strictly interpreted. As discussed in Chapter 2, canonical delicts are limited to those specified in the penal law, and these delicts mandate particular types of penalties.¹⁴³ None of the penalties is monetary in nature.¹⁴⁴ Therefore, if the Church believes that a party needs to be punished, this occurs only through a penal action and not through a contentious trial. If, in addition to the penal action, a damaged party wants to have harm remedied, this is possible only by initiating a concurrent contentious action under c. 1729 so that both types of cases are heard at once. Nevertheless, the contentious action and the penal trial are two separate entities with separate purposes, and more importantly, separate remedial courses of action.

¹⁴² The criminal action is brought by the state, and the civil action is brought by the damaged party.

¹⁴³ See ALESANDRO, "Church Agents and Employees," p. 38.

¹⁴⁴ See Chapter 2, section 2.1.4.

4.3.2 – Equitable Remedies

The previous sections discussed harm that is remedied through the award of monetary damages. However, there are some types of harm for which a monetary remedy is not adequate or appropriate for the situation. These cases require alternate, equitable, non-monetary remedies to attempt to remedy the harm that has been inflicted. The following sections will discuss and compare equitable remedies in both the common law and canon law.

4.3.2.1 – Common Law Equitable Remedies

If a common law case does not involve the assessment of monetary damages, then the remedy applied will be an equitable remedy rather than a legal remedy. This means that the source of the remedy stems from an equitable application of the law rather than a legal application of the law. Historically, remedies in equity are more creative than simply being limited to awarding money damages because they stem from an attempt by the judge actually to fix the problem rather than simply compensating the victim. In addition, equitable remedies historically have differed from legal remedies in that the court did not declare an outcome; rather it compelled a party to produce a certain result or risk being held in contempt of court.¹⁴⁵ An order from the Chancery court was personally directed to the defendant, it ordered or forbade conduct, and it declared the person in contempt of court if he or she failed to comply.¹⁴⁶ Though there are a number of

¹⁴⁵ See S.F.C. MILSOM, *Historical Foundations of the Common Law*, 2nd edition, London, Butterworths & Co. LTD, 1981, p. 90. This is at least one reason why the court was said to have *in personam* jurisdiction rather than jurisdiction *in rem*.

¹⁴⁶ See RENDLEMAN, *Remedies: Cases and Materials*, p. 159.

equitable remedies in the common law, the following are examples of broad categories of equitable remedies that may be of interest to judges both in common law and civil law countries.

4.3.2.1.1 – Injunctions

One of the most useful remedies that equity courts in common law developed is the injunction. An injunction is the primary way that the court can compel an action or prevent a wrong from occurring. Its use is frequent in the common law because it has so many different applications. Black's law dictionary defines an injunction as an order from the court:

...prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. A prohibitive, equitable remedy issued or granted by a court at the suit of a party complainant, directed to a party defendant in an action, or to a party made a defendant for that purpose, forbidding the latter from doing some act which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law. A judicial process operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing. Generally, it is a preventive and protective remedy, aimed at future acts, and is not intended to redress past wrongs.¹⁴⁷

Injunctions have a multitude of uses, from preventing property from being destroyed to preventing a nuisance from reoccurring. The only limitation to the court imposing an injunction is that one should not obtain an injunction "to restrain actionable

¹⁴⁷ "Injunction." *Black's Law Dictionary*, p. 540.

wrongs for which damages are the proper remedy.”¹⁴⁸ If the damage can be repaired through the award of monetary damages, then equitable remedies are not appropriate.

Finally, injunctions can be either temporary or permanent. Temporary injunctions, also known as interlocutory injunctions, will be discussed later in the section. Permanent injunctions often begin as interlocutory injunctions and are imposed at the end of a trial. These permanently enjoin a person from acting in such a way as to violate the rights of another person and can only be lifted by the order of a judge.

4.3.2.1.2 – Contractual Remedies

According to c. 1290, contracts are governed by the local civil law. It follows that the remedies provided for contractual cases in common law jurisdictions are a resource available to judges in canon law, who could apply the same or similar remedies. There are a number of remedies in common law in the event that a contract is breached. Some of these remedies are equitable and others are legal remedies involving monetary damages. Though the precise details of contractual law will vary according to jurisdiction, the general principles concerning these remedies remain the same. The following are three examples of the types of equitable remedies available for contractual cases in common law.

Specific performance is one of the most important equitable remedies. It requires “the exact performance of a contract in the specific form in which it was made, or

¹⁴⁸ R.E. MEGARRY, *Snell's Principles of Equity*, 27th edition. London, Sweet & Maxwell LTD, 1973, p. 626.

according to the precise terms agreed upon.”¹⁴⁹ This remedy is generally imposed when monetary damages for the breached agreement are inadequate to remedy the harm that arose from the breach. Specific performance is generally assigned when the parties agree to a contract to purchase something that is unique. The thing could be a parcel of land, which is always one-of-a-kind, or a particular item that is distinctive or irreplaceable, like a piece of original artwork. This remedy forces the performance of the contract according to its specific terms. The court’s order for specific performance may include such details as the purchase price, awards of additional damages, and any other relief that the court believes to be just.¹⁵⁰

Contractual duress is “a condition where one is induced by wrongful act or threat of another to make a contract...under circumstances which deprive him of exercise of his free will.... A contract entered into under duress by physical compulsion is void. Also, if a party’s manifestation of assent to a contract is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”¹⁵¹ This remedy is much like c. 125 in the 1983 Code. It requires that the parties entering a contract do so of their own free will. Therefore, if a contract is entered into due to physical force, it is void. If it is entered into due to duress, the contract is voidable.

¹⁴⁹ “Performance,” *Black’s Law Dictionary*, p. 788.

¹⁵⁰ See RENDLEMAN, *Remedies: Cases and Materials*, p. 489.

¹⁵¹ “Duress,” *Black’s Law Dictionary*, p. 348.

Unconscionability is another legal doctrine in which a court refuses to enforce a contract. However, instead of a contract being void due to duress, an unconscionable contract is one that is unenforceable because it is so one-sided that it unreasonably favors one party and is unduly oppressive to the other.¹⁵² Unconscionable clauses that, for example, unfairly repudiate warranties, limit damages or grant procedural advantages, are often found in the fine print of contracts. The legal test of unconscionability is if the contract is one in which no sensible, non-delusional person who is not under duress would make, and that no honest, fair, or reasonable person would accept.¹⁵³

Canon 128 certainly applies to contracts entered into by physical or juridic persons. A Rotal decision cites c. 128 in a case concerning a breach of contract that required the defendant to pay court costs as well as compensate the plaintiff for the damages and injury that resulted.¹⁵⁴ Several other cases decided by the Rota have involved contractual disputes, so one can use these Rotal cases as references for deciding future cases.¹⁵⁵ Since the Rota applied the contractual law of the jurisdiction in which the dispute arose, judges should use these Rotal cases as guides, while applying the appropriate law of the jurisdiction.

¹⁵² See "Unconscionability," *Black's Law Dictionary*, p. 1059.

¹⁵³ See "Unconscionable bargain or contract," *Black's Law Dictionary*, p. 1059.

¹⁵⁴ C. FALTIN, November 7, 1990, in *ARRT Dec.*, 82 (1990), pp. 766-773. See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 502.

¹⁵⁵ See c. FALTIN, February 9, 1996, in *ROTAE ROMANAE TRIBUNAL = RRT Dec.*, 88 (1996), pp. 105-115; c. POMPEDDA, November 8, 1983, in *ARRT Dec.*, 75 (1983), pp. 575-590; c. WYNEN, January 2, 1951, in *SRR Dec.*, 43 (1951), pp. 1-13; c. FIDECICCI, July 17, 1950, in *SRR Dec.*, 42 (1950), pp. 481-488; c. PASQUAZI, July 5, 1949, in *SRR Dec.*, 41 (1949), pp. 349-361; c. MANY, August 5, 1913, in *SRR Dec.*, 5 (1913), pp. 520-547; c. MANY, May 27, 1913, in *SRR Dec.*, 5 (1913), pp. 344-345.

4.3.2.1.3 – Remedies for Property Interests

Damage to property is another way that harm can be unlawfully inflicted. Often the damage can be remedied through monetary damages. However, there are many times in which one either wants the property itself, or wants the other person to stop interfering with use of the property. These types of issues require equitable relief rather than monetary damages.

There are two categories of property that can be damaged. The first is personal property, which is generally all property that is not real estate and is movable.¹⁵⁶ The torts in regard to personal property are negligence, conversion, and trespass to chattels. The second category of property is real property. Real property is land and whatever has been erected, grown on, or affixed to that land that is immovable.¹⁵⁷ Real property can also be affected by torts of negligence and conversion, as well as trespass.

Negligence, which has been defined previously, is usually dealt with through monetary damages if it involved damaging property in any way.¹⁵⁸ The way that the harm is assessed and given a value depends on the nature of the negligence and the type of property that was harmed. However, there are other equitable remedies that also are available as a remedy for negligence.

¹⁵⁶ See "Property," *Black's Law Dictionary*, pp. 845-846.

¹⁵⁷ See *ibid.*

¹⁵⁸ Negligence in the common law has previously been discussed in section 4.1.6.3.

Damage from conversion, which is an unauthorized act that deprives an owner of his property either indefinitely or permanently,¹⁵⁹ is usually remedied through a forced sale of the wrongly appropriated property to the person who wrongly took it in the first place. The value of the sale should be equal to the value of the goods at the time of the conversion. However, if the value of the property increases during the time that the property is unlawfully appropriated, because courts recognize the general principle of law that conscious wrongdoers cannot profit from their illegal actions, the wrongdoer may be held responsible for the appreciated value of the object.¹⁶⁰ This remedy can be used both with personal and real property.

Both the torts of negligence and conversion can also be repaired through the equitable action of replevin, which is the legal method by which an owner attempts to regain his personal property.¹⁶¹ Replevin is a legal remedy in which a person is entitled to recover goods from another who has wrongfully taken or restrained these goods. It also is known in the common law as detinue, claim and delivery, sequestration or specific restitution.¹⁶²

Finally, trespass generally is the commission of an unlawful act or doing a lawful act in an unlawful manner that injures another's person or property.¹⁶³ In reference to

¹⁵⁹ See RENDLEMAN, *Remedies: Cases and Materials*, pp. 357, 359.

¹⁶⁰ See *ibid.*

¹⁶¹ See *ibid.*, p. 5.

¹⁶² See *ibid.*, p. 401.

¹⁶³ See "Trespass," *Black's Law Dictionary*, p. 1044.

personal property, trespass of chattels means that a person's personal property is somehow being unlawfully harmed. Trespass to land is any "unauthorized and direct breach of the boundaries of another's land."¹⁶⁴ Both types of trespass can be remedied through the issuance of an injunction, and if there are any damages to the property, monetary damages can be assigned as well.

4.3.2.2 – Canonical Equitable Remedies

In contrast to tangible harm that can be quantified and assigned a monetary value, non-tangible or moral harm is not easily quantifiable because it is damage that harms such things as the mind, the soul, one's faith, or one's reputation and good name. It can also violate a right, such as one's right to privacy (c. 220), one's right to associate (c. 215), or one's right to make one's needs and views known (c. 212). This type of damage is such that it cannot be assessed, repaired, or replaced exactly due to the nature of the damage. This damage is known as *damnum non reparable*, or damage that is not able to be redressed in its own order.¹⁶⁵ This kind of harm generally does not lend itself to being assessed in monetary terms because: 1) the damage that cannot be undone, and 2) its effects cannot be truly compensated by any process. Rather, this damage usually requires

¹⁶⁴ "Trespass to land." *Black's Law Dictionary*, p. 1044.

¹⁶⁵ See KRUKOWSKI, "Responsibility for Damage," p. 234.

a more creative remedy, based on general principles of justice and canonical equity, to repair the harm inflicted.¹⁶⁶

Because the Church has the responsibility for the full care of souls, “special emphasis should be placed on [the] obligation to make up for moral and spiritual harm.”¹⁶⁷ Even though this kind of harm is very difficult to remedy, the Church, as a matter of justice, must at least attempt to repair it in some way.¹⁶⁸ The Rota seems to agree, because it requires that these non-tangible forms of harm be remedied. In 1991, the Rota reaffirmed that reparation can be required for the infliction of moral and ethical harm.¹⁶⁹ Unfortunately, because the damage is not easily quantifiable, one cannot be certain that the remedy will accurately compensate victims for harms that they have endured.¹⁷⁰

Judges, however, do have some guidelines to follow in crafting these remedies.

There are three equitable rules that a judge should apply in determining how to remedy

¹⁶⁶ The Code does not give many guidelines on what kind of remedies are available for the various kinds of non-tangible harms that can be inflicted. However, applying general principles of justice and equity, some examples of these types of remedies could be: a published formal apology, retraction of statements, forbidding the defendant from completing the act that caused the harm, requiring the defendant to act in cases where he was negligent, requiring a defendant to complete a contract, determining the proper distribution of a pious will, etc.

¹⁶⁷ KRUKOWSKI, “Responsibility for Damage,” pp. 234-235. See also, G. MICHIELS, “De delictis, canones 2195-2213,” in *De delictis et poenis: commentaries libri V Codicis juris canonici*, vol. 1, Paris, Desclée, 1961, pp. 68-71.

¹⁶⁸ See KRUKOWSKI, “Responsibility for Damage,” p. 234. Sexual abuse or the gross abuse of authority could be examples of harm whose effects realistically cannot be compensated.

¹⁶⁹ See *c. PALESTRO*, October 23, 1991, in *RRT Dec.*, 83 (1991), pp. 622-669.

¹⁷⁰ For example, if a person has been the victim of a libelous article in a national publication, even though a court requires that a public apology and retraction be printed in the same publication, often this cannot fully repair the damage done to the victim’s reputation.

damage.¹⁷¹ First, the nature of the remedy should be in keeping with the nature of the harm so that, for example, moral harm should be repaired by a moral remedy, and economic harm should be repaired with economic remedies.¹⁷² Second, the way in which the damage is repaired should be equivalent to the way the damage was inflicted. For example, if the damage was publicly inflicted, it should be publicly remedied. Thirdly, as much as possible the perpetrator should be held responsible for compensating the victim for the full extent of the damage done.¹⁷³

In dealing with the reparation of harm resulting from unlawful administrative acts, Paul Hayward writes about the importance of the Signatura's role in setting an example in determining remedies for the reparation of harm. He states:

In the Church, where the fundamental concern is substantive justice, it is essential that each award should entail the objective factors of proportion, adequacy and fairness in the particular circumstances of the case. Hence the importance (and difficulty) of the Signatura's role in establishing the principles upon which later comparisons will be made, in order to ensure that no conflict can arise between the objective justice of the award, and the principle that like cases should be treated alike.¹⁷⁴

This would also hold true for the role of the Rota in giving guidelines and establishing principles through which lower tribunals can have some guidance in adjudicating cases and assigning remedies fairly and equitably. In addition, due to the application of c. 19, judges can look to other areas of law to help craft an appropriate remedy. There were a

¹⁷¹ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 512.

¹⁷² See BACARDÍ, "Pautas para una concepción canónica del resarcimiento de daños," p. 147. See also F. ROMITA, "La responsabilità dell'amministrazione pubblica ecclesiastica," in *Monitor ecclesiasticus*, 98 (1973), pp. 576-578.

¹⁷³ See PREE, "On Juridic Acts and Liability in Canon Law: Part Two," p. 512.

¹⁷⁴ HAYWARD, *Administrative Justice*, pp. 199-200, n. 564.

number of equitable remedies that were present in the 1917 Code, but they were not adopted into the Code of 1983.¹⁷⁵ These certainly could still be used as a guideline for the imposition of a remedy. If cases requiring equitable remedies arise, and there is no guidance given from the jurisprudence of the Rota, the Signatura, or the 1917 Code, the principles developed in the common law courts of equity could be applied (cf. c. 19).

Finally, sometimes the damage suffered cannot be classified as either solely tangible or intangible, but is a mixture of both. In these cases a judge can decide to require the perpetrator to compensate a person monetarily for the harm endured, as well as to require some other equitable remedy. The remedy is left up to the discretion of the judge, who must determine what balance is necessary between monetary and equitable remedies.

4.3.3 – Temporary Equitable Remedies

The equity courts of the common law quickly recognized that damage could be reduced if one could prevent another from inflicting the harm before the act was done, or before it ever became harmful. At times one needs an immediate remedy to prevent a person from committing a harmful act, so that a court has time to adjudicate the lawfulness of the act prior to its being committed. This is certainly true when the act could have profound and irreversible effects, e.g., tearing down a historic building when there is a dispute over its ownership. The common law has extensive jurisprudence on this subject. Canon law also has a few possibilities for preventing harm, but they are not

¹⁷⁵ See CIC/17 cc. 1676-1689 and 1693-1700.

as extensive or as well developed as the common law. The following sections will examine these options for the temporary remedy of harm in both common law and canon law.

4.3.3.1 – Temporary Remedies in Common Law

One of the oldest accepted maxims of equity is that justice delayed is justice denied.¹⁷⁶ Courts of equity realized that in certain cases immediate measures were needed to force or prevent a person from doing something, and that these measures had to be put into place before a case could be fully adjudicated or grave harm could occur. Any delay in the court's acting was certain to result in irreparable harm to one of the parties, and many times this harm could be prevented only by the quick action of the court.¹⁷⁷ Due to this realization, courts of equity created the interlocutory injunction so that harm could be prevented or immediately remedied until a court had time to review the merits of the case and either grant or deny permanent relief. Initiating the process for this temporary remedy is straightforward: all that the parties or their lawyers must do is to file a motion with the court requesting that the court take immediate action. The court then has two options it can implement depending on how critical is the need for action. The court can either call a hearing concerning the issuance of a preliminary injunction, or it can issue a temporary restraining order.

¹⁷⁶ See MEGARRY, *Snell's Principles of Equity*, p. 27.

Preliminary injunctions are granted in a hearing in which both parties have been notified and given an opportunity to participate. Both parties are allowed to present their side, and a judge makes a preliminary decision. Preliminary injunctions are granted only upon a clear showing: 1) there will be probable success following a trial on the merits; and 2) irreparable injury will occur unless the injunction is granted; or 3) even if there is a question concerning the probability of success, substantial and difficult issues have been raised that merit further inquiry, and the harm to the party will outweigh the injury to the other party if the injunction is denied.¹⁷⁸ At the end of the trial, the judge has the option of lifting the preliminary injunction, or the judge can make the preliminary injunction permanent.

The second type of interlocutory injunction is a temporary restraining order, also known as a TRO. A temporary restraining order is a court order granted by a judge in emergency situations and only for a relatively brief period of time. The order maintains the *status quo* until a hearing can be convened to adjudicate whether a preliminary injunction should be issued. The order is granted *ex parte*, which means that the judge issues the order after hearing only one side of the argument. Because a temporary restraining order is issued without any notice to one of the parties, it can be granted only if:

¹⁷⁷ See RENDLEMAN, *Remedies: Cases and Materials*, p. 202. An example of this would be a property dispute between a lumber company and a private wildlife refuge. If the lumber company claimed ownership of the property and proceeded to cut down the property's trees, a decision three years from now that the property in actuality belonged to the refuge is moot. The damage to the property would have already been done.

¹⁷⁸ See "Preliminary injunctions," *Black's Law Dictionary*, p. 817.

- 1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
- 2) The applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.¹⁷⁹

Judges are able to issue temporary restraining orders to prevent immediate harm.

Once the order has been granted, the court must then convene a hearing to determine whether or not to issue a preliminary injunction. Then the court has the time to examine the merits of the case carefully and determine if a long-term injunction is warranted.

The injunction, both temporary and permanent, is one of the greatest contributions of the equity courts to the common law. Because of its flexibility and usefulness it can prevent harm before it happens, or prevent further harm from being inflicted until the case has been adjudicated.

4.3.3.2 – Temporary Remedies in Canon Law

Like the common law, canon law also has temporary judicial remedies contained in cc. 1496-1500, though they are not widely used.¹⁸⁰ Unlike the common law, where there is both significant tradition and jurisprudence concerning the use of temporary injunctions, there are few procedural rules currently found in the 1983 Code concerning the implementation of these canons, especially in regards to c. 1496 §2.

¹⁷⁹ "Temporary Restraining Order," *Black's Law Dictionary*, p. 1021.

¹⁸⁰ Canons 1496-1498 were cc. 1672-1674 in the CIC/17. Canon 1499 was not in the CIC/17, and c. 1500 is a compilation of cc. 1693-1700.

Canons 1496 §1 and 1497 allow for a thing (*res*) to be handed over to or sequestered by the competent authority while there is a dispute over possession, or for the objects to be used as security for an unpaid debt. This is so the thing will not be disposed of, damaged, or sold before proper ownership is determined or before a creditor can repossess the object. If there is any option available other than sequestration that will prevent the harm from occurring, c. 1498 requires that that option be utilized. If the person possessing the thing is going to suffer harm by the object's being sequestered, according to c. 1499 the judge can "impose an obligation upon the person to compensate for damages if that person's right is not proven." This equitable concept of sequestration is also found in the common law, and it is called interpleader.¹⁸¹

Canon law also has an order that a judge can issue called a "restraint."¹⁸² Like a preliminary injunction, c. 1496 §2 allows for a judge to issue a restraint to restrict another person's exercise of a right in certain circumstances, if it is possible that that right is a "probable infringement on the prevailing right of someone else."¹⁸³ According to c. 1498, a restraint is not to be issued if the harm can otherwise be repaired in another way.¹⁸⁴ Canon 1496 states:

¹⁸¹ Interpleader is the method by which a judge decides to allow a third, non-interested person to hold property until the parties resolve their ownership issues.

¹⁸² DIEGO-LORA, "Canons 1476-1512," p. 933.

¹⁸³ L.G. WRENN, "Part I: Trials in General [cc. 1400-1500]," in *New Commentary on the Code of Canon Law*, pp. 1614-1654.

¹⁸⁴ This is an odd reference in regards to c. 1496 §2, because it would imply that the court would allow the right to continue to be infringed upon if the damage somehow could be repaired in another manner after the fact. If this is the case, it certainly conflicts with the common law understanding of the purpose of such an injunction, which is to prevent the damage from occurring in the first place. This could be an instance that takes into account the circumstance when the need of the common good outweighs the need for the right of the individual to be respected.

§1. A person, who through at least probable arguments has shown a right over something held by another and the threat of damage unless the thing is placed in safekeeping, has the right to obtain its sequestration from the judge.

§2. In similar circumstances, a person can obtain an order to restrain another from the exercise of a right.

Though this right to obtain such an order is clearly specified in the Code, the process for the issuance of such an order is not stated explicitly. Therefore, one must look to the canons regarding the adjudication of incidental matters. Because such a matter requires the intervention of the court, a judge must decide this incidental matter in a contentious process in accord with cc. 1587-1591. Unlike the common law, there is no emergency provision allowing the judge to issue this order *ex parte* and then later hold a hearing on the matter. In addition, incidental matters can arise only after the initial summons has been issued (c. 1587). Therefore, this remedy does not seem to be appropriate for situations in which a petition has yet to be presented.

After one party has presented probable evidence of damage, the judge must notify the other party and allow that party to be heard so as not to violate c. 1620 7°. However, the matter can be adjudicated in an oral contentious process unless the judge believes that the issue being decided is too weighty for that process (c. 1590). Since the judge is responsible for issuing the order, he is also responsible for the eventual lifting of the order, or making the order permanent. This can be done either prior to the final judgment, or issued with the final judgment (cc. 1589, 1591). According to c. 1589, the matter can be resolved either as an interlocutory judgment or by a decree. The standard for issuing such an order is only a reasonable probability of harm rather than the higher standard of a moral certitude required for a final disposition of a case. Though a restraint

is not specifically designated as a potentially permanent remedy, it stands to reason that if a judge can issue this order temporarily, it can also be used permanently to remedy or prevent harm from occurring.

Finally, there is also an extra-judicial remedy available to the parties. The parties can go directly to the bishop or a superior and ask him to issue a precept to prevent or oblige a person to act (c. 49). This act is extra-judicial because it is issued outside of the judicial process. Because precepts are singular administrative acts issued by an administrator rather than a judge, they are actually an administrative remedy rather than being part of a contentious case.¹⁸⁵

To issue a precept, the administrator must “seek out the necessary information and proofs” and, if possible, hear from the person “whose rights can be injured” (c. 50) before it is issued. This means that the aggrieved party should approach the bishop and present his or her evidence that harm will occur without the precept being issued. In addition, the other party should be consulted before the precept is issued. However, if the other party is not available for consultation, or if the need is immediate, the bishop can issue the precept anyway without affecting the validity of the act.

Though the act is administrative, it has the potential to function much like a temporary restraining order or an injunction in the common law, depending on how the precept is worded. However, unlike a temporary restraining order, which requires a

¹⁸⁵ For persons accustomed to common law, this approach of going outside the judicial realm and obtaining a remedy from an administrator may seem unusual. However, in the canonical system, because the judicial and administrative branches of government are headed by the same person, this is a real and practical option.

hearing with both parties present in fairly short order, a precept can be permanently imposed without a formal hearing. Because it is not required for the validity of the precept that the person receiving it be heard, this option could potentially infringe on the rights of ones bound by the precept, though they could always take administrative recourse and challenge the precept. Another drawback is, if the harmful act is being committed by a bishop, attempting to obtain a precept can be difficult, especially if the need is particularly time-sensitive.¹⁸⁶

The benefit of the common law's system of injunctive relief is that it is well known, widely used, and easy to access, even in an emergency situation.¹⁸⁷ All judges are able to issue temporary restraining orders and preliminary injunctions, and they do so on a regular basis. The canonical judicial equivalent is not equally known or easy to access. Moreover, since restraints only apply to contentious trials and not to acts of administrative power, it appears that their usefulness is even more limited. Nevertheless, these canonical procedures do exist and their application by judges can be a straightforward way of preventing persons from acting before they cause harm. Since common law injunctions, particularly permanent injunctions and temporary restraining

¹⁸⁶ This problem often arises when dealing with cases that must be handled by a particular dicastery. Oftentimes a matter is time sensitive, and an immediate remedy is needed to prevent the harm from occurring. In many cases an immediate response is not forthcoming, and the harm is inflicted, or is allowed to continue before any response is received. Because there is no equivalent to a temporary restraining order, there is no way for the court to order a cessation or prevention of the harm on the request of one of the parties. It requires a full hearing, which takes the participation of both of the parties. The benefit of a temporary restraining order is that in a case of imminent harm, the order can be issued after only hearing one party. The order remains in place until the issue can be properly adjudicated at a later time. In the case of a diocesan bishop who may be causing harm, it is helpful to contact the Apostolic Nuncio or Delegate as soon as possible.

¹⁸⁷ It is not unheard of for common law judges to receive phone calls at home asking them to issue a temporary restraining order for a particular case.

orders, have been so beneficial in preventing harm in the civil law, this could be an area that canonists could discuss in view of potential future changes in procedural law.

4.4 – Irreparable Harm

The attempt to remedy harm is necessary to fulfill the natural law obligation juridically imposed by c. 128. As stated earlier, this harm can be inflicted on a physical person, but it also can be inflicted on a juridic person such as a parish or diocese. Clearly, some types of damage are easier to repair than others, because the remedy is self-evident. But some types of damage strain the competence of even the best judges to assess and assign a remedy. Though this thesis has touched on the issue a number of times, there is an area concerning the reparation of harm that is especially troubling within the particular context of Church.

How should the Church respond when the harm inflicted is so great that it cannot measurably be remedied? The Church's mission and purpose is the salvation of souls (c. 1752). Its pastors and bishops are specifically entrusted with the full care of souls (cc. 150, 771). Yet harm sometimes is inflicted by those entrusted with the care of souls that can irreparably damage those whom they have been specifically charged with protecting. So, in accord with c. 128, judges and bishops may have to grapple with the difficult problem of attempting to remedy harm that has seriously damaged God's people.

How does one remedy the loss of faith of a priest who has left the priesthood and the Church because he has been sexually abused as a child by his pastor, and in the seminary by his professors and rector? How does one remedy the harm caused by the

rape of young nuns by their priest who has told them that this act is not technically a violation of their vows, especially if the superiors of the religious order tolerate this behavior? How does one remedy the public humiliation and betrayal felt by a divorced parishioner who has been unlawfully and publicly refused the sacraments simply because she is divorced? How does one remedy the spiritual damage inflicted on a diocese that has had two of its bishops leave in four years because of admitted sexual abuse? How does one remedy the loss of faith and trust of a diocese after discovering that its bishop failed to protect innocent children by knowingly assigning a sexual predator to various parishes? How does a parish recover its trust after it discovers that its pastor has embezzled thousands of dollars from parish funds? How does a priest ever trust his bishop after the priest has been vindicated and found innocent of an alleged wrongdoing, but the bishop remains silent and in no way attempts to help clear the priest's name or publicly offer the priest his support before the people of God?

These are real examples that produce very troubling questions in regards to the assessment of canonical remedies. Attempting to remedy these problems by awarding monetary damages to victims may help offset or cover certain costs incurred as a result of the harm, but it does little to repair the emotional and spiritual damage inflicted on these persons. Yet priests and bishops of the Church are charged exclusively with the full care of souls; it is the duty of clerics, in addition to the perpetrators, to try to mend this damage that has been inflicted on victims. It is a daunting task; yet this is an obligation arising from their office that must be attempted, despite the difficulties involved. Because monetary damages are inadequate in these cases, canonists must look to the

tradition of equitable remedies for possible solutions. These remedies can be applied both at the conclusion of a contentious trial or mediation, or they could be applied prior to or in lieu of a contentious trial.

One possibility is for canonists, in conjunction with experts in moral theology and the social sciences, to develop a series of comprehensive remedies applicable to the repair of harm inflicted both on physical and juridic persons. Working together, experts in these fields could develop remedial programs to work with individuals, as well as with those groups of people who make up, for example, parish or diocesan juridic persons to begin to heal some of these injuries. Specific programs could also be developed for the members of religious communities who have suffered harm as a community. These programs could be initiated as soon as there is evidence to believe that a person, either physical or juridic, has suffered from harm, and prior to the initiation of any contentious or administrative process.

Another possibility is for the various national canon law societies to draft a series of model remedies that could be used within their own national milieu and context in the event that a contentious trial is actually initiated. Working in conjunction with mental health professionals, these remedies could be created and drafted in such a way to best help victims begin to heal from the damage inflicted from the various profoundly harmful acts. These model remedies would give judges some guidelines and concrete suggestions rather than forcing them to arrive at their own solutions. This would also be a sign to the greater community that members of the canonical field within the Church are trying to address and remedy these very difficult problems.

In this way, canonists can assist those charged with the full care of souls to begin to remedy the damage that this harm has inflicted in accord with the natural law mandate of c. 128. Remedying this harm is not an option to be considered, rather it is a duty borne by those entrusted with the care of souls. If good faith attempts to remedy this harm are not made, then the Church and its ministers have failed in their most basic mission.

4.5 – Conclusion

This Chapter first examined what constituted an “other act,” and then explored what made these other acts unlawful. It then examined the processes by which harm resulting from these other acts could be remedied. Finally, it investigated the actual remedies that could be assigned when it has been determined that harm has been unlawfully inflicted. As with previous chapters, Chapter 4 has raised many questions.

There is a fundamental dichotomy present in the Code in regards to contentious trials that affects how canonists and bishops regard them. On one hand, the scriptures encourage Christians to resolve differences among themselves. Canon law recognizes the importance of this directive and has developed numerous contentious and non-contentious processes to fulfill it. On the other hand, the procedures specifically created to facilitate the conduct of a contentious process are such that few people are aware of them, they are rarely used, and even among canonists they are downplayed or actively discouraged. Additionally, jurisprudence and research on the use of non-marital

contentious trials is distinctly lacking.¹⁸⁸ Finally, it is clear that the overwhelming majority of Catholics who have suffered harm believe that the resolution of their complaints is the responsibility of the civil law. While it is understandable that bringing a contentious action should be a last resort after other methods have been attempted, for the process to have credibility it needs to be a legitimate and viable option.

Interestingly, the 1983 Code actually reduced the number of canons regarding the procedures and remedies for a contentious trial rather than augmenting them, which has left judges without guidance on some fundamental issues. While the Code provides adequate procedures for a judge conducting a contentious trial, it does not provide enough canonical tools to competently decide these issues and fairly adjudicate the case according to known legal principles.

Civil jurisdictions have significant handbooks on civil procedure that answer questions concerning the requirements and standards for culpability, imputability, causality, contributory negligence, vicarious liability, accomplice liability, assessment of remedies, types of remedies, and most of the other issues that confront civil judges. The common law also has many years of judicial precedent from which to draw if the law itself cannot answer a procedural question. Yet canon law leaves many of these issues completely unaddressed, and it does not recognize precedent as having binding force (cf. c. 16 §3).

¹⁸⁸ While there is ample material concerning the conduct of marital trials, there is very little written specifically concerning trials conducted for non-marital issues.

There are a few ways that canon law could resolve these issues. First, the legislator could augment the procedural law so that judges have adequate guidance concerning the various issues that can arise during a trial. This option would be the clearest in providing canonical guidance, but it also would require a larger and more detailed section on procedures. Of course, canon law could follow the examples of other legal systems and promulgate complete procedural norms separate from the rest of the Code. This also might have the additional effect of helping to publicize the process.

Second, the Church could abandon its claim to adjudicate violations of rights other than specifically ecclesial or ecclesiastical rights, and allow civil jurisdictions the exclusive competence to pursue these matters. Given that the Christian mandate to resolve problems internally has its basis in scripture, this choice might not be a realistic option.

One final option is that the bishop could utilize c. 22 and specifically promulgate as particular law the necessary civil procedures of the local jurisdiction for use in his own diocese, 1) if adequate procedures or norms are lacking in canon law, and 2) so long as these particular laws do not violate natural or universal law. Canon 22 states, "*Leges civiles ad quas ius Ecclesiae remittit...*" The laws of the Church include both universal and particular laws, so there is nothing preventing a bishop from promulgating a particular law for his diocese that remits certain issues to the civil law.¹⁸⁹ In the case of

¹⁸⁹ Although the commentators only speak of certain canons of the Code as yielding (*remittere*) to the civil law, c. 22 does not limit the principle to the universal law, but speaks of the *ius Ecclesiae*. However, the bishop cannot "canonize" civil laws that are contrary to divine law or higher ecclesiastical law (c. 135 §2).

civil procedure, the civil laws could be promulgated canonically in whole sections, or simply be adopted individually.¹⁹⁰ This solution could be a workable option, except that it would require each judge in canon law to learn some of the civil procedure requirements for conducting a trial in his own jurisdiction.¹⁹¹

Presuming that the potential procedural questions can be resolved, there remains the issue of the general non-use of any of the canonical forums, particularly the contentious trial. The Canon Law Society of America commissioned a study on the various options of due process, and has attempted to institute pilot programs in several dioceses to help educate the people and facilitate the use of canonical processes. This attempt to educate the people and institute processes has been taking place over the past ten years. Canonists within their own dioceses have instituted offices of mediation, and have tried to educate the people concerning their rights. Additionally, many articles have been written concerning the protection of rights and the need for readily accessible

¹⁹⁰ A bishop who applies canon 22 and through the particular law for his own diocese remits certain elements to the civil law is different than the application of the norms of c. 19. Canon 19 only allows for the "general principles of law to be observed with canonical equity" to be applied in specific cases. Canon 22 allows a bishop to promulgate particular law that would apply the law of his civil jurisdiction to all applicable cases, rather than the law being applied only on a case-by-case basis. In addition, there is nothing preventing a bishop from "borrowing" the laws from any civil law jurisdiction and promulgating them as his own for his diocese, as long as they do not conflict with universal or divine law. Given that c. 128 had its genesis in similar statutes found in the laws of various European countries, the universal law has already engaged in the practice of adopting comparable civil law norms as its own.

¹⁹¹ This option potentially presents its own difficulties. If canon law relies too much on the local civil law, this would require canon law judges to have civil law degrees so that they can apply the civil law properly. Given that canonists complain that civil jurisdictions wrongly apply canonical law, canonists themselves must have the legal expertise to apply the civil law properly so that members of the civil legal profession could not level the same claims against canon lawyers and judges. Improper applications of the civil law could also open up canon lawyers who are not civil lawyers to charges that they are practicing civil law without a license. This is a serious civil law offense, and can result in fines and imprisonment.

protections for those rights. However, the results of these efforts to promote the use of the Church's processes have been mixed at best.¹⁹²

These results also extend to the utilization of the various methods of alternate dispute resolution (ADR) to work to resolve conflict and remedy harm, and the results of these efforts have tended to be somewhat more positive than the other methods. ADR is encouraged by the Code, and is used much more frequently than ordinary contentious trials for the handling of non-marital cases. This method of remedying harm shows promise, though currently in many places it either does not exist, or it is under-utilized, understaffed, and underfunded. If these methods are to be one of the primary ways that the Church remedies harm, then in accord with c. 1733 §2 offices must be established, funded, staffed, and their use must be promoted and advertised.

Now more than ever, the Church needs workable and readily available procedures, both formal and informal, that can be trusted to do justice as well as appear to do justice. It needs accessible, fair, formal, comprehensive procedures that can provide remedies that take into account the various types of harm that need to be repaired, as well as the situations of both the person who inflicted the harm and the situation of the victim. The faithful need to be educated so that they know these contentious avenues are available to them. They also need to be reassured that there will be no punitive backlash if they do come forward, and that they can receive a just remedy. Finally, they need to

¹⁹² See CLSA, *Due Process in Dioceses in the United States, 1970-1985: Report on A Survey – Task Force to Survey Due Process Experience*, James H. Provost (ed.), Washington, DC, CLSA, 1987; CLSA, *Protection of Rights in the Church: Revised Report of the Canon Law Society of America on the Subject of Due Process*, Washington, DC, CLSA, 1991; and D.L. BARR et al., "CLSA Experiment in Due Process Committee Report," in *CLSA Proceedings of the Fifty-Sixth Annual Convention*, Washington, DC, CLSA, 1994, pp. 68-79.

see those in positions of authority having confidence in and using the formal and informal procedures provided by the Code. If people do not feel that they can get fair and satisfactory results from internal processes, then their only recourse is to have the matter resolved in a civil court. If civil courts are the only avenue that the people believe will provide them with an unbiased process, a full and fair hearing, a just result, and an enforceable remedy, then all the procedures available in the Code are essentially meaningless with respect to the remedy of harm.

CONCLUSION

The purpose of this work has been to study the necessity to remedy unlawfully inflicted harm in accord with the dictates of c. 128. Chapter 1 began this study by briefly tracing the history of the reparation of harm leading up to the creation of c. 128. It also described the process of the creation of the canon, from the 1940's when it was first discussed, through its various schemas, and culminating in the promulgation of c. 128 in the 1983 Code. Chapter 1 demonstrated that there is a long historical tradition in canon law requiring the remedy of harm, and that the creation and promulgation of c. 128 is in keeping with this historical tradition.

Chapter 2 situated c. 128 in its text and context and gave an overview of the meaning of the canon in its entirety. The first section placed the canon within its broader context by examining the nature of c. 128 and its location in the Code. Additionally, this section compared the remedy of harm in c. 128 to the penal law and explained the interrelation of the two systems, as well as their separate functions. The second section of Chapter 2 presented a textual analysis of the canon, which provided a general overview of the canon in its entirety. It also raised some procedural questions concerning the remedy of harm that canon law does not address. Chapter 2 provided an overview of the entire canon to set the groundwork for the in-depth examination in Chapters 3 and 4 of the remedy of harm for juridic acts and "other acts."

Chapters 3 and 4 broke the canon down into two parts, and then individually examined the harm inflicted by a juridic act in Chapter 3, and harm inflicted by an “other act” placed with *dolus* and *culpa* in Chapter 4. These two chapters explored how harm could be unlawfully inflicted by these acts, what processes could be used to remedy that harm, and what concrete remedies could be applied to repair it. Chapter 4 also introduced some concepts from the common law that could be applied in a given situation if canon law did not address the issue in regard to the reparation of harm.

Through its analysis of c. 128, this work has attempted to show that, since its inclusion in the Code of 1983, c. 128 has been under-used as a basis for petitioning a canonical forum to remedy unlawfully inflicted harm. When it has been used, it has been cited as a canon supporting the need to remedy harm, but then the primary case has been developed using other canonical principles. Rarely is c. 128 used as a foundational canon to support a claim that harm has been unlawfully inflicted and that it must be remedied through the use of a canonical process. Nevertheless, this work has sought to show that c. 128 has broad applications of its own rather than simply being a philosophical and canonical support for other juridic principles.

Clearly, c. 128 is based in the natural law and has been adopted juridically into canon law, making it a legally binding mandate. Because of this, the principle can be used either gently to counsel, or firmly to remind or compel those who inflict harm to remedy the damage they do. This need to remedy harm is not a suggestion that one can choose to follow. Rather, it is a legally binding mandate that ensures that all people are treated with justice and with human dignity.

Robert Kennedy, in a workshop given in November, 2001 to the Conference of Chancery and Tribunal Officials in New Orleans, LA, discussed the differences between justice and charity, and how these concepts should be understood in the context of the Church.¹ He proposes that there are two degrees of Christian love. The first and most basic level is justice, which is giving another person that which they have a right to as a human being. All people are entitled to justice because it is owed to them by virtue of their humanity. The higher degree of love is charity, which is anything given to a person that is over and above what justice demands. Charity is optional, though strongly encouraged as a Christian virtue. As a Christian, doing justice is not optional; it is mandatory.

Kennedy commented that a problem facing the Church is that frequently Church officials give others the impression that certain actions and processes are charitable and optional, rather than being matters of justice.² Protecting and respecting the rights of others, and compelling a person to remedy the harm that one inflicts is not a charitable endeavor; rather it is a fundamental matter of justice. It is important that issues concerning the administration of justice be recognized and labeled as such, so that people are not made to feel that what they are asking for is a privilege rather than something they are fundamentally due. Kennedy noted that justice is served by ecclesiastical law when the Church 1) carefully and precisely defines the rights of persons, and continually fine-

¹ R.T. KENNEDY, "Administrative and Judicial Work as Ecclesial Ministry: Church Governance in the Service of Justice" (workshop presented for the Winter Meeting of the Conference of Chancery and Tribunal Officials, November 27-29, 2001), New Orleans, LA, 2001.

² As an aside, Fr. Kennedy made the observation that while we have numerous religious communities dedicated to charity, e.g., the sisters of charity, that he was not aware of any similar communities named for justice. Maybe the Church needs "Sisters of Justice"!

tunes these definitions; 2) enforces the law by preventing violations when possible, and mandating reparations when feasible; and 3) facilitates an atmosphere of justice so that conflict can be resolved.

Canon 128's directive that unlawfully inflicted harm must be remedied is a matter of justice, not charity, because c. 128 is a mandate of the natural law. Persons have a natural law *obligation* to repair the harm that they commit, and the Church has an obligation to uphold the natural law. To enable the Church to enforce this obligation, canon law provides a number of both formal and informal processes to remedy harm. Though each one has both benefits and limitations, these processes exist to facilitate the remedy of harm and administer justice in the Church. These processes are widely available to ensure that people have the opportunity to voice their concerns in a fair and reasonable hearing, as well as to remedy the harm that has been inflicted upon them.

In addition, there are canonical tools that administrators can employ to try to prevent harm from being inflicted. Precepts can be used, particularly in regard to clerics and religious, to formally prohibit certain behaviors from occurring, or to prevent a person from being put in a position or situation where they can potentially inflict harm. Unfortunately, precepts are often seen as "not pastoral" or "too legalistic" a response rather than a useful tool that simultaneously 1) puts the person on notice that certain harmful or potentially harmful behavior will not be tolerated, and 2) helps the person to refrain from behavior that might "lead him into temptation." A more judicious use of precepts, imposed as soon as it becomes evident that harmful behavior is possible and perhaps imminent, could potentially prevent harm from being inflicted in the first place.

Precepts have the added benefit of acting as a formal warning in the event that a penal process ever becomes necessary. Chapter 4 discussed the use of restraints as a method available in canon law to prevent harm from occurring. Though this canonical tool is not widely known or used, it also can be used to prevent the infliction of harm before it can occur, or make it cease before it gets any worse. It is only when prevention fails that the implementation of c. 128 becomes necessary.

Canon 128 applies to all people that unlawfully inflict harm on another and, as such, is binding on all persons regardless of their status in the Church. In many cases physical or juridic persons are reluctant to admit that they have inflicted harm, much less to remedy the harm that they have inflicted. Utilizing the various canonical processes are the only way to force them to face the truth that they harmed another person and live up to their natural law obligation. In keeping with Christian scriptural and historical tradition, persons within the Church must be encouraged to show a greater willingness immediately and voluntarily to repair the harm they inflict, and if they refuse, the Church must be willing to facilitate either a formal or informal process to enforce c. 128.

It is unfortunate that harm is occasionally inflicted by persons who are viewed publicly as representatives of the Church, such as bishops, priests, deacons, and religious. When harm has been inflicted at the hands of a representative of the Church, especially if the harm is widely known, the remedy of that harm takes on a special urgency and importance. This is because these matters often damage a person's spiritual health and well-being as well as harming them in other ways. It is critical in these circumstances

that proper canonical procedures be followed, and that the person be given appropriate information concerning their options for having the harm remedied.

Despite the fact that canon law has provisions for administrative and contentious processes to remedy harm, in many cases persons in the Church are not aware of their right to have c. 128 enforced, much less that canonical processes exist to vindicate this right. In addition, when persons have come forward to report to Church authorities that they have been harmed, one rarely hears of anyone being informed by one in a position of authority that they have a right to have their rights vindicated and their harm remedied through an ecclesiastical process (cc. 221, 1400).³ If a person does discover that formal processes exist, often he or she is actively discouraged from using them because 1) it might cause scandal, and 2) these processes involve significant time, trouble, expense, and expertise.

Another factor preventing harm from being adequately remedied is that, rather than informing persons about their ability to present a case and vindicate their rights, or encouraging a person to make use of a canonical process, or personally attempting to repair the harm, administrators often try to protect the perpetrator, especially if the perpetrator is in a position of authority. Administrators have been known to cover up,

³ Sadly, many cases now being adjudicated by the civil courts were first brought to the attention of Church authorities with the hope that the case could be resolved internally. However, because the issue was not satisfactorily resolved internally, only then was a civil case filed. One wonders if canonical processes were initiated at the time of the complaint, if parties were informed of their right according to c. 1729 to bring a concurrent contentious action to remedy the harm, and if appropriate penalties and remedies were assigned, whether the civil cases would have been pursued.

ignore, excuse, or minimize the harm that is committed rather than addressing it.⁴ And if the person is a victim of one who is in a position of authority, he or she has often encountered obfuscation and denials of responsibility upon reporting the harm that has been inflicted upon them. Worst of all, these people are sometimes accused of coming forward because they are attention-seekers or only desiring monetary compensation, rather than genuinely desiring a remedy from either the perpetrator or his superiors.

Though these actions are usually taken out of a misguided attempt to protect the patrimony of the Church and to prevent scandal, it has resulted in inflicting additional damage. Because victims feel that those in positions of authority have neither listened to them nor responded appropriately to their allegations, and they are unaware of the available ecclesiastical processes and remedies, their only alternative is to force Church administrators to remedy the harm that they have experienced through the civil courts. The *Liber Extra* wisely recognized that, "*Propter scandalum evitandum veritas non est*

⁴ William Bassett wrote about this problem, and because he stated it so eloquently, his entire paragraph will be quoted. He writes:

The great temptation of those devoted to churches and their missions is to protect their resources and their privacy at any cost. This devotion can be misplaced, however, causing leaders to engage in cover-ups, lies or even good faith refusal to acknowledge problems where they exist. There is a tendency in some churches to see every critic, every spokesman for a different political point of view, every plaintiff, as an enemy of the church. Most often, however, this is not the case. When the injury is real the claim for damages to provide healing and redress in individual cases goes to court in an adversarial process. If the cause of action is sensational, such as a child sexual abuse case, the trial of the individual often becomes an indictment of the church in the press. In these cases, unfortunately, repeated failure promptly to address problems within the organization – perhaps with a thought that silence will shield the faithful from scandal and God Himself will intervene to bring healing – has led to disastrous consequences. Crippling awards meted out by juries against churches in child molestation cases have gone hand in hand with dismay and anger dividing the faith communities. (W.W. BASSETT, *Religious Organizations and the Law*, vol. 2, Deerfield, IL, Clark Boardman Callaghan, 1997, p. 7/8.)

omitenda,” or “Truth should not be omitted in order to avoid scandal.”⁵ It is in facing the truth and addressing it in an ecclesiastical forum that harm can begin to be acknowledged, confronted and remedied.

In many parts of the world, the Church is suffering the effects of allowing harm to continually go unremedied. The United States, among other countries, is currently facing the consequences of some of its hierarchy’s failure to recognize and remedy significant damage inflicted on their people. The faithful have begun to doubt their assumption that the Church is a just institution because some of its leaders have 1) failed to enforce c. 128, 2) failed to utilize proper procedures to remedy the harm that was perpetrated on their people, and 3) have appeared to refuse to accept their own accountability for the infliction of harm and to remedy the harm that their actions have caused. The faithful’s vision of the Church has been damaged because they have suffered disillusionment and have been scandalized by these acts or non-acts of their leaders. Unfortunately, large civil lawsuits have been the only successful method to force a bishop to listen to and remedy the harm that he or his representatives have inflicted on his people. One wonders how much of this could have been avoided if genuine efforts to enforce c. 128 and remedy harm had been offered as soon as the harm was discovered.⁶

Despite the benefits of following the law in these matters, the willingness to engage in canonical processes, both formal and informal, is not a common mindset

⁵ D. 41, 3, 25.

⁶ In sexual abuse cases, this remedy would also include either removing the offender, or never putting the offender in a position that has significant contact with young people.

among those in charge of administering the Church. Again, the claim is that formal processes are overly legal and not very pastoral, which is a charge made often in regard to canonical matters. Nevertheless, even in biblical times, the author of the Gospel of Matthew recognized the need for processes, both informal and formal, to handle the problems that members of the Church encountered. Bishops, canonists, and others in positions of authority must be willing to utilize the procedures provided in the Code if persons are not willing voluntarily to remedy the harm that they have inflicted. Instead of trying to discourage people from using Church processes, the Church needs to 1) utilize safeguards to prevent the infliction of harm in the first place, 2) provide the faithful with resources to inform them of their canonical options in the event that harm is inflicted, and 3) in the event that harm occurs, begin a process to attempt to remedy it as soon as it is discovered. This process could be formal or informal. It is because persons who have been harmed feel that they have no formal ecclesiastical recourse, and no one informs them otherwise, that they believe that their only option is to resort to using the civil courts. If persons in the Church are not aware that canonical processes exist, or do not feel that these processes are fair and accessible, they will continue to resort to utilizing the civil law processes and completely remove the administration of justice from the Church.

If a person claims to have been harmed, the Church has the obligation to determine if the allegation is true.⁷ To do this, the proper canonical processes should be initiated so that an administrator or judge can determine the merits of the claim based on the evidence presented. This can be through the investigation of the administrator in an administrative process or a mediator during mediation, or through the presentation of evidence in a contentious trial. Both formal and informal canonical processes help uncover the truth, which is the first step in remedying harm. If the claim has merit, then the judge or administrator can assign a remedy to repair the harm that has been inflicted.

The processes used to enforce c. 128 can work to the benefit of either the plaintiff or the respondent, as well as benefiting the Church. If a process is begun, and it is found that the plaintiff's complaint has merit, then the harm can be remedied according to c. 128. If it is found that the complaint does not have merit, then, rather than having a cloud of suspicion over the head of the person who has been accused of inflicting harm, the person can be vindicated and have his name publicly cleared. In addition, if a complaint is brought vindictively or under false pretenses, the judge can also compel the plaintiff to remedy the harm caused by the complaint. If the process is conducted openly, fairly and impartially, this also strengthens the belief that the Church is just and that it desires to promote justice and respect the natural law rather than covering up its internal problems.

⁷ This is, of course, for claims that have some credibility. There are some claims of harm that are patently non-credible (e.g., a woman claims that she has been sexually abused because, while she was sitting in the back row of a large church during a crowded liturgy, the pastor was "undressing her with his eyes") and as such should be dealt with pastorally rather than juridically. Given the current climate, if a claim has any credibility, those in positions of authority should err on the side of caution and at the very least should thoroughly and prudently investigate the claim.

There are many ways available to remedy harm. As discussed in Chapter 4, there are canonical remedies as well as potential awards for compensatory damages available for persons that have suffered from harm. If a remedy is not specified in canon law, there are resources in the civil law, and more particularly the common law, that can be used by judges to help formulate fair and equitable remedies. Access to a legal library is certainly helpful, but not absolutely necessary. There are resources available that outline the applicability of various common law legal and equitable remedies. In the United States, West Publishing Company is the largest and most reputable publisher of legal materials and texts.⁸ Generally, legal texts known as “Restatements” or “Hornbooks” provide a general overview of the material rather than examining specific cases. Restatements or Hornbooks on remedies, equitable remedies, and injunctions can all provide useful resource material in the event that a case of this nature is presented.

One final remedy that is the least juridic, the least practiced, yet the most profound, is a simple, sincere, and heartfelt apology. An apology by the perpetrator and/or the perpetrator’s superior or bishop to the victim(s) for the harm inflicted, along with a genuine assurance that the harm will not be repeated, is frequently the remedy most desired by the victim. Depending on the injury, oftentimes a sincere apology will satisfy a victim, may dissuade them from resorting to administrative recourse or a contentious trial, and furthers reconciliation between the harmed person and the one who

⁸ Legal materials from the United States can be ordered from West Publishing Company at www.westgroup.com. Though this resource specifically concerns the law as applied in the United States, the principles used in assigning these remedies could be applied canonically in any jurisdiction for a particular case. In Canada, Carswell Publishing also has resources on remedies that can be ordered from www.carswell.com.

inflicted the harm. Sincere apologies, coupled with just and appropriate actions on the part of the Church to prevent further harm, are not only in keeping with the Church's moral teaching, but in some cases might make it unnecessary for people to utilize non-canonical processes to get satisfaction.

Though the Holy Father has taken the initiative and set an example for the rest of the Church over the past few years by apologizing for harm that persons in the Church have inflicted on others, this course of action does not seem to be common elsewhere. When it has been practiced, its use is often diminished by a failure to take personal responsibility for one's own role in either inflicting or compounding the harm, by use of the pronoun "we" instead of "I", by a patent lack of sincerity, and by carefully worded apologies, noticeably drafted by civil lawyers, so that there is no admission of guilt that could leave one open to civil liability. While attempting to prevent civil lawsuits is understandable, for Christians it certainly must be a lesser priority than observing c. 128, which is a mandate of the natural law.

Finally, one often hears the criticism that American society is overly litigious to the detriment of the common good. Given the emphasis this work places on utilizing the varied canonical processes available to remedy harm, one could charge that this work is an American canonist's attempt to encourage people within the Church to become more litigious. Admittedly, this work could contribute to that effect, though it is certainly not its intention. Rather, instead of encouraging litigiousness, this work strives to underscore the importance of the natural and positive law's insistence that any harm unlawfully inflicted on another must be remedied. Furthermore, this work endeavors to contribute to

the canonical discussion on how justice is viewed and administered in the Church.

Lastly, it is hoped that this work will supply a common law perspective to the remedy of harm in canon law, and provide concrete resources from the common law that can aid judges and administrators in assigning fair and equitable remedies to persons that have been harmed.

APPENDIX 1 –THE HISTORY OF THE REMEDY OF HARM IN COMMON LAW

Introduction

This work will trace the history of the remedy of harm in both the English common law as well as in canon law. It will focus on how the various bodies of law, procedures and courts developed in each system to ensure that persons were given a fair hearing, as well as how these systems attempted to come to a just outcome. The work will briefly examine the history of the common law in England and trace the development of the courts of both law and equity that developed under the common law umbrella.

Prior to the development of the common law, one of the most historically influential systems was the Roman system, which was developed and adapted by the Roman Empire over many centuries. The Romans believed that their system was superior to the multitude of “barbarian” alternatives that they imposed it throughout Europe during their centuries of power. Most European legal systems were direct descendents of Roman law, though some of these systems also incorporated various aspects of the systems of their indigenous peoples. Canon law, an ecclesiastical legal system that historically had been enforced both temporally and ecclesiastically within the European context, was also developed directly from the Roman law model.

One major exception to this European trend was the development of the common law¹ in England. Despite the fact that England was subject to the same influences of both Roman and canon law as were her European neighbors, in the eleventh century the development of the English system of law took a very different direction. This change permanently altered the way justice was created and adjudicated. This deviation from the European norm has produced a unique legal system that is still in use in various forms in Great Britain and Ireland, as well as in such countries as Canada, the United States, and Australia.

Many volumes have been written on the history of the common law, and to try to cover a thousand years of history in a few pages necessarily requires considerable abridgement. Therefore, emphasis will be given to the early development of the courts of common law, how the common law was recorded and passed down, and what elements have made the common law unique from the European and canonical legal systems. The history of the development of the Court of Chancery will also be traced, and its developments will be compared with the common law courts. Special attention also will be given to ways in which canon law or English clerics prior to the Reformation may have shaped the common law. Finally, the common law has been adopted with various

¹ Black's Law Dictionary defines "common law" as: "A body of law that develops and derives through judicial decisions, as distinguished from legislative enactments. The 'common law' is all the statutory and case law background of England and the American colonies before the American Revolution. It consists of those principles, usages and rules of action applicable to government and security of persons and property which do not rest for their authority on any express and positive declaration of the will of the legislature." (J.R. NOLAN et al., *Black's Law Dictionary*, 6th edition, Saint Paul, MN, West Publishing Company, 1991, p. 189.) Another author posits that common law is hard to define and states that, "It is obviously a wise man who prefaces any statements on common law with the simple observation that common law is a relative term—it means many things to many people." (B.F. DEUTSCH, "Common Law," in *The Jurist*, 26 (1967), p. 51.)

adaptations by countries such as Canada, Australia, Ireland, and the United States.

Because the author is most familiar with the legal system in the United States, examples of the common law outside the English context will generally be from the United States.

The Beginnings of the Common Law

Though the English mythologize the origins of the common law by fostering the notion that it appeared with King Arthur out of the mists of time, the creation of English common law actually can trace its beginnings to a single event.² The system of justice developed in England and known as the common law was a creation of the Normans after the conquest of 1066 when William the Conqueror became William I, King of England (1066-1087).³ The reign of William I marked the beginning of the creation of the common law system and also began the process that would ultimately lead to the development of the Court of Chancery, which was the English court of equity.

In addition to the Crown's creating the beginnings of the common law system, William I chose to retain a separate judicial system governed by canon law,⁴ which had existed prior to King William's ascension to power. The ecclesiastical courts were maintained after the Norman Conquest, but they were authorized only to adjudicate

² "In 1470 an English serjeant-at-law maintained that the common law had been in existence since the creation of the world." (J.H. BAKER, *An Introduction to English Legal History*, London, Butterworth & Co. LTD. 1981, p. 1.) Blackstone, a noted English jurist who was responsible for codifying the common law into a manageable body, called the common law "the custom of the realm from time immemorial."

³ See J. MARTÍNEZ-TORRÓN, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition*, Berlin, Duncker & Humblot, 1998, p. 5.

⁴ See G.W. KEETON, *The Norman Conquest and the Common Law*, London, Ernest Benn LTD, 1966, p. 61.

specific categories of cases. Though the canonical legal system was administered by the Church, its rulings were enforced by the State. This separate system of ecclesiastical courts that adjudicated cases using canon law ran concurrently with the common law system until the time of the Reformation, when Henry VIII declared himself the “Supreme Head on Earth of the Church of England.”⁵ Though the supremacy of the Pope was rejected in 1534, ecclesiastical courts continued to adjudicate cases, using a mixture of the canon law that was “not contrary to the common law, statutory law, or the King’s prerogative,” as well as the newer Anglican ecclesiastical law that was subsequently added by the monarch, Parliament, or the Anglican Church.⁶

Origins and Growth of the Common Law

During the Saxon era of English history prior to C.E. 1066, the feudal lords administered justice for their people within their own districts. There were three political divisions within the country at that time, and the local law was generally based on whether the territory was under a Mercian jurisdiction, a Danish jurisdiction, or a West

⁵ See A. K. R. KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, London, Sweet & Maxwell LTD, 1958, p. 214.

⁶ See BAKER, *An Introduction to English Legal History*, p. 113. See also KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 214. The existence of concurrent systems obviously begs the question whether the older and more developed canon law system influenced the early development of English common law. Though it is probable that canon law did have some impact on English common law’s development given that it was practiced concurrently for hundreds of years, for the most part, common law developed as a legal system by and large independent from both canon law as well as European continental civil law. It is not the purpose of this work to explore in any depth if or how the development of the common law was affected by canon law. For an in-depth analysis of this topic, see J. MARTÍNEZ-TORRÓN, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition*, Berlin, Duncker & Humblot, 1998.

Saxon jurisdiction.⁷ These systems of justice were not consistently applied across their own territories much less across the entire realm, and this resulted in quite different outcomes for similar types of cases. When William I took power in 1066 he centralized control and consolidated the disparate judicial systems, creating a central system of justice that was “common indeed to all men and all places.”⁸ In addition to his own system of common law, William I separated the Church’s ecclesiastical courts from the jurisdiction of his newly established common law courts and gave them separate jurisdiction over cases that concerned spiritual matters.⁹ These ecclesiastical courts adjudicated cases using canon law. From that time forward the courts of both canon law and common law existed simultaneously.

In the years that followed, and especially during the reign of Henry II (1154-1189), the English monarchs continued to consolidate their power by instituting a policy “centered on achieving a strong, centralized government as a ductile instrument in the hands of the Crown. This policy included the creation of a solid machinery which would permit administration of justice in the name of the King.”¹⁰ This machinery was known

⁷ See W.H. HOLDSWORTH, *A History of English Law*. London, Methuen & Co. LTD, 1956, p. 3.

⁸ KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 18.

⁹ All Christians of the realm were subject to the ecclesiastical law, which governed cases concerning clerical status, marriage, divorce, legitimacy of children, wills, intestacy, tithing, and property disputes over church-owned property. These courts could also punish such offences as adultery, fornication, witchcraft, usury, perjury, simony and defamation. As a last resort, ecclesiastical courts maintained the power to excommunicate, and the state would enforce that judgment. See MARTÍNEZ-TORRÓN, *Anglo-American Law*, pp. 39-40. The consequences of excommunication were serious. They prevented the excommunicated person from performing any legal acts: they could not sue (but they could be sued), could not serve on a jury, and could not be a witness in court. Finally, because these persons had “leprosy of the soul,” other people were barred from eating, praying, or speaking with excommunicated persons. HOLDSWORTH, *A History of English Law*, p. 631.

¹⁰ MARTÍNEZ-TORRÓN, *Anglo-American Law*, p. 12.

as the *Curia Regis*, or King's court, and it was the central and supreme court where the government transacted the business of all its branches.¹¹ Initially, the King himself heard the various cases brought before him as he traveled around his realm, but as the numbers of cases grew, the caseload became impossible for him to administer in a timely fashion. To manage the greater caseload, the King appointed royal judges to ride circuit and administer the common law on his behalf. This led to the replacement of the local courts with the more efficient and consistent royal courts, which exercised broad jurisdiction and whose principles, practices, and precedents were based on the King's court rather than on local practice.¹²

At the beginning of the thirteenth century, the *Curia Regis* was divided into two courts: the Court of Common Pleas and the King's Bench.¹³ Judges were appointed to these Courts by the monarch, and they "held their offices as a rule during the royal pleasure" and vacated their offices upon the demise of the crown.¹⁴ Originally the judges of the King's Bench continued the tradition of following the King, "wheresoever he should be in England."¹⁵ By the fourteenth century it became increasingly clear that cases arising in places other than where the monarch was residing were not being heard

¹¹ See HOLDSWORTH, *A History of English Law*, p. 32.

¹² See BAKER, *An Introduction to English Legal History*, p. 15.

¹³ See HOLDSWORTH, *A History of English Law*, p. 195. There are also other Courts that were created over time such as the Court of Admiralty, the Court of the Exchequer, the Probate Court, the Court of Matrimonial Causes, and the Star Chamber. These courts all dealt with special types of cases rather than having a more general jurisdiction. Therefore, for the purposes of this work these courts will not be examined.

¹⁴ HOLDSWORTH, *A History of English Law*, p. 195.

¹⁵ BAKER, *An Introduction to English Legal History*, p. 35.

in a timely fashion. To remedy this injustice, the judges of the King's Bench ceased to ride circuit, and court was convened solely in Westminster Hall. The King's Bench developed into a court that had unlimited national criminal jurisdiction and heard most of the criminal cases. It was also responsible for reviewing questions of law concerning indictments issued from other courts, reviewing errors made by other courts, and adjudicating actions of trespass¹⁶ and felony appeals.¹⁷ The King's Bench remained in existence and continued to hear cases until the common law courts were amalgamated in 1875.

To promote a certain level of stability and easier access to the courts, Henry II also decreed that five judges should permanently remain in the Curia Regis in Westminster and adjudicate cases on a full time basis.¹⁸ This court became known as the Court of Common Pleas. This court was given exclusive jurisdiction over cases in which the monarch had no interest, including "all the real"¹⁹ actions, and all personal actions not alleging breach of peace."²⁰ This practice was concretized by its inclusion in clause 17 of the Magna Carta (1215), which formally established the two royal benches of the court

¹⁶ Trespass was a wrong committed by force of arms against the King's peace. See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 127.

¹⁷ See BAKER, *An Introduction to English Legal History*, p. 35.

¹⁸ See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 120.

¹⁹ According to Black's law dictionary, in civil law the term "real" refers to actions relating to a thing, either movable or immovable, as distinguished from a person. See "Real," *Black's Law Dictionary*, p. 873.

²⁰ BAKER, *An Introduction to English Legal History*, p. 35.

and required that the Court of Common Pleas be permanently held in “a certain place.”²¹

It was also during the reign of Henry II that the King took measures that placed the criminal law under royal jurisdiction. This action struck a serious blow to the feudal lords, who were now prevented from attempting to administer their own local customary laws.²²

In the beginning, many of these early common law judges were also clerics. This was due to the clergy’s high level of literacy (they were among the few persons in England who could read and write), and their knowledge of both common law and canon law. Among the first few generations of common law judges there were a large number of clerics who were knowledgeable of canon law and often had practical experience litigating before the ecclesiastical courts. This circumstance was significant, “even though it had a greater effect on the administration of law than on its substance.”²³ In fact, some authors believe that in the twelfth and thirteenth centuries, and especially during the reign of Henry II, “Henry’s greatest, his most lasting triumph in the legal field was this, that he made the prelates of the Church his justices.”²⁴ In their opinion, during the time of Henry II:

English law was administered by the ablest, the best educated, men in the realm...it was administered by the selfsame men who were the ‘judges

²¹ See *ibid.* It is said that this doctrine of being located “in a certain place” was held so sacred that some justices objected to changing the court’s location within Westminster Hall for fear of violating the provisions of the Magna Carta.

²² See KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 19.

²³ MARTÍNEZ-TORRÓN, *Anglo-American Law*, p. 25.

²⁴ F. POLLOCK and F.W. MAITLAND, *The History of English Law before the Time of Edward I*, Cambridge, University Press, 1923, p. 132.

ordinary' of the church's courts, men who were bound to be, at least in some measure, learned in the canon law. At one moment Henry had three bishops as 'archjusticiars'.²⁵

The practice of using clerics as judges continued during the reign of Richard I (1189-1199), when the King's court was composed of "the Archbishop of Canterbury, two other bishops, two or three archdeacons, two or three ordained clerks who were going to be bishops and but two or three laymen."²⁶ Over the course of time, the practice of using clerics as judges necessarily began to change as the legal profession developed its own "bench and bar" that was increasingly staffed by professional lay people. This development was aided by the fact that during the Second Lateran Council of 1139, canon nine prohibited clergy from practicing law in the secular courts, except in representing the Church or the helpless.²⁷ The Third Lateran Council of 1179 confirmed the ban of clerics being civil advocates.²⁸ Soon the legal profession, which included all judges, barristers, and solicitors, became a profession of educated and trained laity rather than a predominantly clerical endeavor.

The legal profession was not the only aspect of the law that was undergoing change and standardization. Different elements of the common law such as procedures, legal precedents, and the common law's philosophical underpinnings were also being developed, concretized and standardized. One way in which this was accomplished was

²⁵ Ibid.

²⁶ Ibid.

²⁷ See *Decrees of the Ecumenical Councils Volume 1: Nicea I to Lateran V*, N.P. TANNER (ed.), London. Sheed & Ward LTD., 1990, p. 198.

²⁸ Ibid., p. 218.

by producing written works that detailed these developing aspects of the common law. Scholars began compiling the laws, customs, and precedents of the realm into single bound collections that made it significantly easier for the judges and practitioners to know and apply the law. Because the common law develops as much from judicial precedent as it does from statutory law, it became increasingly more important for common law's principles, customs and procedures, in addition to the court rulings and precedents, to be compiled so that the whole legal profession might have access to the current developments in the law.

During the reign of Henry II (1154-1189), the first English law textbook was compiled.²⁹ The text, called *de legibus Angliae*, was ascribed to Sir Ranulf de Glanvill (justicar from 1180-1189) and detailed the practices of the King's court that constituted the "law and custom of the realm."³⁰ The text, also referred to as *Glanvill*, gave a description of the writs that enforced royal justice.³¹ About a century later during the reign of Henry III (1216-1272), Henry Bracton wrote another seminal treatise on the English common law called *Tractatus de legibus Angliae*.³² Bracton's work contained not only a "scientific exposition of general principles" of common law, but also gives a "practical account of the procedure on the different writs which could be issued in the

²⁹ Legal compilations were being produced across Europe during this time period. The English compilers may have gotten their inspiration from Gratian, who had compiled a coherent system of canon law about the year CE 1140.

³⁰ BAKER, *An Introduction to English Legal History*, p. 12. See also, KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 19.

³¹ See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 20.

³² See *ibid.*, p. 23.

royal courts.”³³ Both of these works were critical in standardizing the early laws and practices to be applied by the royal judges in adjudicating their cases, and helped to lay the juridical foundations on which later English laws, customs and precedents were based.

While Bracton’s textbook remained helpful as a resource, it soon became outdated as all textbooks do. To keep abreast of the changes of the law after Bracton’s textbook was published, it is believed that law students and court clerks began making notes of legal arguments and the precedents set in the various courts.³⁴ By the 1300’s these notes began to be collected, copied, and widely circulated among the legal community because they recorded the ideas, doctrines and precedents that were currently being used by the courts.³⁵ These compilations were commonly referred to as the Year Books, and they were produced continuously until the sixteenth century. By the reign of Henry VIII court officials began producing Court Reports of their own that were more complete and of better quality, so the Year Books ceased to be produced.³⁶ Though the Court Reports had been previously copied and widely circulated, in 1558 printers began to print these collections by year and by folio so that they could continue to be used for reference.³⁷

³³ Ibid., p. 283.

³⁴ Because there are no signatures in the notes that made up the early yearbooks, scholars are not certain who actually wrote them. They do know that they were written by a number of different people, and it is believed that they were written by students and court clerks because of the style of the writing. It is obvious that the early yearbooks were not compiled by professional recorders because various important facts (like the verdict, or who was hearing the case) were frequently left out.

³⁵ See BAKER, *An Introduction to English Legal History*, p. 153.

³⁶ See KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 271.

³⁷ See BAKER, *An Introduction to English Legal History*, p. 154.

Both the Year Books as well as the Court Reports were greatly valued for making it possible to cite “decisions on one cause of action in a case brought under another,” as well as cases that defined the current broad legal principles based on large numbers of unrelated decisions.³⁸

There were two jurists around the time of the Reformation whose legal works had a great impact on the common law. Christopher St. Germain published *Doctor and Student* in 1523 and in 1528, which consisted of a dialogue/discussion between a doctor of divinity and an attorney over the principles, sources, and rules of the common law.³⁹ About one hundred years later, Sir Edward Coke, a judge who at different times was Chief Justice of both the Court of Common Pleas as well as the King’s Bench, wrote a number of works on the common law, and produced his own Court Reports as well. His most famous work was called the *Institutes*, which was divided into four volumes. The first volume was his translation and commentary on Littleton’s *Tenures*, which became known as *Coke on Littleton*. This work became the seminal textbook on land law for many years to come.⁴⁰ The other volumes of the *Institutes* examine current statutes, criminal law, and jurisdiction of the courts.⁴¹

³⁸ See KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 278. Court Reports are used for exactly the same purpose today. To support a legal position, a lawyer first looks for a case substantially similar to the case of the one being tried that has an outcome favorable to the side being presented. If the lawyer cannot find a case directly “on point”, then the lawyer tries to find as many cases as possible that state the same legal principle that the lawyer is trying to prove. Lawyers are able to find these case precedents in commercially produced Court Reports.

³⁹ See KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 287.

⁴⁰ See *ibid.*

⁴¹ See *ibid.*, pp. 287-288.

Finally, in 1765 Sir William Blackstone published a four-volume work entitled *Commentaries on the Laws of England*, the first comprehensive survey of English law since Bracton's work in the thirteenth century.⁴² Blackstone's work has been described as "a final survey of the old common law and the first textbook of a new legal era" in Great Britain.⁴³ This work became the authority in Britain and its colonies for many years to come, and had a profound effect in the formation of the judicial system of what would soon become the United States of America.⁴⁴ These compilations and reporters made it possible for the procedures and precedents of the common law to be passed down to future generations of barristers, solicitors, and judges.

In 1534 Henry VIII rejected the authority of the Pope and declared himself to be head of the Church of England. This action began the period known as the Reformation. While the action by Henry VIII and the further actions by his daughter Elizabeth I had a profound impact on English society, it did not have as great an impact on the development of the common law in general. The Reformation certainly had an impact on the Ecclesiastical Courts, by consolidating all sovereignty under the central government rather than there being divided sovereignty between the Church and the State.⁴⁵ It also resulted in the beheading of Sir Thomas More, who had been the first non-cleric and

⁴² See BAKER, *An Introduction to English Legal History*, p. 166.

⁴³ Ibid.

⁴⁴ KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 291. The American Revolution began in 1776; just eleven years after Blackstone's works were published. Since obtaining newer printed legal texts in the colonies was difficult, Blackstone's work provided a concise but comprehensive overview of the common law, which was then more or less adopted by the new country.

⁴⁵ See *ibid.*, p. 39.

attorney to become Chancellor in 1529.⁴⁶ However, the Reformation in and of itself did not have any profound impact on the development of the common law.

A major change in English court procedure came about in the middle of the nineteenth century. In 1854 the Common Law Procedure Act was passed by Parliament. This Act allowed a single judge to hear a case without the presence of a jury.⁴⁷ The right to a trial by jury was a bastion of the common law, but since the Common Law Procedure Act was passed, trial by jury in England has gotten progressively less common. Since 1933 parties to a case have only been able to have a trial by jury if the request is granted by the Court, and in recent times this permission is not frequently granted.⁴⁸ While the trial by jury has grown into disuse in England, this certainly has not been the case in the United States.⁴⁹

The last major change in the common law came in 1873, with the passage of the Judicature Acts, which went into operation in 1875.⁵⁰ The major effect of the Judicature Acts was the amalgamation of the King's Bench, the Court of Common Pleas and the Chancery Court into one Supreme Court of Judicature, which was divided into the Court

⁴⁶ See HOLDSWORTH, *A History of English Law*, p. 410. As will be discussed in a later section, the chancellor was the equivalent of Chief Justice of the Court of Chancery.

⁴⁷ See BAKER, *An Introduction to English Legal History*, p. 80.

⁴⁸ See *ibid.*

⁴⁹ Across the United States trial by jury is guaranteed for all criminal trials by Article III, Section 2, clause 3 of the United States Constitution, and is guaranteed for all common law civil suits valued at over \$20 in the Seventh Amendment to the U.S. Constitution. The criminal system also makes use of a grand jury, which hears evidence and makes a determination whether there is sufficient evidence to indict a person.

⁵⁰ See HOLDSWORTH, *A History of English Law*, p. 638.

of Appeal and the High Court of Justice. This Act also consolidated the courts of common law and the courts of equity into one superior court called the High Court of Justice, and required that all the courts “give full effect to all the rules of law *and equity* which might arise in any case before them.”⁵¹ The Courts were consolidated because by the nineteenth century there were serious problems with the distinctions between the overlapping jurisdictions of the various courts. The confusion over the “multiplicity of courts was the cause of much delay, expense, and some hardship.”⁵² With the amalgamation, the courts operate more efficiently and made both legal and equitable remedies available in all cases.

Over the millennium of its existence, the common law has steadfastly held its own course against the influences of other European and ecclesiastical legal systems. Because of this, the common law developed unique characteristics that make it very different from the more uniform characteristics of the other European legal systems. Some of these defining characteristics will be explored in the next section.

Differences Between the Common Law and European Civil Law

As the new English system of laws and judicial adjudication developed, the English system began to substantially differentiate itself from its Roman law counterparts. One of the major differences between the common law that evolved in England versus both the civil law and the canon law that spread across Europe was the

⁵¹ KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 235.

⁵² *Ibid.*, p. 232.

way in which the law developed. There is a saying that, “whereas English common law grew from the cumulation of case law, Continental law was formed from authoritative text and academic commentary.”⁵³ Generally speaking, whereas the European civil law and canon law was systematically created by academics and implemented by legislative enactment, common law developed largely from the precedents set through judicial decisions in addition to the traditional statutory law. While the monarch, Parliament, and the lesser levels of government worked to enact and promulgate laws, the meaning and interpretation, as well as the nuances or “glosses”⁵⁴ of these laws were ultimately determined by the rulings of the courts. These arguments and decisions were recorded, first in the Year Books, and then in the volumes of Court Reporters that were produced by court personnel. Barristers used the legal arguments, definitions, and precedents from previously adjudicated cases to argue their own cases, and judges used the same material in making their judgments. For this reason, the common law’s development has been described as “inorganic [and] spontaneous; a growth resisting any attempt at rationalization according to the usual parameters of European doctrine... the life of the law has not been logic, it has been experience.”⁵⁵

⁵³ R.H. HELMHOLZ, *The Spirit of Classical Canon Law*, Athens, GA, University of Georgia Press, 1996, p. 30.

⁵⁴ In legal terminology, judicial interpretations are known as a “gloss” to the law. Black’s defines a gloss as “an interpretation, consisting of one or more words, interlinear or marginal; an annotation, explanation, or comment on any passage in the text of a work, for purposes of elucidation or amplification.” (“Gloss,” *Black’s Law Dictionary*, p. 475.) Glosses were also used extensively in canon law as well as within the common law.

⁵⁵ MARTINEZ-TORRÓN, *Anglo-American Law*, p. 12.

Even the training required for learning the law and then being able to practice law within the two systems evolved differently. Roman law and canon law were being taught in universities across continental Europe, and also in England in such universities as Oxford. This was not the case for common law. Common law traditionally was not taught in a university; rather it was learned by experience and passed down from judges to their clerks, the lawyers, and later to students of the law.⁵⁶ As the common law developed, being a judge went from a part time practice to a full time profession. At that time judges were still clerics, and it became the practice for the clerics who had served as judges' clerks to themselves being promoted to judge.⁵⁷ This made it possible for the practices and traditions of the court to be handed down to future judicial successors, because the aspiring clerk, "worked [his] way up, learned the law and saw how justice was done."⁵⁸ Soon it was only possible for a judge to be appointed from among the senior professional clerks and advocates, which united the bench and bar into one common profession.⁵⁹

As the common law developed it became less of a profession of the clergy and more of a profession of lay judges and attorneys. By the beginning of the thirteenth century, "the typical justices of the Bench were... professional judges spending most of

⁵⁶ There are now schools of common law in England, as well as in Canada, the United States, and Australia. However, to be a barrister in England a person must still belong to one of the Inns of Court.

⁵⁷ See BAKER, *An Introduction to English Legal History*, pp. 133-134.

⁵⁸ R.C. VAN CAENEGEM, *The Birth of the English Common Law*, 2nd edition, Cambridge, Cambridge University Press, 1988, p. 23.

⁵⁹ See BAKER, *An Introduction to English Legal History*, p. 134.

their time on the administration of the nascent common law.”⁶⁰ Even before the fourteenth century this system “was producing judges who were not in Holy Orders and whose background was solely in the practice of the law of the land.”⁶¹ In addition to the development of a class of professional judges, there was also developing a class of professional lawyers. By the end of the thirteenth century, there was a thriving legal profession of men who earned their living, “by representing litigants before the court and giving legal advice.”⁶²

By 1388 the Inns of Court had been formed in London to train laymen in the legal professions of serjeant (advocatus) and attorney (procurator).⁶³ These designations later evolved into the current system of the separate but complementary professions of barrister and solicitor.⁶⁴ By the late fourteenth century, judges, barristers, solicitors, and their apprentice/students all lived at the Inns of Court. These Inns were “private teaching foundations of residential character” where the residents lived, ate, learned and discussed law.⁶⁵ An apprentice/student learned the practice of law from the other judges and

⁶⁰ *Ibid.*, p. 17.

⁶¹ *Ibid.*, p. 134.

⁶² POLLACK, *The History of English Law*, p. 211.

⁶³ See BAKER, *An Introduction to English Legal History*, p. 141.

⁶⁴ While England and some of the other former English colonies have retained these separate distinctions, these designations were not retained in the United States. All lawyers in the U.S. can do all the tasks that either barristers or solicitors practice in England.

⁶⁵ See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 83.

lawyers living at the Inns, from “moots”⁶⁶ conducted at the Inns, and from “readings on the statutes and note-taking in court.”⁶⁷ Though the origin of the Inns is not very clear, as they developed they became a very practical way for young men to learn the practice of law outside of a traditional university setting. This very pragmatic way of learning the law contrasted sharply with the continental university system.

Another major difference between the common law and civil or canon law was the development of a series of “writs” that were used to plead a case. Writs were a unique creation of the common law and never became a part of any of the civil legal systems of Europe or of canon law. All original writs were issued by the Latin side of the Chancery,⁶⁸ which also issued all “patent and close writs and various charters and grants,” as well as the department responsible for distributing the various records.⁶⁹ The Latin side was also responsible for all petitions that sought redress against the Crown.⁷⁰

A writ originally was a written order that was issued in the name of the plaintiff that ordered the defendant to appear in the King’s court.⁷¹ Writs eventually evolved into

⁶⁶ Moot trials or “moots” are mock trials that help to train lawyers in both procedure and advocacy. Modern law schools hold moot trial competitions in efforts to give their students some practical experience in trying cases.

⁶⁷ KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 83.

⁶⁸ The Latin side of the Chancery is not to be confused with the English side, which administered the Court of Chancery. The names of the two sections of the Chancery reflected the language in which the various records of each section were kept.

⁶⁹ KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 154.

⁷⁰ See BAKER, *An Introduction to English Legal History*, p. 86.

⁷¹ See “Writ,” *Black’s Law Dictionary*, p. 1108. This form of writ would now generally be called a summons.

the way an action was instituted in common law.⁷² A person could not begin an action before the court without a writ that specifically named the injury, and directed that the person named by the writ must repair the harm caused or show cause before the Court why he should not.⁷³ In the twelfth century, writs were created to address a specific set of facts, outside of which the court could not act.⁷⁴

Over the next century the number of writs expanded greatly to cover a multitude of legal actions. Soon writs became standardized with the help of the publication of Glanvill's textbook, and in 1258 the Provisions of Oxford declared that the Court could no longer draft new writs without the authorization of the King's Council. From this point on, plaintiffs could not create their own writs. They had either to find one that fit the facts of their case or request the creation of a new writ.⁷⁵ Bracton's text furthered the codification of writs, and expounded on the laws and judicial precedent that had been developing around these writs.⁷⁶ Writs developed into the primary form of pleading in

⁷² See *ibid.* Writs are still used in various common law courts, though the courts no longer rely on them for the introduction of a legal action. People in common law countries are probably most familiar with writs of *habeas corpus*. These writs, which are still used in courts of law in the United States and literally mean, "you have the body," require a court to release a prisoner when he has been unlawfully detained and denied the due process of law. An action is a "lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." ("Action," *Black's Law Dictionary*, p. 18.)

⁷³ See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 21.

⁷⁴ See MARTINEZ-TORRÓN, *Anglo-American Law*, p. 15.

⁷⁵ See *ibid.*

⁷⁶ See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 23.

the case.⁷⁷ The use of the various types of writs became progressively complicated and confusing, so much so that in 1832 all forms of writs were abolished, and a single uniform writ was created where the type of case could be inserted in the provided space.⁷⁸ The highly formalized and confusing use of writs was a major reason why it was necessary for the creation of the English Court of Chancery.

Finally, the common law instituted the right to trial by jury. A jury was “a body of ordinary men sworn to give a true answer (*veredictum*, verdict) to some question.”⁷⁹ In canon law, rooted in the New Testament, witnesses were required to be called forward and questioned by a judge concerning the facts of a given case.⁸⁰ This principle of using outside persons to establish or determine fact was incorporated into the common law, albeit in a different form. Originally a jury consisted of twelve men of good reputation who were called together in a certain county to answer a question (give a verdict) concerning a particular dispute that was specified in a writ. These disputes usually involved a dispute

⁷⁷ The pleadings in common law are the “system of rules and principles...according to which the pleadings or responsive allegations of litigating parties were framed with a view to preserve technical propriety and to produce a proper issue. The process performed by the parties to a suit or action, in alternately presenting written statements of their contention, each responsive to that which precedes, and each serving to narrow the field of controversy, until there evolves a single point, affirmed on one side and denied on the other, called the ‘issue,’ upon which they then go to trial.” (“Pleadings,” *Black’s Law Dictionary*, p. 798.) Once the issue is narrowed down, if the controversy is about a point of law, the Defendant files a “demurrer,” and the judge makes a determination about the case based on the interpretation of that particular point of law. If the controversy is a dispute of fact, in common law these cases are generally decided by a jury.

⁷⁸ See BAKER, *An Introduction to English Legal History*, p. 60.

⁷⁹ *Ibid.*, p. 63.

⁸⁰ See Matt. 18:15-17.

over land.⁸¹ This process slowly evolved into the convening of persons who were called together to render a verdict concerning the facts of a case. The right to a trial by jury was a great improvement over the feudal systems, where general oaths, ordeals, armed contests, and supernatural tests determined guilt or innocence in a criminal action, or determined who won a dispute in a civil action.⁸²

As stated in the section above, trial by jury has fallen into disuse in England over the past century. However, it remains a vital and constitutionally guaranteed part of the judicial system in the United States. Neither the European civil law systems nor canon law ever developed the tradition of a trial by jury. These systems traditionally rely on either a single judge or a panel of judges to adjudicate their cases and render their decisions, regardless of whether the case is over a dispute of law or of fact.

While there are many differences between the common law and other canonical or European systems, one profound difference was the development of the English Court of Chancery. This court, which was created as a court of equity, developed out of and as a result of the common law but became its own judicial entity with its own rules and procedures. The Court of Chancery was formed to remedy types of harm that the common law was not equipped to adjudicate. In doing so, Chancery created its own body of law that was based on conscience and justice rather than law.

⁸¹ Twelve men of the county were called to testify because they would have been the ones who would have had knowledge of the facts surrounding a case. For example, in land disputes these landowners would be the ones who would know the traditional boundary lines for property or who sold what piece of land to whom and for how much. They would also be able to attest to the character, as well as the truthfulness or untruthfulness, of the parties.

⁸² See VAN CAENEGEM, *The Birth of the English Common Law*, pp. 62-72.

The Development of a Court of Equity in Common Law

As the common law system developed, it became increasingly inflexible both in its application of the law as well as its enforcement of proper procedure. Over time the system of using writs to plead common law cases became increasingly complex and technical.⁸³ More emphasis was put on using the correct procedure at the various stages of a case rather than on achieving the most just outcome on the facts of the case. There was very little tolerance for procedural mistakes, and if the person or legal advocate used the wrong procedure the case would be dismissed, even if the case had great factual merit.

In addition, the common law courts placed a high value on strictly enforcing the rules of evidence, even though this would occasionally exclude important merits of the case from consideration.⁸⁴ These rules remained inflexible because judges believed that relaxing the rules would result in the destruction of certainty and the condonation of carelessness.⁸⁵ Though this legal stringency resulted in a high level of procedural correctness and standardization of the rules of evidence, it also resulted in a number of very dissatisfied parties who were unable to have the harm they suffered properly remedied within the common law courts.

Additionally, the development of legal precedents in the common law courts created rules of precedent applicable to large numbers of cases. Unfortunately, this also

⁸³ See HOLDSWORTH, *A History of English Law*, p. 399.

⁸⁴ See D. RENDLEMAN, *Remedies: Cases and Materials*, 6th Edition, Saint Paul, MN, West Group, 1999, p. 9.

⁸⁵ See BAKER, *An Introduction to English Legal History*, p. 88.

meant that sometimes courts returned a seemingly unjust verdict for an individual case because, “judges preferred to suffer mischiefs to individuals than to make exceptions to clear rules.”⁸⁶ Rather than make a legal exception for a hard case that would then have precedential value, judges preferred to follow the maxim that “hard cases make bad law”⁸⁷ and upheld the clear rule of either procedure or precedent.⁸⁸ While the maintenance of the rule of precedent may have ultimately benefited the greater society, occasionally the individual was harmed by the court’s reluctance to make exceptions.

Another problem occurred when there was a great social disparity between the two litigants. On occasion the local sheriffs were reluctant to serve⁸⁹ important parties for fear that they could lose their job, so a party of a lower social status would have a difficult time getting satisfaction from the court. In addition, when a defendant was a particularly powerful or important person, the ordinary courts had great difficulty acting effectively against him.⁹⁰ Sometimes these powerful defendants would ignore or defy the

⁸⁶ *Ibid.*, p. 87.

⁸⁷ See H. BROOM, *A Selection of Legal Maxims: Classified and Illustrated*, 10th edition, London, Sweet & Maxwell LTD, 1939, p. 92.

⁸⁸ See BAKER, *An Introduction to English Legal History*, p. 87. Common law judges also did not always see the necessity of saving foolish people from their own folly.

⁸⁹ To serve someone means that a subpoena is delivered to a party or witness, requiring their presence before the Court at a certain time concerning a certain matter. If a person fails to appear, the person can be cited for contempt of court. If one is able to avoid service, this means that he has avoided being served the subpoena to appear.

⁹⁰ See MARTÍNEZ-TORRÓN, *Anglo-American Law*, p. 53.

rulings of the court, and would even intimidate members of the jury so that they would not return a verdict favorable to the plaintiff.⁹¹

Finally, the common law was limited in two ways. First, it was limited in the types of remedies it was able to provide for harms incurred. The common law generally had jurisdiction over things (*in rem*) such as land; it did not have jurisdiction over people (*in personam*). Because of this, the common law did not develop ways to compel a person's specific performance of a contractual obligation,⁹² nor did it protect persons who had been defrauded by their own foolishness; "the law did not bend to assist fools."⁹³ Instead, the common law could only compensate the wronged party through awarding damages.⁹⁴ Second, courts of common law could only redress harm that had already happened. The law was not equipped to take affirmative steps to prevent an

⁹¹ See R.E. MEGARRY, *Snell's Principles of Equity*, 27th edition, London, Sweet & Maxwell LTD, 1973, p. 8.

⁹² Specific performance is "the remedy requiring exact performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon." ("Specific Performance," *Black's Law Dictionary*, p. 788.) An example of specific performance would be the court's enforcement of an oral contract when one party had already paid for a service to be completed, and the other party refused to complete the contract. Before courts of equity developed this remedy, if the party had no written contract, the common law courts did not have the power to compel the person to complete the contract. Common law courts followed the common law maxim, "an oral contract is not worth the paper it is written upon," which meant, no written contract, no binding agreement.

⁹³ BAKER, *An Introduction to English Legal History*, p. 88.

⁹⁴ See MARTINEZ-TORRÓN, *Anglo-American Law*, p. 53. In the case of a written contract, if the court acted, its only potential remedy would be to make the offending party pay for the work that was not completed. It could not force the person to complete the contract.

injustice before it occurred; it could only punish persons by forcing them to pay compensatory damages for their illegal acts after their acts had been committed.⁹⁵

Over time, the shortcomings of the common law system became increasingly evident, which prompted people to look for alternate solutions. If a party could not find justice at common law, the party had one other alternative, which was to petition the monarch for justice. Though the King had established courts to administer his justice, it was also his sworn duty to “do equal and right justice and discretion in mercy and truth,”⁹⁶ If the regular procedures proved to be defective, it was the King’s duty to furnish a remedy. After a subject had either 1) availed himself of the common law courts, and the court did not provide an appropriate remedy, or 2) there was no remedy for the harm within the common law, the monarch retained the personal power to administer justice outside the regular systems of justice.⁹⁷ This power was intended only to insure that justice was done in the minority of instances where the common law could not address the case, it was not meant to supplant the normal course of justice.

Because the monarch was unable to handle every petition that came before him, the cases were first delegated to the King’s Council, and eventually they were specifically delegated to the chancellor.⁹⁸ The chancellor was the most important official in the State

⁹⁵ See *ibid.* For example, this meant that even if a person had knowledge that a neighbor intended to build a structure that infringed on one’s own property line, the law could not prevent this action. It could only award damages after the structure had been constructed.

⁹⁶ BAKER, *An Introduction to English Legal History*, p. 84.

⁹⁷ See *ibid.*

⁹⁸ See KIRALFY, *Potter’s Historical Introduction to English Law and its Institutions*, p. 153.

after the monarch. He was the King's principal advisor from his Council, was keeper of the Great Seal, he acted as Secretary of State, and was head of the Chancery, which was "a great secretarial bureau, a home office, a foreign office and a ministry of justice,"⁹⁹ as well as the office that issued all original writs.¹⁰⁰ It was his role as head of the ministry of justice that made the chancellor the logical choice to handle all the equitable petitions sent to the monarch.¹⁰¹

In the early days the chancellor was usually a bishop or archbishop, and his staff consisted of clerics, though this began to change after the Reformation when professional lawyers began holding these positions.¹⁰² Because the chancellor was both a cleric and an advisor, he was generally regarded as the "keeper of the King's conscience."¹⁰³ One of the best descriptions of the need for both the Chancery and the Chancellor was written by Lord Ellesmere, chancellor from 1596-1617. He wrote:

[M]en's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law.¹⁰⁴

⁹⁹ POLLACK, *The History of English Law*, p. 193.

¹⁰⁰ See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, p. 155.

¹⁰¹ See S.F.C. MILSOM, *Historical Foundations of the Common Law*, 2nd edition, London, Butterworths & Co. LTD, 1981, p. 83.

¹⁰² See KIRALFY, *Potter's Historical Introduction to English Law and its Institutions*, pp. 157, 161.

¹⁰³ MARTÍNEZ-TORRÓN, *Anglo-American Law*, p. 54.

¹⁰⁴ BAKER, *An Introduction to English Legal History*, p. 90, quoting *Earl of Oxford's Case* (1615) 1 Rep Ch 1 at 6.

Thus the chancellor was given the responsibility to hear all the petitions concerning cases of conscience that were sent to the monarch. The chancellor was then to decide these cases according to equity, conscience, and in accord with the principles of natural justice. He did not have to take into account prevailing common law norms.¹⁰⁵ During the first few centuries when the chancellor was a cleric, assuredly the conscience of the Chancellors would have been guided by their training in both theology and canon law. In a sense, the clerical chancellors “were exercising the temporal counterpart of the confessional” in dealing with the petitions that came before him.¹⁰⁶

As the numbers of these petitions grew, a permanent group of clerks was needed specifically to handle the preparatory work so that the chancellor could attend to his other duties. Soon this group of clerks and their staff working with the chancellor coalesced into the English Court of Chancery. This Court, which started out as particular delegations of cases from the monarch, ended up developing into a permanent court located at Westminster. The chancellor was Chief Justice for a court that utilized principles of equity rather than common law procedure and precedent to render justice.

Differences between Law and Chancery Courts

There were a number of differences between the ways that the common law courts and the Chancery courts functioned. One of the biggest differences was that because the chancellor was not bound to follow common law precedent, all cases were

¹⁰⁵ See MARTÍNEZ-TORRÓN, *Anglo-American Law*, p. 54.

¹⁰⁶ BAKER, *An Introduction to English Legal History*, p. 90.

judged on their individual facts and merits. Then the chancellor issued a specific remedy that only bound the parties.¹⁰⁷ In addition, the process in the Court of Chancery was comparatively informal. Because the Court of Chancery was less tied to the formalities and customs of the common law courts, it was always open and it could sit anywhere, including the chancellor's private house.¹⁰⁸ Chancery did not use either the language or the forms of the common law writs, so pleading was considerably simpler.¹⁰⁹ Actions in this court began with the filing of an informal bill of complaint, and these complaints were generally in English as opposed to Latin.¹¹⁰ The chancellor would then issue a subpoena that summoned the parties to appear before the court or face a penalty for contempt of court.¹¹¹

The production of evidence in the Chancery court also differed from the common law courts. In Chancery, evidence could be given to the chancellor either by interrogation or in the form of written depositions.¹¹² Unlike in the common law courts, the chancellor could question both parties and order the defendant to produce evidence.¹¹³ In the cases before the Court of Chancery, the chancellor was both judge and jury. This dual role allowed the chancellor to delve "as deeply as conscience required into the

¹⁰⁷ See *ibid.*, p. 86.

¹⁰⁸ See *ibid.*, p. 88.

¹⁰⁹ See RENDLEMAN, *Remedies: Cases and Materials*, p. 9.

¹¹⁰ See P.C. HOFFER, *The Law's Conscience*, Chapel Hill, NC, The University of North Carolina Press, 1990, p. 13.

¹¹¹ See *ibid.*

¹¹² See BAKER, *An Introduction to English Legal History*, p. 88.

¹¹³ See RENDLEMAN, *Remedies: Cases and Materials*, p. 9.

particular circumstances before him,” without requiring him to distinguish between law and fact in making his determination.¹¹⁴ All of these factors gave the chancellor considerable freedom to achieve a just and equitable solution when the common law courts could not give satisfaction.

Maxims of Equity

Until the seventeenth century when Chancery decisions began to be recorded, decisions in equitable cases had no precedential value. However, the Court of Chancery did develop some standard rules to help adjudicate cases justly and equitably. These rules took the form of equitable maxims that were very similar to “the *regulæ iuris* included at the end of the Boniface VIII’s *Liber Sextus*.”¹¹⁵ Though there is a dispute among scholars about how many other maxims might have existed, there is universal agreement that the following twelve equitable maxims served as a guide in the disposition of equitable disputes. They are:

- 1) Equity will not suffer a wrong to be without a remedy.
- 2) Equity follows the law.
- 3) Where there is equal equity, the law shall prevail.
- 4) Where the equities are equal, the first in time shall prevail.
- 5) He who seeks equity must do equity.
- 6) He who comes into equity must come with clean hands.
- 7) Delay defeats equity.
- 8) Equality is equity.
- 9) Equity looks to the intent rather than to the form.
- 10) Equity looks on that as done which ought to be done.
- 11) Equity imputes an intention to fulfill an obligation.
- 12) Equity acts *in personam*.¹¹⁶

¹¹⁴ BAKER, *An Introduction to English Legal History*, p. 90.

¹¹⁵ MARTÍNEZ-TORRÓN, *Anglo-American Law*, p. 68.

¹¹⁶ MEGARRY, *Snell’s Principles of Equity*, p. 27.

These maxims were given enormous value and formed the basis of the principles that governed the court's rulings. These principles became so commonly cited that they were considered "indubitable truths that require no justification."¹¹⁷ When countries like the United States brought the common law into usage within its own jurisdiction, these equitable maxims also were retained and became the basis on which cases were decided for courts of equity in the new country.

Equitable Remedies

Because the Court of Chancery was not limited in the kinds of remedies it could fashion, the court began to fashion its own methods of remedying the various cases that were submitted to the court. These remedies were significantly different to the remedies of the common law courts because they could not only compel a person to continue or cease to do a specific action, it could also prevent a person from committing an injustice prior to its occurrence. These remedies have been the Court of Chancery's greatest contribution to the development of the common law. In 1875 when the common law and chancery courts were combined to form one court, all remedies whether legal or equitable became available in all cases and have continued to be used throughout Great Britain as well as in the United States.¹¹⁸

¹¹⁷ MARTÍNEZ-TORRÓN, *Anglo-American Law*, p. 68.

¹¹⁸ Remedies developed by the Court of Chancery are examined in Chapter 4.

Newer Developments to Remedy Harm

Since the creation of courts of equity in common law jurisdictions, there have not been many common law innovations to create new methods to remedy harm. However, since the 1980's there has been a trend in common law to return to some alternate forms of remedying harm that were not necessarily part of the common law system. Some of the newer methods for remedying harm in common law falls under the broad category of alternate dispute resolution. There are two types of processes that fall under this category: arbitration and mediation. These two processes seek to resolve a conflict and remedy the harm inflicted before the case ever reaches the common law courts. In fact, many common law courts are requiring that one of these processes be attempted prior to being able to seek recourse to the courts.

The arbitration process calls for a neutral arbitrator to render a binding decision on a case after both parties have been heard. The person chosen as the arbitrator is neither a judge nor an official of an administrative agency but rather is a privately hired arbitrator.¹¹⁹ Because there is no jury and the arbitrator is not bound by the court's procedural rules or precedent, arbitration is generally less time consuming, less expensive, less formal and much quicker than waiting for a jury trial. Many consumer contracts are now requiring purchasers to agree to arbitration in the event that a problem arises with their merchandise.

¹¹⁹ See L.L. RISKIN and J.E. WESTBROOK, *Dispute Resolution and Lawyers*, Saint Paul, MN, West Publishing Co., 1987, p.120.

Mediation differs from arbitration in that a neutral third party mediator acts as a go-between with the two parties to help them come to an agreement. The mediator has no power to issue a decision concerning the controversy; he or she can only facilitate a negotiation between the two parties. There are a growing number of persons who are choosing mediation because it is less time consuming than a full trial, there are substantially fewer procedural requirements, the process tends to be rather informal, and the process generates results that are more desirable to parties than are traditional adversarial approaches.¹²⁰ Many common law courts in the United States are mandating that parties attempt to mediate their dispute prior to them coming before a court.

These alternate forms of resolving disputes and remedying harm have had various degrees of success. However, they continue to be encouraged by courts because they lessen the numbers of cases on the docket and are considerably less expensive than a full trial. Much of their success depends on how stringently the local courts require that these methods be given a fair try before a case can come to a full hearing in court. Alternate dispute resolution methods and their uses are still being explored within the common law systems, and their use will continue to be an issue in common law for the foreseeable future.

Conclusion

Having discussed the history of the common law and the remedies that the common law has created over the last millennium, it is clear that, while the common law

¹²⁰ See RISKIN, *Dispute Resolution and Lawyers*, p. 88.

takes a different approach to the administration of justice than does canon law, its approach in both its abstract and practical applications is rooted in a system based on justice and equity. The system was created and developed by men who not only were clerics, but who were familiar with both canon and civil law. As the common law developed, courts of equity within the common law were created to remedy harms not able to be adjudicated in the common law courts. The principles of equity used by the Chancery Court were very similar to canonical principles that were commonly known in canon law, and equitable remedies built on these principles to ensure justice was done.

The common law has followed its own model of development, which has produced a legal system that is quite different from modern canon law. Because of these differences, “legislators have not always given the impression that they were generally open to the possibilities of the common law approach.”¹²¹ Despite its reluctance, canon law and canon lawyers might be able to “learn from this alternate mind-set” and be able to discover new approaches to the law in general and the remedy of harm in particular in a number different areas.¹²²

¹²¹ F.G. MORRISEY, “Canon Law Meets Civil Law,” in *Studia canonica*, 32 (1998), p. 185.

¹²² *Ibid.*

APPENDIX 2 - Procedures For Hierarchical Recourse

Procedure	Time	Who Acts	Who Receives Action
1. Request for revocation or amendment of the decree in writing (c. 1734)	Within 10 days of issuance of decree	Person harmed by act	Author of Act
2. Request for suspension of execution of decree in writing (c. 1734)	Within 10 days of issuance of decree	Person harmed by act	Author of act
3. Decision on suspending effects of decree (c. 1736)	Within 10 days of receipt of request	Author of act	Notification of Petitioner
4. Decision on confirmation, revocation, or amendment of decree (c. 1735)	Within 30 days of receipt of request	Author of act	Notification of Petitioner
5. Request to appeal confirmation of act or amended act (c. 1737)	Within 15 days of receipt of confirmation or amended act	Person harmed by act	Superior of Author of Act
6. Request for recourse after no response from author of act (c. 57)	Three months after lodging of recourse	Person harmed by act	Superior of Author of Act
7. Accepting or rejecting appeal	Within 10 days from receipt of appeal	Superior of Author of Act	Person harmed by act
8. Decision to confirm, rescind, revoke, amend, substitute, or obrogate the act, or declare it invalid	No time limit	Superior of Author of act	

APPENDIX 3 - Actions Placed Against A Bishop

Contentious actions – According to *Pastor bonus (PB)*, Article 129 states that the Roman Rota adjudicates in first instance actions against bishops in contentious matters, unless the matter deals with the rights or temporal goods of a juridical person represented by the bishop. The action before the Rota can include a claim for damages.

Administrative Recourse – If one is objecting to an administrative act of a bishop, then the normal procedure for administrative recourse is followed. One would first request a revocation or amendment of the decree from the bishop himself within 10 canonical days from the time the decree was notified (c. 1734 §1, 2). If after 30 days the decree has not been amended or rejected, the injured party has 15 days to then take recourse to the bishop's hierarchical Superior (c. 1737), which would be the Congregation for Bishops (*PB* art. 79). If the congregation does not respond in three continuous months (c. 57), the answer is presumed negative; then the injured person has 30 available days to petition for recourse with the Apostolic Signatura. The Signatura can also adjudicate the reparation of damages under *PB* Art. 123 §2.

In addition, according to c. 1400 §2, disputes arising from acts of administrative power can only be referred to a Superior or to an administrative tribunal. This means that this type of dispute would follow the same process as administrative recourse, in that a dispute involving a bishop would go to the hierarchical Superior i.e. the Congregation for Bishops, or to the only administrative tribunal available to a bishop, which would be the Apostolic Signatura under Art. 123 of *PB*.

Penal Actions – If a person alleges that a bishop has committed a canonical crime, then the allegations must be forwarded to the Holy Father himself. According to canon 1405 §1 3°, "it is reserved solely and personally to the Pope to judge or to try, either himself or by a delegate," a penal case against a bishop. The Holy Father can then designate a local tribunal to handle the matter, he can assign it to the Rota, or he can constitute a *turnus* of his own choosing to adjudicate the matter. If there is an additional claim of damages, that contentious action also must be forwarded to the Holy Father for it to be judged at the same time as the penal case according to c. 1729 §1.

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